Michael K. Wall (2098)
HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Telephone: (702) 385-2500
Facsimile: (702) 385-2086
mwall@hutchlegal.com

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY

Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, D/B/A MARQUEE NIGHTCLUB,

Respondents.

Supreme Court No: 81344
District Court Case No: A758902

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District: Eighth Judicial District Court, State of Nevada

   Department: 26 County: Clark

   Judge: Gloria Sturman District Ct. Docket No. A-17-758902-C

2. **Attorney filing this docketing statement:**

   Attorney: Michael K. Wall Telephone: (702) 385-2500

   Firm: Hutchison & Steffen, PLLC

   Address: 10080 W. Alta Dr., Suite 200,
   Las Vegas, Nevada 89145

   Client(s): Attorney for Appellant
   St. Paul Fire and Marine Insurance Company

   If this is a joint statement by multiple applicants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement

///

///

3. **Attorney(s) representing respondent(s):**

Attorney: Andrew D. Herold — Telephone: (702) 990-3624
Nicholas B. Salerno

Firm: Herold & Sager

Address: 3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

Client(s): Attorneys for Respondents National Union Fire Insurance Company of Pittsburgh PA, and Roof Deck Entertaiment, LLC d/b/a Marquee Nightclub

Attorney: Jennifer L. Keller — Telephone: (949) 476-8700
Jeremy Stamelman

Firm: Keller/Anderle LLP

Address: 18300 Von Karmen Ave., Suite 930
Irvine, CA 92612

Client(s): Attorneys for Respondents National Union Fire Insurance Company of Pittsburgh PA, and Roof Deck Entertaiment, LLC d/b/a Marquee Nightclub

4. **Nature of disposition below (check all that apply):**

Judgment after bench trial
Judgment after jury verdict
Summary Judgment **XXX**
Default Judgment
Dismissal
- Lack of Jurisdiction
- Failure to State a Claim
- Failure to Prosecute
- Other (specify):

Grant/Denial of NRCP 60(b) relief
Grant/Denial of Injunction
Grant/Denial of declaratory relief
Review of agency determination
Divorce Decree
- Original
- Modification

Other disposition (specify):

5. **Does this appeal raise issues concerning any of the following:** No.

Child custody (visitation rights only)
Venue
Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Moradi v. Roof Deck Entertainment d/b/a Marquee Nightclub, et. al.; A-14-698824-C, this case was dismissed with prejudice on July 20, 2017 (underlying case).

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

This action arises from an underlying personal injury suit titled *Moradi v. Roof Deck Entertainment d/b/a Marquee Nightclub, et. al.*; A-14-698824-C, in which a jury awarded the plaintiff $160,500,000.000 in compensatory damages. After settling with the plaintiff for a confidential amount, St. Paul, an excess insurance carrier, filed a complaint (this action) against Aspen and National Union (referred to as AIG in the complaint), the other insurance carriers, seeking to recover the amount it contributed to the settlement on theories of equitable and statutory subrogation. St. Paul also sued in the same action, as the subrogee of its insured, one of the defendants in the *Moradi* suit, Roof Deck Entertainment, on theories of contribution and indemnity. The district court granted summary judgment in separate orders dated May 14, 2020, in favor of National Union and Roof Deck Entertainment, and certified those orders as final pursuant to NRCP 54(b). Notice of Entry of both Orders was entered on May 27, 2020. The matter is still proceeding in district court against Aspen.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

I. Whether the district court erred in concluding that a subrogation cause of action by one insurance carrier against another for bad faith (failure to settle and related claims) does not exist in Nevada.

II. Whether the district court misconstrued the structure of the insurance coverage in this case, and relied on its misapprehension to deny a subrogation remedy to St. Paul where the structure of the insurance coverage was irrelevant to the right to bring the claim.

III. Whether the district court erred in concluding that a subrogation action for breach of contract between insurance carriers does not exist in Nevada.

IV. Whether the district court erred in concluding that the subrogation waiver clause in the contract between the underlying defendants precluded St. Paul's subrogated claims against Roof Deck Entertainment.

V. Whether the district court erred in granting summary judgment against St. Paul on a theory that its insured suffered no loss.

VI. Whether the district court erred in dismissing St. Paul's contribution and indemnity claims based on defenses available to its subrogee.

VII. Other issues under investigation.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

None

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is

not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A X Yes No

If not, explain

12. **Other issues.** Does this appeal involve any of the following: Yes.

Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
An issue arising under the United States and/or Nevada Constitutions
A substantial issue of first-impression XXX
An issue of public policy XXX
An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
A ballot question

If so, explain: This Court has not addressed directly whether the doctrine of equitable subrogation applies to allow one insurance carrier to sue another, but the vast majority of courts that have considered the issue recognize that such actions must be allowed as a matter of public policy, and case law from this Court indicates that it will apply subrogation doctrines and policies broadly. The district court refused to recognize St. Paul's claims because this Court had not yet recognized such claims, and it would not do so in the first instance. The right of subrogation of one carrier against another where one has caused the other unfairly to bear a loss, and where the first should be responsible for the loss because of its bad faith, is a question of statewide importance.

13. **Assignment to the Court of appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstances(s) that warrant retaining the case, and include an explanation of their importance or significance:

Both the amount in controversy and the importance of the issues suggest that this matter should be retained by the Supreme Court. This appeal calls upon the Supreme Court to exercise its most important function, the development of the common law. The district court was clear in its determination that it was not allowing St. Paul's claims based on the fact that such claims had not yet been recognized in Nevada by this Court, not based on any reasoning that such claims should not be allowed. Such claims are presumptively assigned to the Supreme Court. *See* NRAP 17(a)(11)&(12).

14. **Trial.** If this action proceeded to trial, how many days did the trial last?

N/A

Was it a bench or jury trial?

15. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice? No.

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from:**

1. The district court's Findings of Fact, Conclusions of Law and Order Granting Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment was entered on May 14, 2020; and

2. The district court's Findings of Fact, Conclusions of Law and Order Granting National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment was entered on May 14, 2020.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. **Date written notice of entry of judgment or order served:**

1. Notice of entry of the district court's Findings of Fact, Conclusions of Law and Order Granting Roof Deck Entertainment, LLC d/b/a

Marquee Nightclub's Motion for Summary Judgment was served on May 27, 2020 via e-service; and

2. Notice of entry of the district court's Findings of Fact, Conclusions of Law and Order Granting National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment was served on May 27, 2020 via e-service.

18. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52 (b), or 59)**

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

NRCP 50(b) Date of filing_____
NRCP 52(b) Date of filing_____
NRCP 59 Date of filing_____

Note: **Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal.** ***See*** **AA Primo Builders v. Washington, 126 Nev., 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion:

(c) Date of written notice of entry of order resolving motion served:_____

Was service by delivery _____ or by mail _____.

19. **Date notice of appeal was filed:** June 12, 2020

If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

20. **Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other:**

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

NRAP 3A(b)(1) XX NRS 38.205
NRAP 3A(b)(2) NRS 233B.150
NRAP 3A(b)(3) NRS 703.376
Other (specify) NRCP 54(b)

Explain how each authority provides a basis for appeal from the judgment or order:

Both orders, although not final judgments, were certified by the district court as final for appeal pursuant to NRCP 54(b).

22. **List all parties involved in the action in the district court:**

(a) Parties:

St. Paul Fire & Marine Insurance Company, Plaintiff

Aspen Specialty Insurance Company, Defendant

National Union Fire Insurance Company of Pittsburgh PA, Defendant

Roof Deck Entertainment, LLC d/b/a Marquee Nightclub, Defendant

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal *e.g.,* formally dismissed, not served, or other:

Aspen is not a party to this appeal because the claims against it are still pending in district court.

23. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.**

St. Paul brought claims against National Union for (1) subrogation, breach of the duty to settle; (2) subrogation, breach of the National Union Contract; (3) equitable estoppel; and (4) equitable contribution, all as the subrogee of defendant Cosmopolitan for National Union's mishandling of the *Moradi* case. These were all resolved against St. Paul by summary judgment entered on May 14, 2020.

St. Paul brought claims against Roof Deck Entertainment for (1) statutory subrogation, contribution per NRS 17.225; and (2) subrogation, express indemnity, based on the contract between Rood Deck Entertainment and the Cosmopolitan. These were resolved against St. Paul by summary judgment entered on May 14, 2020.

24. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below:**

Yes _____ No __X____

///

///

///

///

25. **If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

St. Pauls' claims against Aspen, which are (1) subrogation, breach of duty to settle; (2) subrogation, breach of the Aspen insurance contract; and (3) equitable estoppel.

(b) Specify the parties remaining below:

St. Paul and Aspen.

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b):

Yes __X____ No _____

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

Yes __X___ No _____

26. **If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):**

27. **Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Name of Appellant: St. Paul Fire & Marine Insurance Company

Name of counsel of record: Michael K. Wall

Date: July 9, 2020

Signature of counsel of record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **DOCKETING STATEMENT CIVIL APPEALS** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Michael M. Edwards, Esq. (6281)
Nicholas L. Hamilton, Esq. (10893)
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
medwards@messner.com
nhamilton@messner.com
efile@messner.com
T: 702-363-5100
F: 702-363-5101

Attorneys for Defendant Aspen Specialty Company

Jennifer L. Keller, Esq. (Pro Hac Vice)
Jeremy Stamelman, Esq. (Pro Hac Vice)
KELLER/ANDERLE LLP
18300 Von Karman Ave., Suite 930
Irvine CA 92612
jkeller@kelleranderle.com
jstamelman@kellweanderle.com
T: 949-476-8700
F: 949-476-0900

Attorneys for Respondent National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

Andrew D. Herold, Esq. (7378)
Nicholas B. Salerno, Esq. (6118)
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
aherold@heroldsagerlaw.com
nsalerno@herlodsagerlaw.com
T: 702-990-3624
F: 702-990-3835

Attorneys for Respondent National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

A copy was served via U.S. Mail to the below:

Lansford W. Levitt
4230 Christy Way
Reno, NV 89519

Settlement Judge

Dated this 9th day of July. 2020.

An employee of Hutchison & Steffen, PLLC

ACOMP
RAMIRO MORALES [Bar No.: 007101]
E-mail: rmorales@mfrlegal.com
WILLIAM C. REEVES [Bar No. 008235]
E-mail: wreeves@mfrlegal.com
MARC J. DEREWETZKY [Bar No.: 006619]
E-mail: mderewetzky@mfrlegal.com
MORALES, FIERRO & REEVES
600 South Tonopah Drive, Suite 300
Las Vegas, Nevada 89106
Telephone: (702) 699-7822
Facsimile: (702) 699-9455

Attorneys for Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT.: 26 REDACTED FIRST AMENDED COMPLAINT JURY TRIAL DEMANDED Exempt from Arbitration: Amount in Controversy Exceeds $50,000.00

Plaintiff ST. PAUL FIRE & MARINE INSURANCE COMPANY ("St. Paul") for its First Amended Complaint alleges as follows:

THE PARTIES

1. St. Paul is a Connecticut corporation, is duly authorized to do business in Nevada and is engaged in the business of insurance.

2. Defendant ASPEN SPECIALTY INSURANCE COMPANY ("Aspen") is a foreign corporation doing business in Nevada, and is engaged in the business of insurance. Aspen's

principal place of business is in Connecticut.

3. Defendant NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. ("AIG") is a foreign corporation doing business in Nevada, and is engaged in the business of insurance.

4. Defendant ROOF DECK ENTERTAINMENT, LLC, d/b/a Marquee Nightclub ("Marquee") is a foreign limited liability company doing business in Nevada. Marquee owns and operates the Marquee Nightclub located in Las Vegas, Nevada. Upon information and belief, one or more of Marquee's members is a citizen of Nevada.

5. St. Paul is unaware of the true names and capacities of defendants named herein as DOES 1-20, inclusive, and therefore sues these defendants by such fictitious names. St. Paul will seek leave of this Court to amend this Complaint to show the true names and capacities of these fictitiously named defendants when the same have been ascertained.

FACTUAL ALLEGATIONS

6. This dispute arises out of a $160,500,000 compensatory damages jury verdict in a personal injury suit titled *Moradi v. Roof Deck Entertainment, LLC, d/b/a Marquee Nightclub, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action").

7. In the Underlying Action, plaintiff David Moradi ("Moradi") generally alleged that on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends. Moradi alleged that he drank champagne at the Marquee Nightclub for approximately three hours, amassing a bar tab of over $10,000. He alleged that the cocktail waitress serving him at the Marquee Nightclub, who drank several alcoholic drinks while serving Moradi and was "presumably drunk," started a confrontation with Moradi over his credit card/identification that escalated and ultimately resulted in Moradi being violently and brutally attacked and beaten by Marquee employees, resulting in personal injuries, including brain damage.

8. Moradi filed the complaint in the Underlying Action on April 4, 2014, a copy of which is attached hereto as **Exhibit A**.

9. In the complaint, Moradi sought general, special and punitive damages. In

particular, Moradi alleged that as a result of his injuries, he had suffered lost wages/income and that he would continue to suffer lost wages/income into the future. Moradi asserted causes of action for: 1) Assault and Battery; 2) Negligence; 3) Intentional Infliction of Emotional Distress; and 4) False Imprisonment.

10. In addition to Marquee, Moradi named Nevada Property 1 LLC, d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") as a defendant to the complaint. Cosmopolitan is the owner of the property where the Marquee Nightclub is located. Cosmopolitan leased the nightclub location to Nevada Restaurant Venture 1 LLC. Nevada Restaurant Venture 1 LLC entered into a written agreement with Marquee to manage the nightclub.

11. During the course of the Underlying Action, Moradi put forth testimony, documentation, and expert opinion in support of his allegations: that Moradi suffered brain injury as a result of the beating; that before the incident Moradi was a highly successful hedge fund manager, and owned his own hedge fund in New York City; that Moradi's income was approximately $11,000,000 the year before the incident; that as a result of Moradi's brain injuries he could no longer function as a hedge fund manager, resulting in closure of his hedge fund; that the underlying defendants were liable for Moradi's injuries; and that the underlying defendants concealed and/or destroyed evidence pertaining to the incident.

12. Moradi asserted a lost income claim specifically for past lost wages in the range of approximately $29,000,000 to $44,000,000, and future lost wages in the range of approximately $87,000,000 to $264,000,000.

13. During the course of the Underlying Action, Moradi made legal arguments that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub is located), had a "non-delegable duty" to keep patrons safe, including Moradi. The Court in the Underlying Action agreed with Moradi's position, and therefore imposed vicarious liability on Cosmopolitan for Marquee's actions and Moradi's resulting damages.

14. The Court in the Underlying Action also ruled that Marquee and Cosmopolitan were jointly and severally liable for Moradi's damages claim.

15. Marquee is a named insured to Aspen primary commercial general liability policy

number CRA8XYD11, effective October 6, 2011, to October 6, 2012 ("Aspen Policy").

16. The Aspen Policy includes limits of: $1,000,000 each occurrence; $1,000,000 personal and advertising injury for any one person or organization; and $2,000,000 general aggregate. The Aspen Policy also includes Liquor Liability coverage, with a separate $1,000,000 common cause limit and a $2,000,000 Liquor Liability general aggregate limit.

17. Aspen's $1,000,000 each occurrence limit generally provides coverage for damages because of "bodily injury" caused by an "occurrence."

18. Aspen's $1,000,000 personal and advertising injury limit generally provides coverage for damages because of "personal and advertising injury," sustained by any one person or organization.

19. Aspen's $1,000,000 Liquor Liability coverage generally provides coverage for damages because of "injury" in connection with the selling, serving or furnishing of alcohol.

20. Aspen eventually tendered its Coverage A, $1,000,000 "bodily injury" occurrence limit as a combined settlement offer on behalf of both its insureds, Marquee and Cosmopolitan.

21. Aspen later paid its Coverage A, $1,000,000 "bodily injury" occurrence limit solely on behalf of Marquee and has paid no indemnity policy benefits on Cosmopolitan's behalf.

22. Aspen did not offer, and has not paid, the "personal injury" $1,000,000 per offense limit.

23. Aspen did not offer, and has not paid, the $2,000,000 Coverage A and B general aggregate limit.

24. Cosmopolitan is an insured to the Aspen Policy with respect to the Underlying Action. The Aspen Policy insures Cosmopolitan for liability arising out of Marquee's management of the Marquee Nightclub for both Cosmopolitan's independent negligence as well as its vicarious liability.

25. Cosmopolitan tendered the Underlying Action to Marquee for defense and indemnity pursuant to a written agreement wherein Marquee agreed to indemnify, hold harmless and defend Cosmopolitan in connection with Marquee's management of the Marquee Nightclub. Marquee accepted Cosmopolitan's tender.

26. Marquee and Cosmopolitan tendered the Underlying Action to Aspen for coverage under the Aspen Policy.

27. Aspen acknowledged coverage for Cosmopolitan and Marquee under the Aspen Policy, and in light of Marquee's acceptance of Cosmopolitan's contractual indemnity tender, provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a single defense firm, Marquee having agreed to defend and indemnify Cosmopolitan in connection with the Underlying Action.

28. Based on information and belief, Aspen initially retained the law firm of Kravitz Schnitzer & Johnson to represent Marquee and Cosmopolitan. Then without providing proper informed consent to Cosmopolitan or advising Cosmopolitan that Kravitz Schnitzer & Johnson reported the matter as a nine figure exposure, Aspen terminated Kravitz Schnitzer & Johnson's services. Aspen then appointed Lewis Brisbois Bisgaard & Smith LLP to defend Marquee and Cosmopolitan, also without providing Cosmopolitan proper informed consent.

29. During the course of the Underlying Action, Aspen took the position that its maximum coverage obligation for a settlement or judgment on behalf Cosmopolitan and Marquee combined was $1,000,000 total, corresponding to only the $1,000,000 Coverage A each occurrence "bodily injury" limit. Aspen thereby denied coverage regarding its obligation to pay, among other things, the $1,000,000 "personal and advertising injury" limit.

30. Marquee is a named insured to AIG commercial umbrella liability policy number BE25414413, effective October 6, 2011, to October 6, 2012 ("AIG Policy").

31. The AIG Policy includes limits of $25,000,000 each occurrence, a $25,000,000 general aggregate, and a $25,000,000 products-completed operations aggregate limit.

32. After the verdict in the Underlying Action, AIG paid a $25,000,000 "bodily injury" occurrence limit solely on behalf of Marquee and has paid no indemnity policy benefits on Cosmopolitan's behalf. AIG denied that it had any further obligation to pay benefits on Cosmopolitan's behalf.

33. Cosmopolitan is an insured to the AIG Policy with respect to the Underlying Action for liability arising out of Marquee's management of the Marquee Nightclub, both

Cosmopolitan's independent negligence as well as its vicarious liability.

34. Marquee and Cosmopolitan tendered the Underlying Action to AIG for coverage under the AIG Policy.

35. Given the large exposure in the Underlying Action, AIG acknowledged coverage for Cosmopolitan and Marquee under the AIG Policy and, in light of Marquee's acceptance of Cosmopolitan's contractual indemnity tender, provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a single defense firm selected by AIG, Weinberg Wheeler Hudgins Gunn & Dial, Marquee having agreed to defend and indemnify Cosmopolitan in connection with the Underlying Action.

36. AIG appointed counsel, Weinberg Wheeler, associated into the case on or about June 10, 2016.

37. AIG did not issue a reservation of rights letter upon appointing Weinberg Wheeler to defend both Marquee and Cosmopolitan.

38. During the course of the Underlying Action, AIG took the position that its total limit under the AIG Policy to pay for a settlement or judgment on behalf of both Cosmopolitan and Marquee was $25,000,000 total. AIG further took the position that its $25,000,000 obligation was excess to Aspen's claimed $1,000,000 limit and that AIG had no indemnity unless and until Aspen paid or tendered the primary limit.

39. Based on the respective positions taken by Aspen and AIG (unless otherwise differentiated, collectively referred to hereinafter as "Carrier Defendants") regarding their limits, Carrier Defendants took the position throughout the Underlying Action that the total combined limit of liability to pay for a judgment or settlement on behalf of Cosmopolitan and Marquee was $26,000,000.

40. Cosmopolitan is an insured to St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 ("St. Paul Policy").

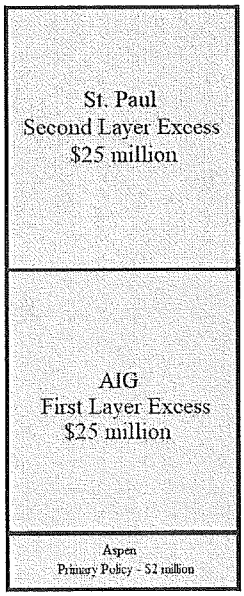
41. Marquee is not an insured to the St. Paul Policy and St. Paul had no coverage obligations to Marquee in the Underlying Action.

42. The St. Paul Policy contains a subrogation provision which transfers all of

Cosmopolitan's rights of recovery against any other person or organization to St. Paul for all or part of any payment made by St. Paul under the St. Paul Policy.

43. The St. Paul Policy includes limits of $25,000,000 each occurrence.

44. The St. Paul Policy is excess to the Aspen Policy, the AIG Policy, as well as other underlying insurance. Based on information and belief Marquee, Cosmopolitan, Aspen and AIG agreed that all policies issued to Marquee, to which Cosmopolitan is an additional insured, shall be primary to any insurance issued directly to Cosmopolitan, and other Cosmopolitan policies, including the St. Paul Policy, shall be excess of, and not contribute towards the Marquee purchased policies, i.e. the Aspen Policy and AIG Policy. In other words, with regard to the Underlying Action, the Aspen Policy provides primary coverage for Cosmopolitan, the AIG Policy provides first level excess coverage for Cosmopolitan over the Aspen Policy and the St. Paul Policy provides Cosmopolitan coverage that is excess to both the Aspen Policy and the AIG Policy. The insurance available to Cosmopolitan for the Moradi claim was layered as follows:



45. During the Underlying Action Carrier Defendants were aware of: facts, evidence and expert opinion supporting Moradi's allegations that Marquee was liable for Moradi's injuries; facts and evidence supporting Moradi's allegations that Marquee concealed and/or destroyed evidence pertaining to the incident; facts, evidence and expert opinion supporting Moradi's claim that he sustained brain injury as a result of the beating; facts, evidence and expert opinion

supporting Moradi's lost wage claim for hundreds of millions of dollars; and Moradi's legal arguments, endorsed by court rulings, that imposed vicarious liability on Cosmopolitan for Moradi's injuries and damages caused solely by Marquee's actions.

46. Upon information and belief, in addition to Carrier Defendants' knowledge of facts, evidence, expert opinions, and legal rulings demonstrating the potential and likelihood of an adverse verdict and astronomical damages award against Cosmopolitan, the defense attorneys hired by Carrier Defendants to jointly defend Marquee and Cosmopolitan provided legal opinions to Defendant Carriers that Cosmopolitan faced liability exposure in the hundreds of millions of dollars if the Underlying Action was tried and not settled. Specifically, by way of example, the defense attorneys at one point opined and reported to the Carrier Defendants that the compensatory damages exposure in the case was over $310,000,000, and including punitive damages, the exposure was as high as $4,000,000,000.

47. Given the facts known by Carrier Defendants, and the liability and damages assessments provided by the attorneys and/or consultants/experts Carrier Defendants hired to defend Cosmopolitan, Carrier Defendants, in breach of their contractual obligations, and in bad faith refused to settle the Underlying Action despite multiple reasonable pre-trial settlement demands by Moradi at or within the Carrier Defendants' available policy limits, which were only a fraction of Cosmopolitan's compensatory damages exposure, as predicted by Aspen's and AIG's appointed defense attorneys.

48. On or around December 10, 2015, after the Underlying Action had been pending for over a year and a half, Moradi served an Offer of Judgment for $1,500,000 pursuant to Nevada Rule of Civil Procedure 68 and Nevada Revised Statute 17.115. Carrier Defendants let the Offer of Judgment lapse without any counter-offer or further discussions regarding potential settlement.

49. At the time the Offer of Judgement was pending AIG took the position that it had no obligation to respond to the Offer of Judgement because Aspen had not offered a $1,000,000 occurrence limit.

50. Subsequently, AIG has represented to the Court that AIG, as an excess carrier, had an independent obligation to Marquee and Cosmopolitan to settle the claim regardless of whether

a lower level insurer first offered its policy limit.

51. On November 2, 2016, almost a year after Moradi's $1,500,000 Offer of Judgement, Moradi made a settlement demand for $26,000,000 – the claimed limit of the Carrier Defendants' policies. Per the terms of the settlement demand, acceptance by the Carrier Defendants would have resulted in global resolution of all claims against Marquee and Cosmopolitan. Carrier Defendants rejected the November 2, 2016 settlement demand, and made no counter-offers to Moradi.

52. Based on information and belief, in January 2017, Aspen authorized the one and only pre-trial settlement offer by the defense, an Offer of Judgement in the amount of $500,000, on behalf of both Marquee and Cosmopolitan. At the time of Aspen's $500,000 offer, AIG continued to take the position that it had no obligation to offer settlement dollars because Aspen had not tendered its full policy limit. AIG's position at that time is in contradiction to AIG's representation to this Court that insurers possess an independent settlement obligation regardless of what other insurers may or may not do.

53. On March 9, 2017, Moradi made another settlement demand for $26,000,000 – the claimed limit of the Carrier Defendants' policies. Per the terms of the settlement demand, acceptance by the Carrier Defendants would have resulted in global resolution of all claims against both Marquee and Cosmopolitan. A copy of Moradi's pre-trial settlement demand dated March 9, 2017, is attached hereto as **Exhibit B**. Based on information and belief, in response to Moradi's March 9, 2017 settlement demand, Marquee wrote to Aspen's and AIG's appointed defense counsel for Cosmopolitan demanding that the Underlying Action be settled within the Carrier Defendants' policy limits. Carrier Defendants rejected the March 9, 2017 settlement demand, and made no counter offer to Moradi.

54. On or around March 20, 2017, the jury trial commenced.

55. Based on information and belief, on or around March 21, 2017, after trial began and after defending Cosmopolitan and Marquee through a single conflicted law firm throughout the case without raising any coverage issues, AIG issued a reservation of rights letter to Cosmopolitan for the Underlying Action.

56. In the present action AIG has represented to this Court that the AIG Policy does not cover false imprisonment, assault or battery or Cosmopolitan's independent negligence.

57. Upon information and belief, during the pendency of the jury trial, Carrier Defendants made a single global settlement offer to Moradi. On or around April 21, 2017, shortly before closing arguments, Carrier Defendants offered a mere $1,000,000 to resolve the liability on behalf of both Marquee and Cosmopolitan.

58. Based on information and belief, coverage counsel for Cosmopolitan responded to AIG's March 21, 2017 reservation of rights letter as improper. In rejecting AIG's late reservation, coverage counsel for Cosmopolitan pointed out that all pre-trial reports indicated that Cosmopolitan's exposure was well in excess of the Aspen Policy limits, Moradi submitted evidence at trial well in excess of Aspen's policy limit, Aspen tendered its policy limits on March 8, 2017, and in response to the March 9, 2017 demand by Moradi, Cosmopolitan demanded AIG settle the action within its limits, which demand AIG completely ignored without response to Cosmopolitan. Coverage counsel for Cosmopolitan complained that AIG was not communicating with Cosmopolitan and instructed AIG that due to its improper conduct, AIG would be liable for all of Cosmopolitan's liability, if any, regardless of policy limits.

59. Based on information and belief, the Carrier Defendants made multiple misrepresentations and breached their obligations related to the coverage provided Cosmopolitan for the Underlying Action under their respective polices. Carrier Defendants' misrepresented and breached their obligations to make policy limits available by denying that they had a duty to accept offers to settle within their policy limits. Carrier Defendants' never disclosed that there was a potential conflict of interest between Cosmopolitan and Marquee due to Marquee's indemnity obligation. AIG never disclosed that there was a conflict of interest between Cosmopolitan and AIG because the law firm AIG appointed was also AIG's coverage counsel. AIG never disclosed that an actual conflict of interest existed between itself and Cosmopolitan given AIG's new assertion, made for the first time in its motion to dismiss St. Paul's original complaint, that Cosmopolitan was not covered for its independent negligence, assault, battery and false imprisonment under the AIG Policy, thereby intentionally withholding from Cosmopolitan

its right to independent counsel.

60. On April 26, 2017, the jury in the Underlying Action rendered a compensatory damages verdict against Marquee and Cosmopolitan for $160,500,000. A copy of the special jury verdict form filed in the Underlying Action is attached hereto as **Exhibit C**. Per the verdict, the jury found in favor of Moradi on his claims for assault, battery, false imprisonment, and negligence. Per the verdict, the jury awarded Moradi $23,000,000 in past loss of earnings/earning capacity, $79,500,000 in future loss of earnings/earning capacity, $20,000,000 in past pain, suffering, anguish and disability, and $38,000,000 in future pain, suffering, anguish and disability. Per court order, Marquee and Cosmopolitan were each jointly and severally liable for the $160,500,000 verdict.

61. In addition to Carrier Defendants' unreasonable and bad faith failure to accept Moradi's reasonable pre-trial settlement demands within the claimed combined policy limits, and their failure to communicate with their insured, Cosmopolitan, regarding settlement negotiations, Carrier Defendants also failed to communicate with St. Paul, as a high level excess carrier for Cosmopolitan, regarding offers, settlement negotiations and the facts pertaining to the Underlying Action.

62. Soon after St. Paul first received notice of the Underlying Action on February 13, 2017, St. Paul sent correspondence on multiple occasions to AIG requesting information pertaining to the Underlying Action and settlement negotiations in the Underlying Action. AIG ignored and/or delayed responding to St. Paul's reasonable requests for information.

63. Despite knowledge of St. Paul's requests for information, Carrier Defendants did not report to St. Paul that Moradi had made a settlement demand on March 9, 2017 for the Carrier Defendants' combined claimed limit of $26,000,000.

64. St. Paul first learned of the March 9, 2017 settlement demand after the demand had expired and trial had commenced.

65. On or around March 29, 2017, St. Paul sent AIG (which at that point was the lead decision-maker among the Carrier Defendants regarding the settlement of the Underlying Action) a letter confirming that Carrier Defendants had previously rejected the pre-trial $26,000,000

settlement demand. In that letter, St. Paul demanded that AIG take all reasonable and necessary steps to settle the case on behalf of Cosmopolitan for the Carrier Defendants' combined claimed policy limit of $26,000,000.

66. On April 28, 2017, two days after the jury delivered its $160,500,000 compensatory damages verdict, and during the punitive damages phase of the trial, Moradi made a demand to Marquee and Cosmopolitan for $REDACTED.

67. In response to the April 28, 2017 settlement demand, Aspen re-tendered its claimed $ REDACTED on Marquee's behalf.

68. Finally, in the face of a $160,500,000 compensatory damages jury verdict, AIG tendered a $ REDACTED towards the settlement demand on Marquee's behalf. AIG took the position that it had no further obligation to Cosmopolitan. At that point, despite having complete control of defense and settlement negotiations, and letting all prior settlement demands expire, AIG represented to St. Paul that it should pay to settle on behalf of Cosmopolitan and that St. Paul could reserve its right to seek reimbursement against AIG.

69. The primary carrier for Cosmopolitan only, Zurich American Insurance Company, tendered REDACTED towards the settlement demand.

70. In light of AIG's previous unreasonable and bad faith failure to settle and/or attempt to settle, upon Moradi's issuance the $REDACTED settlement demand, St. Paul sent correspondence to AIG demanding that it satisfy the full demand. AIG again refused, in further breach of its obligations owed under the AIG Policy and at law. Therefore, and despite Carrier Defendants' unreasonable and bad faith failure to settle the case at or within the claimed policy limits of $26,000,000, and given the $160,500,000 jury verdict, St. Paul tendered REDACTED to consummate the settlement of Underlying Action, caused by the Carrier Defendants breach of their duty to settle.

71. St. Paul's $REDACTED contribution to the settlement of the Underlying Action was made pursuant to a full and complete reservation of rights, including, but not limited to the right to seek reimbursement of the $REDACTED settlement payment from Carrier Defendants and/or Marquee.

FIRST CAUSE OF ACTION

Subrogation –Breach Of The Duty To Settle
(Against Aspen Only)

72. St. Paul incorporates herein by reference all preceding paragraphs as though fully set forth.

73. At all relevant times, Aspen had a duty to its insured Cosmopolitan to comply with the implied covenant of good faith and fair dealing, which is implied under all contracts, including insurance contracts.

74. Included in the implied covenant are duties imposed on Aspen with respect to settling or attempting to settle the Underlying Action on behalf of Cosmopolitan. With respect to this duty to settle, Aspen was obligated to: give the interests of Cosmopolitan at least as much consideration as it gave its own interests; and act as a prudent insurer in accepting offers to settle without considering policy limits.

75. As part of its duty to settle, Aspen had a duty in the Underlying Action to accept a reasonable settlement demand within its policy limits so as not to expose Cosmopolitan to a jury verdict in excess of the Aspen limits. Breach of the duty to settle makes Aspen liable for all damages imposed against Cosmopolitan, both within, and in excess of Aspen's policy limits.

76. Aspen breached the duty to settle by refusing to settle the Underlying Action despite a reasonable $1,500,000 pre-trial Offer of Judgement by Moradi, which was within Aspen's available policy limits. Aspen further breached its duty to settle by failing to tender its limits to AIG in response to Moradi's numerous settlement demands. The defense counsels' compensatory damages liability assessment of $310,000,000 was over 200 times Moradi's $1,500,000 Offer of Judgement, and twelve times Moradi's settlement demand of $26,000,000. The ultimate compensatory damages jury verdict of $160,500,000 was more than 100 times the amount of Moradi's $1,500,000 Offer of Judgement, and six times Moradi's settlement demand of $26,000,000.

77. Aspen further breached the duty to settle by failing to attempt settlement of the Underlying Action up until the time it tendered its limits to AIG for settlement purposes, nearly

two years after the commencement of the Underlying Action.

78. Aspen's breach of the duty to settle at or within the available Aspen Policy limits is especially actionable considering, among other things: the extent of damages recoverable (estimated to be no less than $310,000,000); the extent of Cosmopolitan's exposure (estimated to be no less than $310,000,000); the probability of Cosmopolitan's liability; Aspen's lack of diligence in investigating the claims; the failure of Aspen to provide a conflict free defense; and the failure of Aspen to provide information relating to Moradi's claims and settlement negotiations in the Underlying Action.

79. As a direct result of Aspen's breach of the duty to settle, the Underlying Action went to trial resulting in a $160,500,000 compensatory damages verdict against Cosmopolitan, for which Aspen was completely liable due to its breach of the duty to settle but which Aspen refused to recognize.

80. Unlike Aspen, St. Paul did not breach its obligations to Cosmopolitan in connection with the Underlying Action, as Cosmopolitan's coverage under the St. Paul Policy did not apply until, at a minimum, the Aspen Policy (and AIG Policy) exhausted. Instead, when Aspen's breach of the duty to settle resulted in the $160,500,000 compensatory damages verdict against Cosmopolitan, and the subsequent $REDACTED settlement demand by Moradi, all of which should have been paid by Aspen, St. Paul agreed to contribute REDACTED to resolve the case, reserving its right to pursue Aspen (and AIG) for the $REDACTED for their breach of the duty to settle.

81. As a result, St. Paul, Cosmopolitan's high-level excess carrier above both Aspen and AIG, sits in a position of superior equity to the Aspen, and St. Paul is subrogated under its policy, by law and principles of equity to the rights of Cosmopolitan for claims against Aspen for breach of the duty to settle.

82. As a result of Aspen's breach of the duty to settle, St. Paul was forced to, and without acting as a volunteer, pay REDACTED on behalf of the insured, Cosmopolitan, to satisfy the post-verdict $REDACTED settlement demand and consummate settlement of the Underlying Action. St. Paul, therefore, has been damaged in the liquidated sum of $REDACTED.

83. Under the express terms of the St. Paul Policy and principles of subrogation, having made the settlement payment on behalf of Cosmopolitan, St. Paul steps into Cosmopolitan's shoes, and succeeds to all of Cosmopolitan's rights of recovery against the Aspen. It is just and fair to have Aspen reimburse St. Paul's damages in the amount of $REDACTED, as it was Aspen's improper conduct, not that of St. Paul, that resulted in the $160,500,000 verdict against Cosmopolitan, and subsequent $REDACTED settlement demand, and equity requires Aspen to therefore bear the burden of its improper conduct and pay the entire settlement.

WHEREFORE, St. Paul prays for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

Subrogation –Breach Of The Duty To Settle
(Against AIG Only)

84. St. Paul incorporates herein by reference all preceding paragraphs as though fully set forth.

85. At all relevant times, AIG had a duty to its insured Cosmopolitan to comply with the implied covenant of good faith and fair dealing, which is implied under all contracts, including insurance contracts.

86. Included in the implied covenant are duties imposed on AIG with respect to settling or attempting to settle the Underlying Action on behalf of Cosmopolitan. With respect to this duty to settle, AIG was obligated to: give the interests of Cosmopolitan at least as much consideration as it gave its own interests; and act as a prudent insurer in accepting offers to settle without considering policy limits.

87. As part of its duty to settle, AIG had a duty in the Underlying Action to accept a reasonable settlement demand within its policy limits so as not to expose Cosmopolitan to a jury verdict in excess of the AIG Policy limits. Breach of the duty to settle makes AIG liable for all damages imposed against Cosmopolitan, both within, and in excess of the AIG policy limits.

88. AIG breached the duty to settle by refusing to settle the Underlying Action despite multiple reasonable pre-trial settlement demands by Moradi at or within AIG's policy limits. Specifically, AIG failed to pay the $1,500,000 pre-trial Offer of Judgement by Moradi while

representing to this Court that it had an independent duty to settle regardless of whether a lower level insurer such as Aspen tendered its policy limit. Further, based on information and belief, AIG breached its duty to settle by failing to request Aspen tender its policy limits and accept Moradi's various settlement demands. The defense counsels' compensatory damages liability assessment of $310,000,000 was almost twelve times the amount of the settlement demands for $26,000,000. The ultimate compensatory damages jury verdict was more than six times the amount of the settlement demands for $26,000,000.

89. AIG further breached the duty to settle by failing to attempt settlement of the Underlying Action with Moradi either before or during trial for an amount at or within the AIG policy limits.

90. AIG's breach of the duty to settle is especially actionable considering, among other things: the extent of damages recoverable (estimated to be no less than $310,000,000); the extent of Cosmopolitan's exposure (estimated to be no less than $310,000,000); the probability of Cosmopolitan's liability; AIG's lack of diligence in investigating the claims; the failure of AIG to provide a conflict free defense; and the failure of AIG to provide information relating to Moradi's claims and settlement negotiations in the Underlying Action.

91. As a direct result of AIG's breach of the duty to settle, the Underlying Action went to trial resulting in a $160,500,000 compensatory damages verdict against Cosmopolitan, for which AIG was completely liable due to its breach of the duty to settle but which AIG refused to recognize.

92. Unlike AIG, St. Paul did not breach its obligations to Cosmopolitan in connection with the Underlying Action, as Cosmopolitan's coverage under the St. Paul Policy did not apply until, at a minimum, the AIG Policy (and Aspen Policy) exhausted. Instead, when AIG's breach of its duty to settle resulted in the $160,500,000 compensatory damages verdict against Cosmopolitan, and the subsequent $REDACTED settlement demand by Moradi, all of which should have been paid by AIG, St. Paul agreed to contribute REDACTED to resolve the case, reserving its right to pursue AIG for the $REDACTED for its breach of the duty to settle.

93. As a result, St. Paul, Cosmopolitan's high-level excess carrier, sits in a position of

superior equity to AIG, and St. Paul is subrogated under its policy, by law and principles of equity to the rights of Cosmopolitan for claims against AIG for breach of the duty to settle.

94. As a result of AIG's breach of the duty to settle, St. Paul was forced to, and without acting as a volunteer, pay REDACTED on behalf of the insured, Cosmopolitan, to satisfy the post-verdict $REDACTED settlement demand and consummate settlement of the Underlying Action. St. Paul, therefore, has been damaged in the liquidated sum of $REDACTED.

95. Under the express terms of the St. Paul Policy and principles of subrogation, having made the settlement payment on behalf of Cosmopolitan, St. Paul steps into Cosmopolitan's shoes, and succeeds to all of Cosmopolitan's rights of recovery against the AIG. It is just and fair to have AIG reimburse St. Paul's damages in the amount of $REDACTED, as it was AIG's improper conduct, not that of St. Paul, that resulted in the $160,500,000 verdict against Cosmopolitan, and subsequent $REDACTED settlement demand, and equity requires AIG should therefore bear the burden of its improper conduct and pay the entire settlement.

WHEREFORE, St. Paul prays for judgment as hereinafter set forth.

THIRD CAUSE OF ACTION

Subrogation -- Breach of The Aspen Insurance Contract (Against Aspen Only)

96. St. Paul incorporates herein by reference all preceding paragraphs as though fully set forth.

97. Cosmopolitan tendered the Underlying Action to Aspen for defense and indemnity under the Aspen Policy. Aspen breached its obligations to Cosmopolitan under the Aspen Policy by, among other things, failing to provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan's interests, failing to pay any amount on Cosmopolitan's behalf toward the $REDACTED settlement, and by failing to pay all available limits under the Aspen Policy to resolve Cosmopolitan's liability when it had the opportunity.

98. Upon information and belief, Cosmopolitan performed all obligations owing under the Aspen Policy in connection with its tender of defense and indemnity, and Cosmopolitan satisfied all relevant conditions precedent in connection therewith.

99. As a direct and proximate result of Aspen's breach of its obligations under the Aspen Policy as alleged herein, a compensatory damages verdict in the amount of $160,500,000 was entered against Cosmopolitan in the Underlying Action.

100. As a direct and proximate result of Aspen's breach of its obligations under the Aspen Policy as alleged herein, St. Paul was forced to, and without acting as a volunteer, pay its $REDACTED limit on behalf of the insured, Cosmopolitan, to satisfy the post-verdict $REDACTED settlement demand and consummate settlement of the Underlying Action, reserving its right to pursue Aspen for the $REDACTED due to Aspen's breach of contract. St. Paul, therefore, has been damaged in the liquidated sum of $REDACTED.

101. Unlike Aspen, St. Paul did not breach its obligations to Cosmopolitan under the St. Paul Policy in connection with the Underlying Action, as Cosmopolitan's coverage under the St. Paul Policy did not apply until the Aspen Policy (and AIG Policy) exhausted. As a result, St. Paul, Cosmopolitan's high-level excess carrier, sits in a position of superior equity to Aspen.

102. Under the express terms of the St. Paul Policy and principles of subrogation, having made the settlement payment on behalf of Cosmopolitan, St. Paul steps into Cosmopolitan's shoes, and succeeds to all of Cosmopolitan's rights of recovery against Aspen for breach of contract.

103. It is just and fair to have Aspen reimburse St. Paul damages in the amount of $REDACTED, as it was Aspen's breach of its obligations under the Aspen Policy, not that of St. Paul, that resulted in the $160,500,000 verdict against Cosmopolitan, and subsequent $REDACTED settlement demand, and equity requires Aspen should therefore bear the burden of its improper conduct and reimburse St. Paul for its $REDACTED contribution to the post-verdict $REDACTED settlement.

WHEREFORE, St. Paul prays for judgment as hereinafter set forth.

FOURTH CAUSE OF ACTION

Subrogation -- Breach of The AIG Insurance Contract
(Against AIG Only)

104. St. Paul incorporates herein by reference all preceding paragraphs as though fully

set forth.

105. Cosmopolitan tendered the Underlying Action to AIG for defense and indemnity under the AIG Policy. AIG breached its obligations to Cosmopolitan under the AIG Policy by, among other things, failing to provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan's interests, failing to pay all available limits under the AIG Policy to resolve Cosmopolitan's liability when it had the opportunity, and failing to pay any amount on Cosmopolitan's behalf toward the $REDACTED settlement.

106. Upon information and belief, Cosmopolitan performed all obligations owing under the AIG Policy in connection with its tender of defense and indemnity, and Cosmopolitan satisfied all relevant conditions precedent in connection therewith.

107. As a direct and proximate result of AIG's breach of its obligations under the AIG Policy as alleged herein, a compensatory damages verdict in the amount of $160,500,000 was entered against Cosmopolitan in the Underlying Action.

108. As a direct and proximate result of AIG's breach of its obligations under the AIG Policy as alleged herein, St. Paul was forced to, and without acting as a volunteer, pay its $REDACTED limit on behalf of the insured, Cosmopolitan, to satisfy the post-verdict $REDACTED settlement demand and consummate settlement of the Underlying Action, reserving its right to pursue AIG for the $REDACTED due to AIG's breach of contract. St. Paul, therefore, has been damaged in the liquidated sum of $REDACTED.

109. Unlike AIG, St. Paul did not breach its obligations to Cosmopolitan under the St. Paul Policy in connection with the Underlying Action, as Cosmopolitan's coverage under the St. Paul Policy did not apply until the AIG Policy (and Aspen Policy) exhausted. As a result, St. Paul, Cosmopolitan's high-level excess carrier, sits in a position of superior equity to AIG.

110. Under the express terms of the St. Paul Policy and principles of subrogation, having made the settlement payment on behalf of Cosmopolitan, St. Paul steps into Cosmopolitan's shoes, and succeeds to all of Cosmopolitan's rights of recovery against AIG for breach of contract.

111. It is just and fair to have AIG reimburse St. Paul damages in the amount of $REDACTED, as it was AIG's breach of its obligations under the AIG Policy, not that of St. Paul,

that resulted in the $160,500,000 verdict against Cosmopolitan, and subsequent $REDACTED settlement demand, and equity requires AIG should therefore bear the burden of its improper conduct and reimburse St. Paul for its $REDACTED contribution to the post-verdict $REDACTED settlement.

WHEREFORE, St. Paul prays for judgment as hereinafter set forth.

FIFTH CAUSE OF ACTION

Statutory Subrogation – Contribution Per NRS § 17.225 (Against Marquee Only)

112. St. Paul incorporates herein by reference all preceding paragraphs as though fully set forth.

113. Per NRS § 17.275, St. Paul has an existing statutory subrogation right against Marquee for contribution per NRS § 17.225 for a share of the $REDACTED settlement payment made by St. Paul in the Underlying Action.

114. St. Paul's $REDACTED payment towards the post-verdict $REDACTED settlement discharged Cosmopolitan's liability in the Underlying Action and also discharged any obligation St. Paul had as an insurer for Cosmopolitan.

115. Per court order, Cosmopolitan and Marquee were jointly and severally liable for the $160,500,000 jury verdict in the Underlying Action.

116. The $REDACTED post-verdict settlement jointly extinguished the liability of Marquee and Cosmopolitan.

117. Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct.

118. Moradi's injuries and damages were not caused by any affirmative actions or unreasonable conduct on the part of Cosmopolitan. Rather, per court order, Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages.

119. St. Paul's $REDACTED payment on behalf of Cosmopolitan towards the settlement of the Underlying Action was in excess of Cosmopolitan's equitable share of the common liability of Marquee and Cosmopolitan.

120. Per NRS §§ 17.225 and 12.275, Marquee is liable to St. Paul in contribution for all sums paid by St. Paul towards the settlement of the Underlying Action which were in excess of Cosmopolitan's equitable share of the common liability.

WHEREFORE, St. Paul prays for judgment as hereinafter set forth.

SIXTH CAUSE OF ACTION

Subrogation – Express Indemnity
(Against Marquee Only)

121. St. Paul incorporates herein by reference all preceding paragraphs as though fully set forth.

122. Per written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action.

123. Upon information and belief, Cosmopolitan performed all conditions giving rise to Marquee's contractual obligation to indemnify Cosmopolitan in connection to the Underlying Action. Alternatively, Cosmopolitan has been excused from performing any conditions giving rise to Marquee's contractual obligation to indemnify Cosmopolitan in connection with the Underlying Action.

124. Upon information and belief, Cosmopolitan tendered the Underlying Action to Marquee for indemnification per written agreement.

125. Based on information and belief, Marquee accepted Cosmopolitan's tender for indemnification per written agreement without reservation through its insurers, but did not provide indemnification to Cosmopolitan for the claims asserted against Cosmopolitan in the Underlying Action.

126. St. Paul, as an insurer for Cosmopolitan, is subrogated by its policy, law and principles of equity to the rights of Cosmopolitan for claims against Marquee for express indemnification.

127. As a result of Marquee's failure to provide express indemnification, St. Paul was forced to, and without acting as a volunteer, pay REDACTED on behalf of Cosmopolitan to satisfy the post-verdict $REDACTED settlement demand and consummate settlement of the

Underlying Action. St. Paul, therefore, has been damaged in the liquidated amount of $REDACTED.

128. Marquee is liable to St. Paul, in subrogation for express indemnification, and justice requires that Marquee reimburse St. Paul's damages in the amount of $REDACTED.

129. Per the terms of the written agreement, Marquee is also liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement.

WHEREFORE, St. Paul prays for judgment as hereinafter set forth.

SEVENTH CAUSE OF ACTION

Equitable Estoppel
(Against Carrier Defendants Only)

130. St. Paul incorporates herein by reference all preceding paragraphs as though fully set forth.

131. In its motion to dismiss St. Paul's original complaint, AIG asserted for the first time that it is a "co-excess" carrier with St. Paul, that the AIG Policy, which is specifically excess to the Aspen Policy, does not apply before Cosmopolitan's excess policy with St. Paul as alleged herein. Representing that it has an independent duty owed to Cosmopolitan in relation to the Underlying Action, AIG now asserts that St. Paul had the same independent duty as AIG to settle the Underlying Action. AIG's "co-excess" assertion is not only inconsistent with the parties' agreement regarding the priority of coverage between Marquee's policies and Cosmopolitan's policies, as alleged herein, it is also inconsistent with the Carrier Defendants' own representations.

132. Throughout the Underlying Action, the Carrier Defendants consistently represented through both words and actions that the coverage they provided Cosmopolitan as both an additional insured and as Marquee's contractual indemnitee was primary to Cosmopolitan's direct coverage under Cosmopolitan's own policies, including the St. Paul Policy, and therefore Carrier Defendants were responsible for defending and resolving the Underlying Action. Specifically:

a. By appointing joint counsel the Carrier Defendants affirmed Marquee's acceptance of Cosmopolitan's indemnity tender, and agreed to pay all sums incurred by

Cosmopolitan for both defense and indemnity regardless of policy limits, since the appointment of joint counsel foreclosed Cosmopolitan's ability to bring a cross-complaint against Marquee, the only actual wrongdoer. Based on information and belief, Carrier Defendants appointed joint counsel because they understood that the entire loss was theirs to defend and resolve on behalf of both Marquee and Cosmopolitan.

b. Throughout the Underlying Action Carrier Defendants controlled the defense and all settlement negotiations on behalf of Marquee and Cosmopolitan. Based on information and belief, none of Cosmopolitan's direct insurers were given notice of the loss until late in February 2017, even though the case had been pending since 2014, trial was set for March 2017, and had been previously set for June 27, 2016. St. Paul was not notified of the Underlying Action until on or about February 13, 2017. Trial began on March 20, 2017, but St. Paul was not advised of the trial date and did not learn of the trial until three days after trial started, on March 23, 2017.

c. The Carrier Defendants never requested Cosmopolitan's direct carriers, including St. Paul, participate in the defense of the Underlying Action or settlement negotiations. In fact, once given notice of the Underlying Action by Cosmopolitan, Cosmopolitan's direct carriers reached out to the Carrier Defendants numerous times attempting to obtain information regarding the Underlying Action and the Carrier Defendants' plans for resolving it. Based on information and belief, Carrier Defendants viewed St. Paul's and Cosmopolitan's other direct carriers' communications and requests for information as annoying and unnecessary, given the Carrier Defendants' primary responsibility for the defense and resolution the Underlying Action. As a result, during trial, the Carrier Defendants, specifically AIG who was the lead decision maker on settlement negotiations by that time, often totally ignored communications from Cosmopolitan and Cosmopolitan's direct carriers, including St. Paul, regarding the status of settlement negotiations, and when AIG did respond, it was in a dismissive and perfunctory manner. AIG repeatedly represented to St. Paul that AIG was seeking to settle the Underlying Action on behalf of both Marquee and Cosmopolitan consistent with its accepted obligations.

133. Based on information and belief, during the Underlying Action, the Carrier

Defendants were aware Cosmopolitan had its own direct insurance, and were provided copies of Cosmopolitan's direct insurance policies, including the St. Paul Policy.

134. As alleged herein, St. Paul contends that it is a high level excess carrier and its coverage to Cosmopolitan for the Underlying Action did not apply until after exhaustion of the Aspen Policy and AIG Policy, which is consistent with the words and actions of the Carrier Defendants during the Underlying Action. During the Underlying Action, St. Paul was unaware that AIG, or Aspen, intended to contradict its representations regarding the priority of Marquee's direct insurance to that of Cosmopolitan. Instead, St. Paul, and Cosmopolitan's other direct carriers, relied on the Carrier Defendants' representations that they were primarily responsible for defending and resolving the Underlying Action on behalf of both Marquee and Cosmopolitan. As a result, St. Paul, and Cosmopolitan's other direct carriers, did not participate in the defense or settlement negotiations on behalf of Cosmopolitan in the Underlying Action. As alleged above, the Carrier Defendants' unreasonable failure to settle the Underlying Action resulted in a verdict against Cosmopolitan (and Marquee) in the amount of $160,500,000, and St. Paul's eventual contribution of $REDACTED on behalf of the insured, Cosmopolitan, towards a post-verdict settlement.

135. Equity requires that the Carrier Defendants be bound by their words and actions in the Underlying Action, that they be precluded from asserting now, for the first time, that 1) their policies were not primarily responsible for the defense and resolution of the Underlying Action, and 2) St. Paul, a non-defending carrier, had the same obligation to resolve the Underlying Action as the Carrier Defendants. Instead, it is just and fair that Carrier Defendants individually and/or collectively reimburse St. Paul's damages in the amount of $REDACTED, as it was the Carrier Defendants' improper conduct, not that of St. Paul, that resulted in the $160,500,000 verdict against Cosmopolitan, and subsequent $REDACTED settlement demand.

WHEREFORE, St. Paul prays for judgment as hereinafter set forth.

///

///

///

EIGHTH CAUSE OF ACTION

Equitable Contribution
(Against AIG Only)

136. St. Paul incorporates herein by reference all preceding paragraphs as though fully set forth.

137. As alleged herein, St. Paul contends that it is a high level excess carrier for Cosmopolitan, and that the St. Paul Policy responds to the Underlying Action only after exhaustion of the coverages provided by Aspen, the primary carrier, and AIG, the first level excess carrier, under their respective policies. As alleged above, AIG now asserts, for the first time, that it is a "co-excess" carrier with St. Paul, that the AIG Policy, which is specifically excess to the Aspen Policy, does not apply before Cosmopolitan's excess policy with St. Paul as alleged herein. While St. Paul disputes AIG's contention, as alleged herein, in light of AIG's new assertions, St. Paul pleads this cause of action for contribution in the alternative to its Second Cause of Action for Subrogation -- Breach of the Duty to Settle as against AIG only, and its Fourth Cause of Action for Subrogation -- Breach of the AIG Insurance Contract as against AIG only.

138. In contributing to the settlement of the Underlying Action on behalf of Cosmopolitan, St. Paul's insured, St. Paul incurred amounts in excess of its equitable share. St. Paul contributed $REDACTED on Cosmopolitan's behalf. AIG contributed nothing on Cosmopolitan's behalf.

139. AIG failed to contribute its fair and equitable share toward the settlement of the Underlying Action on behalf of Cosmopolitan, also AIG's insured.

140. The amount due from AIG for its fair and equitable share of the settlement of the Underlying Action on behalf of Cosmopolitan will be according to proof at trial.

141. AIG is obligated under the principals of equity to reimburse St. Paul for the settlement amounts St. Paul inequitably incurred in settlement of the Underlying Action on behalf of Cosmopolitan.

WHEREFORE, St. Paul prays for judgment as hereinafter set forth.

///

PRAYER FOR RELIEF

1. On the First and Third Causes of Action, for damages against Aspen in the amount of $REDACTED.

2. On the Second and Fourth Causes of Action, for damages against AIG in the amount of $REDACTED.

3. On the Fifth Cause of Action, for damages against Marquee for all portions of St. Paul's $REDACTED settlement payment which is in excess of Cosmopolitan's equitable share of the liability in the Underlying Action.

4. On the Sixth Cause of Action, for damages against Marquee in the amount of $REDACTED.

5. On the Seventh Cause of Action, for damages against Carrier Defendants in the amount of $REDACTED.

6. On the Eighth Cause of Action, for damages against AIG for all portions of St. Paul's $REDACTED settlement payment which is in excess of St. Paul's equitable share of the liability in the Underlying Action.

7. For attorney's fees.

8. For costs of suit.

9. For pre-judgment interest.

10. For such whatever other relief this Court deems proper.

Dated: April 23, 2018

MORALES FIERRO & REEVES

By: */s/ Ramiro Morales*
Ramiro Morales [Bar No. 007101]
William Reeves [Bar No. 008235]
Marc Derewetzky [Bar No. 006619]
Attorneys for Plaintiff
600 So. Tonopah Dr., Suite 300
Las Vegas, NV 89106

PROOF OF SERVICE

I, Tonia Woods, declare that:

I am over the age of eighteen years and not a party to the within cause.

On April 25, 2018, I served the following documents:

(1) REDACTED FIRST AMENDED COMPLAINT

Service as effectuated in the following manner:

XXXX BY ODYSSEY: I caused such document(s) to be electronically served through Odyssey for the above-entitled case to the parties listed on the Service List maintained on the Odyssey website for this case on the date specified below, as follows:

Andrew D. Herold (aherold@heroldsager.com), *Attorney for National Union Fire Insurance Company of Pittsburgh PA*
Eileen Monarez (emonarez@heroldsagerlaw.com), *Attorney for Roof Deck Entertainment LLC*

XXXX BY U.S. MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same date with postage thereon fully prepaid in the ordinary course of business. The following parties were served by U.S. Mail.

Michael M. Edwards, Esq.
Messner Reeves LLP
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
Tel: (702) 363-5100
medwards@messner.com
Attorney for
Aspen Specialty Insurance Company

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 25, 2018

Tonia Woods

S:\Docs\TR3012\POS180423.Redacted First Amended Complaint.tpw.docx

FFCO

ANDREW D. HEROLD, ESQ.
Nevada Bar No. 7378
NICHOLAS B. SALERNO, ESQ.
Nevada Bar No. 6118
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Telephone: (702) 990-3624
Facsimile: (702) 990-3835
aherold@heroldsagerlaw.com
nsalerno@heroldsagerlaw.com

JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)
JEREMY STAMELMAN, ESQ. (Pro Hac Vice)
KELLER/ANDERLE LLP
18300 Von Karman Ave., Suite 930
Irvine, CA 92612
Telephone: (949) 476-8700
Facsimile: (949) 476-0900
jkeller@kelleranderle.com
jstamelman@kelleranderle.com

Attorneys for Defendants NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA. and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNON FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT.: XXVI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT

Defendant National Union Fire Insurance Company of Pittsburgh PA's ("National Union") Motion for Summary Judgment ("MSJ") came on for hearing on October 15, 2019 in Department XXVI of this Court, the Honorable Gloria Sturman presiding. Nicholas B. Salerno of Herold & Sager and Jennifer L. Keller of Keller/Anderle LLP appeared for Defendant National Union, William Reeves and Marc J. Derewetzky of Morales Fierro & Reeves appeared for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and Ryan A. Loosvelt of Messner Reeves LLP appeared for Defendant Aspen Specialty Insurance Company ("Aspen").

The Court, having reviewed and considered the pleadings and papers on file,[1] having heard and considered argument of counsel, and good cause appearing, hereby GRANTS National Union's Motion for Summary Judgment.

On October 15, 2019, the Court issued a minute order granting National Union's Motion for Summary Judgment. However, the Court's decision set out herein is not based solely on the contents of the minute order but includes the entire record on file herein. The Court hereby issues the following Findings of Facts, Conclusions of Law and Order.

I.

FINDINGS OF FACT

A. The Underlying Action

1. This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). (FAC ¶ 6.)

---

[1] The pleadings and papers reviewed and considered by the Court include, among other things, National Union's Motion for Summary Judgment, National Union's Request for Judicial Notice in Support of Motion for Summary Judgment, National Union's Appendix of Exhibits in Support of Motion for Summary Judgment, Declaration of Nicholas B. Salerno in Support of Motion for Summary Judgment, Declaration of Richard C. Perkins in Support of Motion for Summary Judgment, St. Paul's Opposition to Motion for Summary Judgment and Request for Discovery Per NRCP 56(d), St. Paul's Response to Statement of Undisputed Facts, St. Paul's Consolidated Appendix of Exhibits in Support of Opposition to Motions for Summary Judgment, Declaration of Marc J. Derewetzky in Support of Opposition to Motion for Summary Judgment, Declaration of William Reeves in Support of Opposition to Motion for Summary Judgment, National Union's Reply in Support of Motion for Summary Judgment, and National Union's Objections to Facts Not Supported by Admissible Evidence Filed in Support of Opposition to Motion for Summary Judgment and Request for Discovery Per NRCP 56(d).

2. Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was beaten by Marquee employees. (FAC ¶¶ 6-7.)

3. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (FAC ¶¶ 8-10, Exhibit A.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit A.)

5. Aspen, who issued a primary insurance policy to Marquee, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union, who issued an excess policy to Marquee, subsequently appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

6. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for the conduct of Marquee by breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

7. The Court held in the Underlying Action that that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers." and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (*See* Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.)

8. After a five-week trial, the jury in the Underlying Action issued a special verdict on April 26, 2017 finding that Moradi established his claims for assault, battery, false imprisonment and negligence against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the

///

judgment would have been joint and several against Marquee and Cosmopolitan. *See* NRS 41.141(5)(b). (FAC, Ex. C.)

9. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

10. Aspen and National Union as the primary and excess insurers of Marquee, and Zurich American Insurance Company and St. Paul as the primary and excess insurers of Cosmopolitan, accepted the settlement demand and resolved the Underlying Action with the confidential contributions set forth in the FAC filed by St. Paul under seal. (FAC ¶¶ 67-70.)

11. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money out-of-pocket towards the settlement. National Union on behalf of Marquee and St. Paul on behalf of Cosmopolitan contributed the same amount towards the settlement of the Underlying Action. (FAC ¶ 67-70.)

12. National Union contends its contribution towards the settlement of the Underlying Action on behalf of Marquee resulted in the exhaustion of the National Union Excess Policy. (MSJ p. 10, Undisputed Fact No. ("UF") 17.)

13. The combined defense of Cosmopolitan and Marquee was funded entirely by Aspen and National Union. (FAC ¶ ¶ 27-28, 35-36.)

B. Insurance Policies

1. The Cosmopolitan Insurance Tower

a. Cosmopolitan's Primary Policy with Zurich American Insurance Company

14. Zurich American Insurance Company ("Zurich") issued commercial general liability policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012 to Nevada Property 1 LLC (the "Zurich Primary Policy"). (FAC ¶ 69; National Union's Appendix of Exhibits in Support of MSJ ("NU Appx."), Ex. 2, W005478.)

15. Cosmopolitan is a named insured under the Zurich Primary Policy. (FAC ¶ 69.) Marquee is not an insured under the Zurich Primary Policy. (*Id.*)

///

16. The Zurich Primary Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶ 69; NU Appx., Ex. 2, W005508.)

17. The Zurich Primary Policy provides that Zurich will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 2, W005497 – W005498.)

18. The Zurich Primary Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (*Id.*)

b. Cosmopolitan's Excess Policy with St. Paul

19. St. Paul issued commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013, to Premier Hotel Insurance Group (the "St. Paul Excess Policy"). (FAC ¶ 40; MSJ p. 11, UF 20.)

20. Cosmopolitan is a named insured under the St. Paul Excess Policy. (FAC ¶ 40.) Marquee is not an insured under the St. Paul Excess Policy. (FAC ¶ 41.)

21. The St. Paul Excess Policy contains liability limits of $25,000,000 with each occurrence and $25,000,000 general aggregate. (MSJ p. 11, UF 22.)

22. The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained Limit" that the named insured becomes legally obligated to pay as damages assumed by the named insured under an "Insured Contract." (MSJ p. 11, UF 23.)

23. The St. Paul Excess Policy contains an Other Insurance provision, which provides:

> If Other Insurance applies to damages that are also covered by this policy, this policy will apply excess of and shall not contribute with, that Other Insurance, whether it is primary, excess, contingent or any other basis. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

(MSJ p. 11. UF 24.)

///

///

2. The Marquee Insurance Tower

a. Marquee's Primary Policy with Aspen Specialty Insurance Company

24. Aspen issued a commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 to The Restaurant Group et. al. (the "Aspen Primary Policy"). (FAC ¶ 15; NU Appx., Ex. 4, ASPEN000032.)

25. Marquee is a named insured under the Aspen Primary Policy. (FAC ¶ 15.)

26. Cosmopolitan qualified as an additional insured to the Aspen Primary Policy with respect to the Underlying Action. (FAC ¶ 24.)

27. The Aspen Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶¶ 17, 23; NU Appx., Ex. 4, ASPEN000033.)

28. The Aspen Policy provides that Aspen will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 4, ASPEN000042.)

29. The Aspen Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (*Id.*)

b. Marquee's Excess Policy with National Union

30. National Union issued commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. (the "National Union Excess Policy") (MSJ p. 10, UF 11.)

31. Marquee is a named insured under the National Union Excess Policy. (FAC ¶ 30.)

32. Cosmopolitan qualified as an additional insured to the National Union Excess Policy with respect to the Underlying Action. (FAC ¶ 33; MSJ p. 11, UF 18.)

33. The National Union Excess Policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. (MSJ p. 10, UF 13.)

34. The National Union Excess Policy provides that National Union will pay on behalf of the insured "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and Advertising Injury to which this insurance applies or because of

Bodily Injury or Property Damage to which this insurance applies assumed by the Insured under an Insured Contract." (MSJ p. 10, UF 14.)

35. The National Union Excess Policy defines Retained Limit, in pertinent part, as the total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance providing coverage to the Insured. (NU Appx., Ex. 1, p. 30.)

36. The policy defines Scheduled Underlying Insurance as the policy or policies of insurance and limits of insurance shown in the Schedule of Underlying Insurance forming a part of the National Union Excess Policy. (*Id.*)

37. Other Insurance is defined in the National Union Excess Policy as a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy. (NU Appx., Ex. 1, p. 29.)

38. The National Union Excess Policy contains an Other Insurance provision, which provides:

> If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the Other Insurance. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

(MSJ p. 10, UF 15.)

39. The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy. (MSJ p. 10, UF 16.)

40. National Union received notice of the Underlying Action against Marquee and Cosmopolitan and provided coverage to Cosmopolitan and Marquee in the Underlying Action under a reservation of rights. (FAC ¶ 35.)

41. Cosmopolitan and Marquee were insured under separate towers of insurance. Cosmopolitan was insured under one of the towers of insurance where it was a named insured under the Zurich Primary Policy and the St. Paul Excess Policy, and under the other tower of insurance

///

where Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy that were issued to Marquee as the named insured.

C. St. Paul's Claims Against National Union

42. St. Paul's FAC asserts the following four causes of action against National Union:

1) Second Cause of Action for Subrogation – Breach of the Duty to Settle;

2) Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract;[2]

3) Seventh Cause of Action for Equitable Estoppel; and

4) Eighth Cause of Action for Equitable Contribution.

43. In the Second Cause of Action of the FAC for Subrogation – Breach of the Duty to Settle, St. Paul asserts that National Union breached a duty owed to Cosmopolitan to settle by refusing to settle the Underlying Action in response to pre-trial settlement demands within its applicable policy limits and by failing to initiate and/or attempt settlement prior to or during trial for an amount within the applicable policy limits. (FAC ¶¶ 88-89.) St. Paul further asserts that it is subrogated under its policy and principles of equity to the rights Cosmopolitan possesses directly against its insurers Aspen and National Union for breach of the duty to settle and seeks reimbursement for the amount St. Paul paid towards the settlement of the Underlying Action. (*Id.* at ¶¶ 93-95.)

44. In the Fourth Cause of Action of the FAC for Subrogation – Breach of the AIG Insurance Contract, St. Paul makes similar allegations to those raised in the cause of action for breach of the duty to settle. St. Paul asserts that National Union breached its obligations to Cosmopolitan by failing to provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan, failing to pay all available limits under the National Union Excess Policy to resolve Cosmopolitan's liability, and failing to pay any amount on Cosmopolitan's behalf towards the settlement of the Underlying Action. (FAC ¶ 105.) St. Paul asserts that, unlike National Union, St.

---

[2] St. Paul's FAC refers to the National Union Excess Policy as the AIG Insurance Contract.

Paul did not breach its obligations to Cosmopolitan under the St. Paul Excess Policy in connection to the Underlying Action because Cosmopolitan's coverage under the St. Paul Excess Policy did not apply until the Aspen Primary Policy and National Union Excess Policy exhausted. St. Paul claims it was damaged because it was required to contribute to the settlement of the Underlying Action as a result of National Union's breach of its obligations to Cosmopolitan. (*Id.* ¶¶ 108, 111.) St. Paul alleges that pursuant to the express terms of the St. Paul Excess Policy and principles of subrogation, it is entitled to step into Cosmopolitan's shoes and pursue its rights of recovery against National Union for such breach. (*Id.* ¶ 110.)

45. In the Seventh Cause of Action of the FAC for Equitable Estoppel, St. Paul asserts that both National Union and Aspen asserted throughout the Underlying Action "through both words and actions" that their coverage to Cosmopolitan was primary to Cosmopolitan's direct coverage under Cosmopolitan's own policies, including the St. Paul Excess Policy. (FAC ¶ 132.) St. Paul alleges that it and Cosmopolitan's other direct carriers did not participate in the defense or settlement negotiations on behalf of Cosmopolitan based on these representations. (*Id.* ¶ 134.) St. Paul alleges that equity requires that National Union be precluded from claiming that St. Paul and National Union were excess carriers and that St. Paul had the same obligation to resolve the Underlying Action.

46. In the Eighth Cause of Action of the FAC for Equitable Contribution, St. Paul asserts that in contributing to the settlement of the Underlying Action, it incurred amounts in excess of its equitable share and that National Union failed to contribute its fair and equitable share towards the settlement of the Underlying Action on behalf of Cosmopolitan (St. Paul's insured). (FAC ¶¶ 138-139.) St. Paul asserts that National Union is obligated under principles of equity to reimburse St. Paul for the amounts St. Paul contributed towards settlement of the Underlying Action that Aspen and National Union should have otherwise paid. (*Id.* ¶ 141.)

II.

NATIONAL UNION'S MOTION FOR SUMMARY JUDGMENT

47. On September 13, 2019, National Union's filed Defendant National Union Fire Insurance Company of Pittsburgh PA's MSJ. National Union's MSJ asserts that the Second and

Fourth Causes of Action for subrogation fail as a matter of law because the St. Paul Excess Policy is not excess to the National Union Excess Policy, rather St. Paul and National Union are both excess insurers at the same level of coverage in separate towers of coverage with equal obligations to their insured(s).

48. National Union's MSJ further asserts as a separate and independent ground to grant summary judgment that the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract fails as a matter of law because St. Paul has no legal basis or standing to step into the shoes of Cosmopolitan to pursue subrogation for breach of contract against National Union when Cosmopolitan was fully defended and indemnified by the insurers in the Underlying Action and, thus, has suffered no damages under the insurance contract. Additionally, National Union argues that the damages sought by St. Paul are extra-contractual damages that are not available under a breach of contract cause of action.

49. National Union's MSJ further asserts as a separate and independent ground to grant summary judgment that the Eighth Cause of Action for Equitable Contribution fails as a matter of law because National Union exhausted its policy limit in settlement of the Underlying Action and a claim for contribution does not apply to seek extra-contractual damages that fall outside of policy limits.

50. National Union's MSJ further asserts that the Seventh Cause of Action for Equitable Estoppel fails as a matter of law because such a claim is dependent on the legal viability of the other causes of action against National Union, which all fail for the reasons each cause of action against National Union fails as a matter of law.

III.

CONCLUSIONS OF LAW

A. Standard of Review

1. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some

metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. St. Paul's Second Cause of Action For Subrogation – Breach of The Duty To Settle

2. In the Second Cause of Action of the FAC for Subrogation – Breach of the Duty to Settle ("Second Cause of Action"), St. Paul asserts a right of subrogation against National Union on the premise the St. Paul Excess Policy is excess to the National Union Excess Policy. (*see, e.g.*, FAC ¶ 44.)

3. As a threshold matter, the Second Cause of Action fails as a matter of law because the Nevada Supreme Court has never recognized an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

4. The Second Cause of Action also fails as a matter of law for the separate and independent reason that no jurisdiction, let alone Nevada, recognizes an equitable subrogation claim between excess carriers in separate towers of coverage. And this Court is unwilling to be the first to do so.

5. General insurance principles and the subject policies outlined above demonstrate that Cosmopolitan and Marquee are named insureds in separate towers of coverage. Cosmopolitan is a named insured under a separate tower of insurance that includes the Zurich Primary Policy and the St. Paul Excess Policy. Marquee is a named insured under a separate tower of insurance that includes the Aspen Primary Policy and the National Union Excess Policy. Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy issued to Marquee as the named insured.

6. It is well-established that "[p]rimary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability," and that "[e]xcess or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted." *Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co.*, 113 Cal. Rptr. 2d 613, 618 (Cal. Ct. App. 2001) (citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 178 Cal. Rptr. 908 (Cal. Ct. App. 1981); *Carmel Dev. Co. v. RLI Ins. Co.*, 24 Cal. Rptr. 3d 588, 595 (2005) ("[U]mbrella coverage is generally regarded as true excess over and above any type of primary coverage, excess provisions arising in any manner, or escape clauses." (internal quotation marks omitted)).

7. St. Paul issued an umbrella policy to Cosmopolitan while National Union issued an umbrella policy to Marquee. Thus, St. Paul's and National Union's respective umbrella policies remain in separate towers of coverage and, as such, St. Paul and National Union are co-excess insurers that provided coverage to Cosmopolitan at equal levels of coverage under two separate and distinct coverage towers.

8. The St. Paul Excess Policy is a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured, Cosmopolitan. The scheduled underlying insurance to the St. Paul Excess Policy is the Zurich Primary Policy.

9. The National Union Excess Policy is also a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured Cosmopolitan. The scheduled underlying insurance to the National Union Excess Policy is the Aspen Primary Policy.

10. Based on the aforementioned discussions herein, the St. Paul Excess Policy and the National Union Excess Policy contain nearly identical "other insurance" provisions. When two policies contain such language, neither policy shall be excess to the other. *See Everest Nat. Ins. Co. v. Evanston Ins. Co.*, No. 2:09-cv-2077-RLH-PAL, 2011 WL 534007 at *3 (D. Nev. Feb. 8, 2011) (ruling that judgment and defense costs were to be shared equally between insurers that contained the same amounts of limits and both contained Other Insurance clauses providing they were excess

to other available insurance); *CSE Ins. Group v. Northbrook Property & Cas. Co.*, 29 Cal. Rptr. 2d 120, 121-23 (Cal. Ct. App. 1994); *Century Surety Co. v. United Pac. Ins. Co.*, 135 Cal. Rptr. 2d 879, 884-85 (Cal. Ct. App. 2003).

11. The St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. Both St. Paul and National Union had independent obligations to Cosmopolitan, both discharged those obligations by settlement of the Underlying Action, both had the same limits of insurance, and neither is in an equitably superior position to the other.

12. Accordingly, St. Paul's Second Cause of Action For Subrogation – Breach of the Duty to Settle fails as a matter of law.

B. St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract

13. Although St. Paul is not a party to the National Union Excess Policy, in the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract ("Fourth Cause of Action"), St. Paul is pursuing a claim against National Union for an alleged breach of National Union's insurance contract as an alleged subrogee of Cosmopolitan.

14. However, for the same reasons proffered above in concluding that the Second Cause of Action fails as a matter of law, the Fourth Cause of Action must also fail as a matter of law. Specifically, the Nevada Supreme Court has never recognized the viability of an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

15. And even if equitable subrogation claims among carriers were viable in Nevada, for the reasons explained above, the St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. As such, St. Paul cannot pursue any claims against National Union based on an equitable subrogation theory of recovery.

16. The Fourth Cause of Action also fails as a matter of law because Nevada courts have expressly rejected contractual subrogation claims between insurers. In the insurance context, contractual subrogation generally is not applied by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No.

2:12-cv-01727-RFB-NJK, 2016 WL 3360943 at *6 (D. Nev. June 9, 2016). As noted by the *Colony* court, the Nevada Supreme Court has held that contractual subrogation in the context of insurers and insureds may contravene public policy and contractual subrogation may provide for windfalls in the insurance context. *Id.* (citing *Maxwell v. Allstate Ins. Cos.*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986)). As such, St. Paul cannot pursue claims against National Union based on a contractual subrogation theory of recovery.

17. The Second Cause of Action also fails as a matter of law for the separate and independent reason that Cosmopolitan has suffered no contractual damages.

18. General principles of subrogation allow an insurer to step into the shoes of its insured, but the insurer has no greater rights than the insured and is subject to all of the same defenses that can be asserted against the insured. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*, 49 Cal. Rptr. 3d 785, 790-91 (Cal. Ct. App. 2006).

19. A breach of contract claim requires (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *See Contreras v. American Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1224 (D. Nev. 2015) (*citing Richardson v. Jones*, 1 Nev. 405, 409 (1865)).

20. A claim for breach of contract is not actionable without damage. *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished) ("It is beyond cavil that a party must suffer actual loss before it is entitled to damages." (quoting *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1153 (1st Cir. 1992)); *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815, at *4 (Cal.Ct.App. May 18, 2018) (unpublished); *Bramalea California, Inc. v. Reliable Interiors, Inc.*, 14 Cal. Rptr. 3d 302, 306 (Cal. Ct. App. 2004). In the insurance context, damages for breach of an insurance policy are based on the failure to provide benefits owed under the policy. *Morris v. Paul Revere Life Ins. Co.*, 135 Cal. Rptr. 2d 718, 726 (Cal. Ct. App. 2003); *Avila v. Century Nat'l Ins. Co.*, No. 2:09-cv-00682-RCJ-GWF, 2010 WL 11579031 (D. Nev. Feb. 10, 2010). If the insured does not suffer "actual loss" from the insurer's breach of a duty under the policy, there can be no claim for

///

damages. *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished).

21. Here, St. Paul alleges that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy and seeks extra-contractual damages for such breach. However, it is undisputed that Cosmopolitan's defense and indemnity in the Underlying Action were fully paid for by insurers. The damages sought by St. Paul are not contract damages suffered by Cosmopolitan due to any failure to provide policy benefits, but are instead an attempt to recoup extra-contractual damages to reimburse St. Paul for the money it was required to pay under its policy in discharge of its separate obligation to Cosmopolitan.

22. It is undisputed that Cosmopolitan was indemnified by National Union when it exhausted its policy limit by participating in the settlement of the Underlying Action. Cosmopolitan's defense in the Underlying Action was funded entirely by insurers. Accordingly, Cosmopolitan suffered no contract damages as a matter of law and, as such, has no viable claim for breach of contract against National Union. As Cosmopolitan has no viable claim for breach of contract against National Union, neither does St. Paul under subrogation principles as it holds no greater rights than Cosmopolitan.

23. The facts of this case are similar to *California Capital*, in which an insurer sued another insurer to recover amounts it paid in settlement (and defense) of its named insureds in an underlying bodily injury action. Like St. Paul, California Capital asserted causes of action against a co-carrier for breach of contract and breach of the covenant of good faith and fair dealing, among others, alleging its named insureds were additional insureds under the defendant insurer's policy and that its named insureds had expressly assigned all of their rights under the defendant insurer's policy to California Capital. 2018 WL 2276815, at *2-4. California Capital alleged the defendant insurer breached its policy by refusing to provide the additional insureds the benefits due under the policy and also alleged defendant insurer breached its obligations of good faith by failing to defend and indemnify the insureds when it knew they were entitled to overage under the policy, withholding payments under the policy when defendant insurer knew plaintiff's claim was valid, failing to properly investigate the insureds' request for policy benefits, and failing to provide a

reasonable explanation of the factual basis for denial of the insureds' claim for benefits under the policy. *Id.* at *4. The trial court held that California Capital had no cause of action for breach of contract or breach of the covenant of good faith and fair dealing because the insureds had sustained no damage as a result of defendant insurer's alleged failure to defend and indemnify them or its failure to settle the claim within its policy limit. *Id.* Given the insureds' defense and post-judgment settlement had been fully paid by California Capital, the trial court found the essential element of contract damages was absent from the breach of contract cause of action such that the insureds had no viable claims to assign to California Capital. *Id.* The trial court further found that California Capital had no direct cause of action against the defendant insurer because it was not a party to defendant insurer's policy. *Id.* at *6. The trial court in *California Capital* found that both insurers provided primary coverage for the loss. *Id.* at *8. The Court of Appeal affirmed the foregoing findings by the trial court and held that California Capital could not pursue assigned claims for breach of contract or breach of the covenant of good faith and fair dealing against the defendant insurer. *Id.* at *1, *30.

24. Like the plaintiff insurer in *California Capital*, St. Paul is not a party to the National Union Excess Policy and has no direct cause of action against National Union for breach of contract or breach of the covenant of good faith and fair dealing. Both St. Paul and National Union had independent obligations to Cosmopolitan, and both insurers discharged those obligations by settlement of the Underlying Action. As such, neither insurer is in an equitably superior position as to the other. Further, given the cost of Cosmopolitan's defense and the post-verdict settlement was fully funded by insurers in the Underlying Action, Cosmopolitan has no contract damages for policy benefits against National Union. Therefore, Cosmopolitan has no viable breach-of-contract claim for St. Paul to step into its shoes to pursue against National Union. Accordingly, St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract fails as a matter of law.

C. St. Paul's Eighth Cause of Action for Equitable Contribution

25. The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of

insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy.

26. The National Union Excess Policy further provides the most National Union will pay for damages on behalf of any person or organization to whom the named insured is obligated to provide insurance is the lesser of the limits shown in the declarations or the minimum limits of insurance the named insured agrees to procure in a written insured contract.

27. Here, National Union exhausted its policy limit in contributing towards the settlement of the Underlying Action.

28. Given the National Union Excess Policy is exhausted, National Union has no further obligation under the policy. *See Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, No. 2:09-cv-01672-RCJ-RJJ, 2012 WL 870289 at *3 (D. Nev. Mar. 14, 2012) (concluding that "once the [limits are] reached, the insurer's duties under the policy are extinguished"); *Deere & Co. v. Allstate Ins. Co.*, 244 Cal. Rptr. 3d 100, 112 (Cal. Ct. App. 2019) (holding that "[a] 'policy limit' or 'limit of liability' is the maximum amount the insurer is obligated to pay in contract benefits on a covered loss." (internal quotation marks omitted)).

29. St. Paul seeks to step into Cosmopolitan's shoes to pursue extra-contractual damages outside National Union's policy benefits based a claim for equitable contribution. However, a claim for contribution is not available to pursue damages from a carrier that is in excess of the carrier's policy limit. Accordingly, St. Paul's Eighth Cause of Action for Equitable Contribution against National Union fails as a matter of law.

D. St. Paul's Seventh Cause of Action for Equitable Estoppel

30. In the FAC, St. Paul asserts the Seventh Cause of Action for Equitable Estoppel ("Seventh Cause of Action"), seeking to preclude National Union from asserting that: (1) National Union's policies were not primarily responsible for the defense and resolution of the Underlying Action; and (2) St. Paul, a non-defending carrier, had the same obligation to resolve the Underlying Action as Aspen and National Union. (FAC ¶ 135.)

///

///

31. Typically, equitable estoppel is raised as an affirmative defense. However, under Nevada Law, equitable estoppel can be treated as an affirmative claim under the appropriate circumstances.

32. To establish equitable estoppel, the plaintiff must prove the following: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must have relied to his detriment on the conduct of the party to be estopped. *See Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.,* 98 Nev. 609, 614, 655 P.2d 996, 999 (1982); I*n re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-1062 (2005).

33. Because the Second, Fourth, and Eighth Causes of Action fail as a matter of law, including for reasons that are unaffected by National Union's assertions that St. Paul seeks to estop, this Seventh Cause of Action must also fail.

E. St. Paul's Request for Discovery Per NRCP 56(d)

34. True and correct copies of the Nightclub Management Agreement ("NMA") and the St. Paul Excess Policy at issue in this matter have been provided as part of National Union's MSJ. As such, all necessary and potentially relevant exhibits to properly consider and determine National Union's MSJ are included in the moving papers and the record is complete.

35. There remains no genuine dispute of material facts with respect to National Union's MSJ that require further discovery.

36. Accordingly, St. Paul's Request for Discovery per NRCP 56(d) is denied.

F. Certification under NRCP 54(b)

37. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

///

///

38. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting National Union's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of National Union's Motion for Summary Judgment, and the arguments of the parties and good cause existing, National Union's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2019.

Honorable Gloria Sturman
District Judge, Department XXVI

Electronically Filed
5/14/2020 8:44 AM
Steven D. Grierson
CLERK OF THE COURT

FFCO
ANDREW D. HEROLD, ESQ.
Nevada Bar No. 7378
NICHOLAS B. SALERNO, ESQ.
Nevada Bar No. 6118
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Telephone: (702) 990-3624
Facsimile: (702) 990-3835
aherold@heroldsagerlaw.com
nsalerno@heroldsagerlaw.com

JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)
JEREMY STAMELMAN, ESQ. (Pro Hac Vice)
KELLER/ANDERLE LLP
18300 Von Karman Ave., Suite 930
Irvine, CA 92612
Telephone: (949) 476-8700
Facsimile: (949) 476-0900
jkeller@kelleranderle.com
jstamelman@kelleranderle.com

Attorneys for Defendants NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA. and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNON FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT.: XXVI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT

Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's ("Marquee") Motion for Summary Judgment ("MSJ") came on for hearing on October 15, 2019 in Department XXVI of this Court, the Honorable Gloria Sturman presiding. Nicholas A. Salerno of Herold & Sager and Jennifer L. Keller of Keller/Anderle LLP appeared for Defendant Marquee, William Reeves and Marc J. Derewetzky of Morales Fierro & Reeves appeared for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and Ryan A. Loosvelt of Messner Reeves LLP appeared for Defendant Aspen Specialty Insurance Company ("Aspen").

The Court, having reviewed and considered the voluminous pleadings and papers on file,[1] having heard and considered argument of counsel, and good cause appearing, hereby GRANTS Marquee's Motion for Summary Judgment.

On October 15, 2019, the Court issued a minute order granting Marquee's Motion for Summary Judgment. However, the Court's decision set out herein is not based solely on the contents of the minute order, but is also based on the record on file herein. The Court hereby issues the following Findings of Facts and Conclusions of Law.

I.

FINDINGS OF FACT

A. The Underlying Action

1. This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). (*See* Plaintiff's First Amended Complaint ("FAC") ¶ 6.)

---

[1] Marquee's Motion for Summary Judgment, Marquee's Request for Judicial Notice in Support of Motion for Summary Judgment, Marquee's Appendix of Exhibits in Support of Motion for Summary Judgment, Declaration of Nicholas B. Salerno in Support of Motion for Summary Judgment, Declaration of Bill Bonbrest in Support of Motion for Summary Judgment, St. Paul's Opposition to Motion for Summary Judgment and Countermotion re: Duty to Indemnify, St. Paul's Response to Statement of Undisputed Facts, St. Paul's Consolidated Appendix of Exhibits in Support of Opposition to Motions for Summary Judgment, Declaration of Marc J. Derewetzky in Support of Opposition to Motion for Summary Judgment, Declaration of William Reeves in Support of Opposition to Motion for Summary Judgment, National Union's (defined below) Opposition to St. Paul's Countermotion for Summary Judgment, Marquee's Reply in Support of Motion for Summary Judgment, and Marquee's Objections to Facts Not Supported by Admissible Evidence Filed in Support of Opposition to Motion for Summary Judgment and Countermotion re: Duty to Indemnify.

2. Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was beaten by Marquee employees. (FAC ¶¶ 6-7.)

3. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (FAC ¶¶ 8-10, Exhibit A.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit A.)

5. Roof Deck Entertainment, LLC owns and operates the Marquee Nightclub. (FAC ¶ 4.)

6. Nevada Property 1, LLC owns and operates The Cosmopolitan of Las Vegas. (*Id.* ¶ 10.)

7. Cosmopolitan is the owner of the subject property where the Marquee Nightclub is located and leased the nightclub location to its subsidiary, Nevada Restaurant Venture 1, LLC ("NRV1"). (FAC ¶ 10.)

8. NRV1 entered into a written agreement (discussed *infra* Section I.D) with Marquee to manage the nightclub. (FAC ¶ 10.)

9. Marquee is a named insured under the National Union Excess Policy defined below. (FAC ¶ 30.)

10. Cosmopolitan is a named insured under the St. Paul Excess Policy defined below. Cosmopolitan is also an additional insured to the National Union Excess Policy defined below. (FAC ¶¶ 40 and 44.)

11. Marquee is not an insured to the St. Paul Excess Policy defined below. (FAC ¶ 41.)

12. Aspen Insurance Company, which issued a primary insurance policy, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union subsequently

///

appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

13. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

14. The Court held in the Underlying Action that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (*See* Request for Judicial Notice in Support of Marquee's Motion for Summary Judgment, Ex. 3.)

15. After a five-week trial, the jury in the Underlying Action issued a special verdict on April 26, 2017, finding that Moradi established his claims for assault, battery, false imprisonment and negligence jointly and severally against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the judgment would have been joint and several against Marquee and Cosmopolitan. *See* NRS 41.141(5)(b). (FAC, Ex. C.)

16. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

17. Aspen and National Union Fire Insurance Company of Pittsburgh PA ("National Union") as the primary and excess insurers of Marquee, and Zurich American Insurance Company ("Zurich") and St. Paul as the primary and excess insurers of Cosmopolitan, accepted the settlement demand and resolved the Underlying Action with the confidential contributions set forth in the FAC filed by St. Paul under seal. (FAC ¶¶ 67-70.)

18. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money toward the settlement. (FAC ¶¶ 67-70.)

/ / /

B. Insurance Policies and Insured Parties

19. Cosmopolitan is a named insured to a primary policy issued by Zurich American Insurance Company to Nevada Property 1 LLC, under policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012, with limits of $1,000,000 per occurrence and $2 million general aggregate (the "Zurich Primary Policy"). (FAC ¶ 69; MSJ p. 14, Undisputed Fact No. ("UF") 25.)

20. Cosmopolitan is also a named insured to the St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group (the "St. Paul Excess Policy"), which is excess to the Zurich Primary Policy. (FAC ¶ 40; MSJ pp. 13-14, UF 24 and 25.)

21. Marquee is a named insured to a primary policy issued by Aspen Specialty Insurance Company to The Restaurant Group et al., under policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 (the "Aspen Primary Policy"). (FAC ¶ 15.)

22. Marquee is also a named insured to the National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. (the "National Union Excess Policy"), which is excess to the Aspen Primary Policy (FAC ¶ 30; MSJ p. 13, UF 23.) Cosmopolitan was an additional insured under the Aspen Primary Policy and the National Union Excess Policy. (FAC ¶¶ 24 and 30; MSJ p. 14, UF 26.)

23. The St. Paul Excess Policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery of such payment. (MSJ p. 14, UF 27.)

C. St. Paul's Claims Against Marquee

24. In the Fifth Cause of Action of the FAC for Statutory Subrogation – Contribution Per NRS 17.225 ("Fifth Cause of Action"), St. Paul asserts a subrogation right against Marquee under NRS 17.225 for contribution to recoup a share of St. Paul's settlement payment. (FAC ¶ 113.)

St. Paul asserts that Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct rather than any affirmative actions or unreasonable conduct on the part of Cosmopolitan. (FAC ¶¶ 117-118.) St. Paul further asserts that Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages. (FAC ¶ 118.) St. Paul alleges that its settlement payment on behalf of Cosmopolitan was in excess of Cosmopolitan's equitable share of this common liability such that St. Paul is entitled to subrogate to Cosmopolitan's contribution rights against Marquee pursuant to NRS 17.225 and NRS 17.275 for all sums paid by St. Paul as part of the settlement of the Underlying Action. (FAC ¶¶ 119-120.)

25. In the Sixth Cause of Action of the FAC for Subrogation – Express Indemnity ("Sixth Cause of Action"), St. Paul asserts that "[p]er written agreement," Marquee was obligated to "indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (*Id.* ¶ 122.) St. Paul further alleges that Marquee did not provide indemnification to Cosmopolitan for the claims asserted in the Underlying Action and that, as a result, St. Paul was forced to contribute to the settlement of the Underlying Action to protect Cosmopolitan's interests as well as its own. (*Id.* ¶¶ 125, 127.) St. Paul further alleges that "[p]er the terms of the written agreement," Marquee is liable to St. Paul for its attorneys' fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (*Id.* ¶ 129.)

D. Nightclub Management Agreement

26. Marquee and NRV1 entered the Nightclub Management Agreement ("NMA"), dated April 21, 2010, with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (MSJ p. 8, UF 17.) In the NMA, Marquee agreed to manage and operate the Marquee nightclub in The Cosmopolitan Hotel & Casino.

27. Cosmopolitan is identified as the Project Owner in the Recitals section of the NMA and is also a signatory to the agreement both on behalf of itself and NRV1, for which Cosmopolitan is the Managing Member. (MSJ p. 8, UF 13.)

28. The NMA provides in pertinent part:

1. Definitions

. . .

> **"Losses"** shall mean any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance, including, without limitation, all reasonable attorneys' fees and all other reasonable professional or consultants' expenses incurred in investigating, preparing for, serving as a witness in, or defending against any action or proceeding, whether actually commenced or threatened.

(MSJ p. 9, UF 18.)

29. Section 12 of the NMA sets out the insurance requirements among the parties, and provides, in pertinent, part as follows:

> **12. Insurance**
>
> 12.1 [NRV1's] Insurance. During the Term of this Agreement, [NRV1] shall provide and maintain the following insurance coverage, at its sole cost and expense . . .
>
> . . .
>
> 12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage, with a combined single limit of not less than Two Million Dollars ($2,000,000) for each occurrence, and at least Four Million Dollars ($4,000,000) in the aggregate, including excess coverage; and
>
> 12.1.3 Any coverage required under the terms of the Lease to the extent such coverage is not the responsibility of [Marquee] to provide pursuant to Section 12.2 below.
>
> 12.2 [Marquee's] Insurance.
>
> 12.2.1 During the Term of this Agreement, [Marquee] shall provide and maintain the following insurance coverage (the "[Marquee] Policies"), the cost of which shall be an Operating Expense:
>
> 12.2.1.1 Commercial general liability insurance (occurrence form), including broad form contractual liability coverage, with minimum coverages as follows: general aggregate - $4,000,000; products-completed operations aggregate - $4,000,000 personal and advertising injury - $5,000,000; liquor liability - $1,000,000 with $4,000,000 liquor liability annual aggregate each occurrence - $2,000,000; . . . and medical expense (any one person) - $5,000;
>
> 12.2.1.2 Excess liability insurance (follow form excess or umbrella), liquor liability, commercial general liability, automobile liability and employers liability), with minimum coverages as follows: each occurrence - $25,000,000; aggregate - $25,000,000;
>
> . . .

12.2.3 Except with respect to workers compensation and the employee practices liability insurance, [NRV1], [Cosmopolitan], the landlord and tenant under the Lease, Hotel Operator, their respective parents, subsidiaries and Affiliates, and their respective officers, directors, officials, managers, employees and agents (collectively "Owner Insured Parties"), shall all be named as additional insureds on all other [Marquee] Policies.

(MSJ pp. 9-11, UF 19.)

30. Section 12.2.6 of the NMA includes the following provision requiring that any insurance required under the NMA by both NRV1 and Marquee include a waiver of subrogation:

All Owner Policies and [Marquee] Policies shall contain a waiver of subrogation against the Owner Insured Parties and [Marquee] and its officers, directors, officials, managers, employees and agents and the [Marquee] Principals. The coverages provided by [NRV1] and [Marquee] shall not be limited to the liability assumed under the indemnification provisions of this Agreement.

(MSJ p. 11, UF 19.) (emphasis added).

31. Section 13 of the NMA includes the following express indemnity provision:

13. Indemnity

13.1 By [Marquee]. [Marquee] shall indemnify, hold harmless and defend [NRV1] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("Owner Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [Marquee] of any term or condition of this Agreement, or (ii) the negligence or willful misconduct of [Marquee] or any of its owners, principals, officers, directors, agents, employees, Staff, members, or managers ("[Marquee] Representatives") **and not otherwise covered by the insurance required to be maintained hereunder**. [Marquee's] indemnification obligation hereunder shall include liability for any deductibles and/or self retained insurance retentions to the extent permitted hereunder, and shall terminate on the termination of the Term; provided however that such indemnification obligation shall continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

13.2 By [NRV1]. [NRV1] shall indemnify, hold harmless and defend [Marquee] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("[Marquee] Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [NRV1] of any term or condition of this Agreement or (ii) the negligence or willful misconduct of [NRV1] or any of its owners, principals, officers, directors, agents, employees, members, or managers **and not otherwise covered by the insurance required to be maintained hereunder**. [NRV1's] indemnification obligation hereunder shall terminate on the termination of the

> Term; provided, however, that such indemnification obligation shall continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

(MSJ pp. 11-12, UF 20.)

32. Section 13 of the NMA expressly provides that any express indemnity obligation owed by Marquee to Cosmopolitan applies only to the extent any and all Losses (as defined above) are not reimbursed by insurance.

33. Section 17.2 of the Lease attached as Exhibit D to the NMA provides, in relevant part, that Cosmopolitan shall procure "all insurance required to be obtained by" NRV1 under Section 12.1 of the NMA. (Ex. 1 to MSJ, at T000183.)

34. Section 20 of the NMA provides as follows:

> **20. Third Party Beneficiary**
>
> Except as otherwise expressly provided herein, the Parties acknowledge and agree that [NRV1] may assign, delegate or jointly exercise any or all of its rights and obligations hereunder to or with any one or more of the following: [Cosmopolitan], Hotel Operator, Casino Operator and/or their Affiliates, or any successors thereto (collectively "Beneficiary Parties"). All such Beneficiary Parties to whom certain rights and obligations of [NRV1] have been assigned shall, to the extent of such assigned, delegated or shared rights and obligations, be an express and intended third-party beneficiary of this Agreement. Without limiting the generality of the foregoing, Beneficiary Parties shall have the right to enforce the obligations of [NRV1] to the extent of the rights and obligations assigned to, delegated to or shared with the Beneficiary Party by [NRV1]. Except as provided above, nothing in this Agreement, express or implied, shall confer upon any person or entity, other than the Parties, their authorized successors and assigns, any rights or remedies under or by reason of this Agreement.

(MSJ pp. 12-13, UF 21.)

II.

MARQUEE'S MOTION FOR SUMMARY JUDGMENT

1. On September 13, 2019, Marquee filed Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment. Marquee's MSJ asserts that the NMA entered between Marquee and NRV1 contains a waiver of subrogation provision that prevents Cosmopolitan from pursuing any claims against Marquee. As such, St. Paul cannot not step into

/ / /

Cosmopolitan's shoes to pursue the subrogation claims against Marquee set forth in the Fifth and Sixth Causes of Action of the FAC as a matter of law.

2. Marquee's MSJ further asserts as a separate and independent ground to grant summary judgment that the Sixth Cause of Action in the FAC for express indemnity fails because the express indemnity provisions set out in Section 13 of the NMA applies by its express terms only to losses not reimbursed by insurance. As such, Marquee contends the Sixth Cause of Action fails as a matter of law because the damages sought by St. Paul under the Sixth Cause of Action pertain to a loss that was reimbursed by insurance.

3. Marquee's MSJ also asserts as a separate and independent ground to grant summary judgment that that the Fifth Cause of Action fails as a matter of law because Cosmopolitan was found jointly and severally liable with Marquee in the Underlying Action for the intentional torts of assault, battery, and false imprisonment, and NRS 17.255 provides "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury." Marquee further asserts as a separate and independent ground to grant summary judgment that that the Fifth Cause of Action fails as a matter of law because Nevada common law and NRS 17.265 provide that "[w]here one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation." As such, Marquee contends the Fifth Cause of Action in the FAC for Statutory Subrogation – Contribution Per NRS 17.225 fails as a matter of law based on the application of NRS 17.255 and NRS 17.265.

III.

CONCLUSIONS OF LAW

A. Standard of Review

1. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in

the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. St. Paul's Fifth And Sixth Causes of Action For Subrogation Are Barred By The Subrogation Waiver Provisions Contained In The Nightclub Management Agreement And The St. Paul Excess Policy

2. St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated to the rights of Cosmopolitan for contribution and express indemnity against Marquee. (FAC ¶¶ 116 and 126.)

3. Pursuant to Section 12.2.6 of the NMA, however, the insurance policies required under the NMA must "contain a waiver of subrogation against the Owner Insured Parties and [Marquee] and its officers, directors, officials, managers, employees and agents and the [Marquee] Principals" as defined in the NMA.

4. Section 12.2.3 of the NMA defines "Owner Insured Parties" to include the Owner (NRV1), the Project Owner (Cosmopolitan), the landlord and tenant under the Lease (also Cosmopolitan and NRV1), their respective parents, subsidiaries, affiliates, and other related persons and entities.

5. Section 12.2.6 of the NMA also provides that the waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies."

6. "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance maintained by any "Owner Insured Parties."

7. In accordance with the requirement under Section 12.2.6 of the NMA, the St. Paul Excess Policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if the Named Insured has agreed in a written contract to waive its rights to

recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery for such payment. (Ex. 2 to MSJ, at T000038.)

8. Cosmopolitan is a Named Insured under the St. Paul Excess Policy pursuant to the Designated Premises Limitation endorsement. (Ex. 2 to MSJ, at T000057.)

9. Waiver of subrogation provisions are universally enforced. *See Davlar Corp. v. Superior Court*, 62 Cal. Rptr. 2d 199, 201-02 (Cal. Ct. App. 1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 32 Cal. Rptr. 2d 144, 146-49 (Cal. Ct. App. 1994) (waiver of rights for damages covered by insurance barred insurer's subrogation suit.); *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 86 Cal. Rptr. 3d 715, 718-20 (Cal. Ct App. 2008) (holding tenant's failure to obtain the full amount of liability insurance required by lease did not preclude enforcement of subrogation waiver); *Commerce & Indus. Ins. Co. v. Orth*, 458 P.2d 926, 929 (Or. 1969) (holding insurer waived its subrogation rights against various contractors); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 831 P.2d 724, 728 (Wash. 1992) (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, No. 14-cv-890 GBW/CG, 2016 WL 4425095, *7 (D. N.M. Feb. 29, 2016) (finding subrogation waivers serve important public policy goals, such as "encouraging parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity" (internal quotation marks omitted)).

10. The intent of the parties to the NMA to waive subrogation rights for losses paid by insurance proceeds is clear and unambiguous as expressed in Section 12.2.6 of the NMA. To find otherwise would be inconsistent with the terms of the NMA and the Waiver of Rights of Recovery Endorsement contained within the St. Paul Excess Policy.

11. In opposition to Marquee's MSJ, St. Paul asserts that the subrogation waiver requirements of the NMA and the St. Paul Excess Policy do not apply because Cosmopolitan, as the Project Owner, only agreed to be bound with respect to certain provision of the NMA, which did not include the subrogation waiver provision contained in 12.2.6 of the NMA. This argument fails because it ignores that Section 17.2 of the Lease attached as Exhibit D to the NMA delegated

NRV1's insurance requirements under the NMA to Cosmopolitan. Section 17.2 of the Lease provides that Cosmopolitan shall procure "all insurance required to be obtained by" NRV1 under Section 12.1 of the NMA. (*See* National Union's Appendix of Exhibits in Support of MSJ, Ex. 1, T000172, T000183.) Thus, Cosmopolitan assumed NRV1's obligation to provide the insurance as required by Section 12.1 of the NMA. Accordingly, Cosmopolitan assumed the obligation to procure insurance that complied with all of the terms of Section 12, including the waiver of subrogation obligation set out in Section 12.2.6. Regardless of whether Cosmopolitan agreed to be bound by the subrogation waiver provision contained in 12.2.6 of the NMA or assumed NRV1's insurance obligations under the NMA, the clear intent of the parties to the NMA was to waive any claims for losses against each other that were paid by insurance proceeds including claims against the Owner Insured Parties (as defined in NMA), which includes Cosmopolitan.

12. St. Paul nonetheless contends that Cosmopolitan is not a party to the NMA. Even if St. Paul's subrogation rights under the NMA are not based on Cosmopolitan's status as a party to the NMA, Cosmopolitan is still a third-party beneficiary of the NMA and is bound by its terms. (*See* NMA, Section 20); *See also Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005) (recognizing that "an intended third-party beneficiary is bound by the terms of a contract even if she is not a signatory"); *Gibbs v. Giles*, 96 Nev. 243, 246-247, 607 P.2d 118, 120 (1980) (recognizing that "a third-party beneficiary takes subject to any defense arising from the contract that is ascertainable against the promisee"). St. Paul is pursuing subrogation claims by attempting to step into Cosmopolitan's shoes as a third-party beneficiary of the NMA and the intent of the parties to the NMA was to waive such subrogation rights.

13. Accordingly, St. Paul's subrogation claims set forth in the Fifth and Sixth Causes of Action of the FAC fail as a matter of law.

C. <u>St. Paul's Sixth Cause of Action For Subrogation – Express Indemnity Also Fails Because Cosmopolitan Did Not Sustain Any Uninsured Losses</u>

14. The Sixth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that Cosmopolitan did not sustain any uninsured losses.

///

15. Pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify, hold harmless and defend NRV1 and its parents, subsidiaries and affiliates (including Cosmopolitan), from and against Losses (as defined in the NMA) to the extent incurred as a result of the breach or default by Marquee of any term or condition of the Agreement, or the negligence or willful misconduct of Marquee that is "not otherwise covered by the insurance required to be maintained" under the NMA. (Emphasis added.)

16. The NMA defines "Losses", in pertinent part, as "liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance." (Emphasis added.)

17. Nevada courts strictly construe indemnity obligations and will enforce them in accordance with the terms of the contracting parties' agreement. *See United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 673, 289 P.3d 221, 226 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 339-40, 255 P.3d 268, 274 (2011); *Contreras v. American Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1231 (D. Nev. 2015); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F. Supp. 2d 1262, 1268 (D. Nev. 2008) ("It is well settled that a court should enforce a contract as it is written, should not create a new contract by rewriting unambiguous terms, and has no power to create a new contract.").

18. As explained by the Nevada Supreme Court in *United Rentals Highway Technologies*:

> [T]his court will not attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations. Additionally, every word in a contract must be given effect if at all possible.

128 Nev. at 677, 289 P.3d at 229 (internal quotation marks and citations omitted).

19. The exclusion of insurance payments from the definition of "Losses" in Section 1 of the NMA and the indemnity provision set out in Section 13.1 expressly limits any purported indemnity obligation by Marquee to Cosmopolitan to uninsured losses. (UF 18, 20.)

20. Cosmopolitan's defense in the underlying action and its joint-and-several liability for the verdict and resulting settlement were paid for by insurance. Thus, there is no uninsured loss for which Cosmopolitan could pursue indemnity against Marquee.

21. Accordingly, St. Paul has no valid subrogation claim for express indemnity, and thus, the Sixth Cause of Action against Marquee fails as a matter of law.

D. St. Paul's Fifth Cause of Action For Statutory Subrogation For Contribution Pursuant To NRS 17.225 Also Fails Pursuant to NRS 17.255 Because Cosmopolitan Was Found Liable In The Underlying Action For Intentional Torts

22. The Fifth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that Cosmopolitan was found jointly and severally liable in the underlying action for intentional torts.

23. NRS 17.255 provides, in relevant part, that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death."

24. In the trial of the Underlying Action, Cosmopolitan was found liable with Marquee on all of Moradi's asserted claims, including the intentional tort claims for assault, battery, and false imprisonment, which made Cosmopolitan jointly and severally liable with Marquee. *See* NRS 41.141(5)(b). Prior to trial, the Court held that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan can be jointly and severally liable for Moradi's injuries. (*See* Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.) Cosmopolitan had its own obligation pursuant to the nondelegable duty to keep patrons of The Cosmopolitan Hotel & Casino safe. *Rockwell v. Sun Harbor Budget Suites,* 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) ("[I]n the situation where a property owner hires security personnel to protect his or her premises and patrons, that property owner has a personal and nondelegable duty to provide responsible security personnel.")

25. Given that the jury in the Underlying Action found Cosmopolitan liable with Marquee for the intentional tort claims of assault, battery, and false imprisonment that contributed to Moradi's injury, Cosmopolitan is precluded from pursuing a contribution from Marquee pursuant to the application of NRS 17.255. As such, St. Paul's subrogation claim for contribution set out in the Fifth Cause of Action premised on stepping into the shoes of Cosmopolitan is also precluded as a matter of law.

E. St. Paul's Fifth Cause of Action For Statutory Subrogation For Contribution Pursuant To NRS 17.225 Also Fails Pursuant to NRS 17.265 Because A Claim For Contribution Is Not Available When The Parties Have Contracted For Express Indemnity

26. The Fifth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that the parties have contracted for express indemnity.

27. When a tortfeasor has a right to indemnity from another tortfeasor, there is no right to contribution under the Uniform Contribution Act. NRS 17.265 (Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation."); *Calloway v. City of Reno*, 113 Nev. 564, 578, 939 P.2d 1020, 1029 (1997) ("[I]mplied indemnity theories are not viable when an express indemnity agreement exists between the parties.")

28. Section 13 of the NMA contains an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was paid by insurance.

29. Given the existence of the contractually bargained for right to indemnity set out in Section 13 of the NMA, Cosmopolitan has no statutory or equitable right to contribution under Nevada common law or the Uniform Contribution Act pursuant to NRS 17.265. St. Paul asserts the contribution claim is permitted because it is an alternative theory of recovery in the event the express indemnity claim does not prevail. However, a contribution theory of recovery is not permitted when a contract for express indemnity exists to govern the obligations of the respective parties. Accordingly, St. Paul cannot pursue a contribution claim against Marquee based on the alleged subrogation principles as a matter of law.

F. Certification under NRCP 54(b)

30. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

31. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting Marquee's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of Marquee's Motion for Summary Judgment, and the arguments of the parties and good cause existing, Marquee's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2020.

Honorable Gloria Sturman
District Judge, Department XXVI

NEOJ
Michael K. Wall (2098)
HUTCHISON & STEFFEN, PLLC
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Tel. (702) 385-2500
mwall@hutchlegal.com

Attorneys for Plaintiff
St. Paul Fire & Marine Ins. Co.

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, v. ASPEN SPECIALITY INSRUANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	Case No: A-17-758902-C Dept. No: XXVI **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT**

Please take notice the on the 14th day of May, 2020, the Court entered Findings of Fact, Conclusions of Law and Order Granting National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment in the above-entitled action. A copy of said Order is attached hereto.

DATED this 27 day of May, 2020.

HUTCHISON & STEFFEN, PLLC

By /s/ Michael K. Wall
Michael K. Wall (2098)
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
mwall@hutchlegal.com

Attorney for Plaintiff

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 21st day of May, 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT** to be served as follows:

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

[ ] to be sent **via facsimile;** and/or

[X] to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

[ ] to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

Michael M. Edwards, Esq. (6281)
Nicholas L. Hamilton, Esq. (10893)
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
medwards@messner.com
nhamilton@messner.com
efile@messner.com
T: 702-363-5100
F: 702-363-5101
Attorneys for Defendant Aspen Specialty Company

Andrew D. Herold, Esq. (7378)
Nicholas B. Salerno, Esq. (6118)
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
aherold@heroldsagerlaw.com
nsalerno@herlodsagerlaw.com
T: 702-990-3624
F: 702-990-3835
Attorneys for Defendants National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

Jennifer L. Keller, Esq. (Pro Hac Vice)
Jeremy Stamelman, Esq. (Pro Hac Vice)
KELLER/ANDERLE LLP
18300 Von Karman Ave., Suite 930
Irvine CA 92612
jkeller@kelleranderle.com
jstamelman@kellweanderle.com
T: 949-476-8700
F: 949-476-0900
Attorneys for Defendants National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

An employee of Hutchison & Steffen, PLLC

FFCO
ANDREW D. HEROLD, ESQ.
Nevada Bar No. 7378
NICHOLAS B. SALERNO, ESQ.
Nevada Bar No. 6118
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Telephone: (702) 990-3624
Facsimile: (702) 990-3835
aherold@heroldsagerlaw.com
nsalerno@heroldsagerlaw.com

JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)
JEREMY STAMELMAN, ESQ. (Pro Hac Vice)
KELLER/ANDERLE LLP
18300 Von Karman Ave., Suite 930
Irvine, CA 92612
Telephone: (949) 476-8700
Facsimile: (949) 476-0900
jkeller@kelleranderle.com
jstamelman@kelleranderle.com

Attorneys for Defendants NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA. and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNON FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT.: XXVI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT

Defendant National Union Fire Insurance Company of Pittsburgh PA's ("National Union") Motion for Summary Judgment ("MSJ") came on for hearing on October 15, 2019 in Department XXVI of this Court, the Honorable Gloria Sturman presiding. Nicholas B. Salerno of Herold & Sager and Jennifer L. Keller of Keller/Anderle LLP appeared for Defendant National Union, William Reeves and Marc J. Derewetzky of Morales Fierro & Reeves appeared for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and Ryan A. Loosvelt of Messner Reeves LLP appeared for Defendant Aspen Specialty Insurance Company ("Aspen").

The Court, having reviewed and considered the pleadings and papers on file,[1] having heard and considered argument of counsel, and good cause appearing, hereby GRANTS National Union's Motion for Summary Judgment.

On October 15, 2019, the Court issued a minute order granting National Union's Motion for Summary Judgment. However, the Court's decision set out herein is not based solely on the contents of the minute order but includes the entire record on file herein. The Court hereby issues the following Findings of Facts, Conclusions of Law and Order.

I.

FINDINGS OF FACT

A. The Underlying Action

1. This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). (FAC ¶ 6.)

---

[1] The pleadings and papers reviewed and considered by the Court include, among other things, National Union's Motion for Summary Judgment, National Union's Request for Judicial Notice in Support of Motion for Summary Judgment, National Union's Appendix of Exhibits in Support of Motion for Summary Judgment, Declaration of Nicholas B. Salerno in Support of Motion for Summary Judgment, Declaration of Richard C. Perkins in Support of Motion for Summary Judgment, St. Paul's Opposition to Motion for Summary Judgment and Request for Discovery Per NRCP 56(d), St. Paul's Response to Statement of Undisputed Facts, St. Paul's Consolidated Appendix of Exhibits in Support of Opposition to Motions for Summary Judgment, Declaration of Marc J. Derewetzky in Support of Opposition to Motion for Summary Judgment, Declaration of William Reeves in Support of Opposition to Motion for Summary Judgment, National Union's Reply in Support of Motion for Summary Judgment, and National Union's Objections to Facts Not Supported by Admissible Evidence Filed in Support of Opposition to Motion for Summary Judgment and Request for Discovery Per NRCP 56(d).

2. Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was beaten by Marquee employees. (FAC ¶¶ 6-7.)

3. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (FAC ¶¶ 8-10, Exhibit A.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit A.)

5. Aspen, who issued a primary insurance policy to Marquee, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union, who issued an excess policy to Marquee, subsequently appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

6. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for the conduct of Marquee by breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

7. The Court held in the Underlying Action that that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers." and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (*See* Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.)

8. After a five-week trial, the jury in the Underlying Action issued a special verdict on April 26, 2017 finding that Moradi established his claims for assault, battery, false imprisonment and negligence against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the

///

judgment would have been joint and several against Marquee and Cosmopolitan. *See* NRS 41.141(5)(b). (FAC, Ex. C.)

9. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

10. Aspen and National Union as the primary and excess insurers of Marquee, and Zurich American Insurance Company and St. Paul as the primary and excess insurers of Cosmopolitan, accepted the settlement demand and resolved the Underlying Action with the confidential contributions set forth in the FAC filed by St. Paul under seal. (FAC ¶¶ 67-70.)

11. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money out-of-pocket towards the settlement. National Union on behalf of Marquee and St. Paul on behalf of Cosmopolitan contributed the same amount towards the settlement of the Underlying Action. (FAC ¶ 67-70.)

12. National Union contends its contribution towards the settlement of the Underlying Action on behalf of Marquee resulted in the exhaustion of the National Union Excess Policy. (MSJ p. 10, Undisputed Fact No. ("UF") 17.)

13. The combined defense of Cosmopolitan and Marquee was funded entirely by Aspen and National Union. (FAC ¶ ¶ 27-28, 35-36.)

B. <u>Insurance Policies</u>

1. The Cosmopolitan Insurance Tower

a. <u>Cosmopolitan's Primary Policy with Zurich American Insurance Company</u>

14. Zurich American Insurance Company ("Zurich") issued commercial general liability policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012 to Nevada Property 1 LLC (the "Zurich Primary Policy"). (FAC ¶ 69; National Union's Appendix of Exhibits in Support of MSJ ("NU Appx."), Ex. 2, W005478.)

15. Cosmopolitan is a named insured under the Zurich Primary Policy. (FAC ¶ 69.) Marquee is not an insured under the Zurich Primary Policy. (*Id.*)

///

16. The Zurich Primary Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶ 69; NU Appx., Ex. 2, W005508.)

17. The Zurich Primary Policy provides that Zurich will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 2, W005497 – W005498.)

18. The Zurich Primary Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (*Id.*)

b. Cosmopolitan's Excess Policy with St. Paul

19. St. Paul issued commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013, to Premier Hotel Insurance Group (the "St. Paul Excess Policy"). (FAC ¶ 40; MSJ p. 11, UF 20.)

20. Cosmopolitan is a named insured under the St. Paul Excess Policy. (FAC ¶ 40.) Marquee is not an insured under the St. Paul Excess Policy. (FAC ¶ 41.)

21. The St. Paul Excess Policy contains liability limits of $25,000,000 with each occurrence and $25,000,000 general aggregate. (MSJ p. 11, UF 22.)

22. The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained Limit" that the named insured becomes legally obligated to pay as damages assumed by the named insured under an "Insured Contract." (MSJ p. 11, UF 23.)

23. The St. Paul Excess Policy contains an Other Insurance provision, which provides:

> If Other Insurance applies to damages that are also covered by this policy, this policy will apply excess of and shall not contribute with, that Other Insurance, whether it is primary, excess, contingent or any other basis. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

(MSJ p. 11. UF 24.)

///

///

2. **The Marquee Insurance Tower**

a. **Marquee's Primary Policy with Aspen Specialty Insurance Company**

24. Aspen issued a commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 to The Restaurant Group et. al. (the "Aspen Primary Policy"). (FAC ¶ 15; NU Appx., Ex. 4, ASPEN000032.)

25. Marquee is a named insured under the Aspen Primary Policy. (FAC ¶ 15.)

26. Cosmopolitan qualified as an additional insured to the Aspen Primary Policy with respect to the Underlying Action. (FAC ¶ 24.)

27. The Aspen Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶¶ 17, 23; NU Appx., Ex. 4, ASPEN000033.)

28. The Aspen Policy provides that Aspen will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 4, ASPEN000042.)

29. The Aspen Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (*Id.*)

b. **Marquee's Excess Policy with National Union**

30. National Union issued commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. (the "National Union Excess Policy") (MSJ p. 10, UF 11.)

31. Marquee is a named insured under the National Union Excess Policy. (FAC ¶ 30.)

32. Cosmopolitan qualified as an additional insured to the National Union Excess Policy with respect to the Underlying Action. (FAC ¶ 33; MSJ p. 11, UF 18.)

33. The National Union Excess Policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. (MSJ p. 10, UF 13.)

34. The National Union Excess Policy provides that National Union will pay on behalf of the insured "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and Advertising Injury to which this insurance applies or because of

Bodily Injury or Property Damage to which this insurance applies assumed by the Insured under an Insured Contract." (MSJ p. 10, UF 14.)

35. The National Union Excess Policy defines Retained Limit, in pertinent part, as the total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance providing coverage to the Insured. (NU Appx., Ex. 1, p. 30.)

36. The policy defines Scheduled Underlying Insurance as the policy or policies of insurance and limits of insurance shown in the Schedule of Underlying Insurance forming a part of the National Union Excess Policy. (*Id.*)

37. Other Insurance is defined in the National Union Excess Policy as a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy. (NU Appx., Ex. 1, p. 29.)

38. The National Union Excess Policy contains an Other Insurance provision, which provides:

> If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the Other Insurance. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

(MSJ p. 10, UF 15.)

39. The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy. (MSJ p. 10, UF 16.)

40. National Union received notice of the Underlying Action against Marquee and Cosmopolitan and provided coverage to Cosmopolitan and Marquee in the Underlying Action under a reservation of rights. (FAC ¶ 35.)

41. Cosmopolitan and Marquee were insured under separate towers of insurance. Cosmopolitan was insured under one of the towers of insurance where it was a named insured under the Zurich Primary Policy and the St. Paul Excess Policy, and under the other tower of insurance

///

where Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy that were issued to Marquee as the named insured.

C. **St. Paul's Claims Against National Union**

42. St. Paul's FAC asserts the following four causes of action against National Union:

1) Second Cause of Action for Subrogation – Breach of the Duty to Settle;

2) Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract;[2]

3) Seventh Cause of Action for Equitable Estoppel; and

4) Eighth Cause of Action for Equitable Contribution.

43. In the Second Cause of Action of the FAC for Subrogation – Breach of the Duty to Settle, St. Paul asserts that National Union breached a duty owed to Cosmopolitan to settle by refusing to settle the Underlying Action in response to pre-trial settlement demands within its applicable policy limits and by failing to initiate and/or attempt settlement prior to or during trial for an amount within the applicable policy limits. (FAC ¶¶ 88-89.) St. Paul further asserts that it is subrogated under its policy and principles of equity to the rights Cosmopolitan possesses directly against its insurers Aspen and National Union for breach of the duty to settle and seeks reimbursement for the amount St. Paul paid towards the settlement of the Underlying Action. (*Id.* at ¶¶ 93-95.)

44. In the Fourth Cause of Action of the FAC for Subrogation – Breach of the AIG Insurance Contract, St. Paul makes similar allegations to those raised in the cause of action for breach of the duty to settle. St. Paul asserts that National Union breached its obligations to Cosmopolitan by failing to provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan, failing to pay all available limits under the National Union Excess Policy to resolve Cosmopolitan's liability, and failing to pay any amount on Cosmopolitan's behalf towards the settlement of the Underlying Action. (FAC ¶ 105.) St. Paul asserts that, unlike National Union, St.

---

[2] St. Paul's FAC refers to the National Union Excess Policy as the AIG Insurance Contract.

Paul did not breach its obligations to Cosmopolitan under the St. Paul Excess Policy in connection to the Underlying Action because Cosmopolitan's coverage under the St. Paul Excess Policy did not apply until the Aspen Primary Policy and National Union Excess Policy exhausted. St. Paul claims it was damaged because it was required to contribute to the settlement of the Underlying Action as a result of National Union's breach of its obligations to Cosmopolitan. (*Id.* ¶¶ 108, 111.) St. Paul alleges that pursuant to the express terms of the St. Paul Excess Policy and principles of subrogation, it is entitled to step into Cosmopolitan's shoes and pursue its rights of recovery against National Union for such breach. (*Id.* ¶ 110.)

45. In the Seventh Cause of Action of the FAC for Equitable Estoppel, St. Paul asserts that both National Union and Aspen asserted throughout the Underlying Action "through both words and actions" that their coverage to Cosmopolitan was primary to Cosmopolitan's direct coverage under Cosmopolitan's own policies, including the St. Paul Excess Policy. (FAC ¶ 132.) St. Paul alleges that it and Cosmopolitan's other direct carriers did not participate in the defense or settlement negotiations on behalf of Cosmopolitan based on these representations. (*Id.* ¶ 134.) St. Paul alleges that equity requires that National Union be precluded from claiming that St. Paul and National Union were excess carriers and that St. Paul had the same obligation to resolve the Underlying Action.

46. In the Eighth Cause of Action of the FAC for Equitable Contribution, St. Paul asserts that in contributing to the settlement of the Underlying Action, it incurred amounts in excess of its equitable share and that National Union failed to contribute its fair and equitable share towards the settlement of the Underlying Action on behalf of Cosmopolitan (St. Paul's insured). (FAC ¶¶ 138-139.) St. Paul asserts that National Union is obligated under principles of equity to reimburse St. Paul for the amounts St. Paul contributed towards settlement of the Underlying Action that Aspen and National Union should have otherwise paid. (*Id.* ¶ 141.)

II.

NATIONAL UNION'S MOTION FOR SUMMARY JUDGMENT

47. On September 13, 2019, National Union's filed Defendant National Union Fire Insurance Company of Pittsburgh PA's MSJ. National Union's MSJ asserts that the Second and

Fourth Causes of Action for subrogation fail as a matter of law because the St. Paul Excess Policy is not excess to the National Union Excess Policy, rather St. Paul and National Union are both excess insurers at the same level of coverage in separate towers of coverage with equal obligations to their insured(s).

48. National Union's MSJ further asserts as a separate and independent ground to grant summary judgment that the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract fails as a matter of law because St. Paul has no legal basis or standing to step into the shoes of Cosmopolitan to pursue subrogation for breach of contract against National Union when Cosmopolitan was fully defended and indemnified by the insurers in the Underlying Action and, thus, has suffered no damages under the insurance contract. Additionally, National Union argues that the damages sought by St. Paul are extra-contractual damages that are not available under a breach of contract cause of action.

49. National Union's MSJ further asserts as a separate and independent ground to grant summary judgment that the Eighth Cause of Action for Equitable Contribution fails as a matter of law because National Union exhausted its policy limit in settlement of the Underlying Action and a claim for contribution does not apply to seek extra-contractual damages that fall outside of policy limits.

50. National Union's MSJ further asserts that the Seventh Cause of Action for Equitable Estoppel fails as a matter of law because such a claim is dependent on the legal viability of the other causes of action against National Union, which all fail for the reasons each cause of action against National Union fails as a matter of law.

III.

CONCLUSIONS OF LAW

A. Standard of Review

1. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some

metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. St. Paul's Second Cause of Action For Subrogation – Breach of The Duty To Settle

2. In the Second Cause of Action of the FAC for Subrogation – Breach of the Duty to Settle ("Second Cause of Action"), St. Paul asserts a right of subrogation against National Union on the premise the St. Paul Excess Policy is excess to the National Union Excess Policy. (*see, e.g.*, FAC ¶ 44.)

3. As a threshold matter, the Second Cause of Action fails as a matter of law because the Nevada Supreme Court has never recognized an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

4. The Second Cause of Action also fails as a matter of law for the separate and independent reason that no jurisdiction, let alone Nevada, recognizes an equitable subrogation claim between excess carriers in separate towers of coverage. And this Court is unwilling to be the first to do so.

5. General insurance principles and the subject policies outlined above demonstrate that Cosmopolitan and Marquee are named insureds in separate towers of coverage. Cosmopolitan is a named insured under a separate tower of insurance that includes the Zurich Primary Policy and the St. Paul Excess Policy. Marquee is a named insured under a separate tower of insurance that includes the Aspen Primary Policy and the National Union Excess Policy. Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy issued to Marquee as the named insured.

6. It is well-established that "[p]rimary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability," and that "[e]xcess or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted." *Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co.*, 113 Cal. Rptr. 2d 613, 618 (Cal. Ct. App. 2001) (citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 178 Cal. Rptr. 908 (Cal. Ct. App. 1981); *Carmel Dev. Co. v. RLI Ins. Co.*, 24 Cal. Rptr. 3d 588, 595 (2005) ("[U]mbrella coverage is generally regarded as true excess over and above any type of primary coverage, excess provisions arising in any manner, or escape clauses." (internal quotation marks omitted)).

7. St. Paul issued an umbrella policy to Cosmopolitan while National Union issued an umbrella policy to Marquee. Thus, St. Paul's and National Union's respective umbrella policies remain in separate towers of coverage and, as such, St. Paul and National Union are co-excess insurers that provided coverage to Cosmopolitan at equal levels of coverage under two separate and distinct coverage towers.

8. The St. Paul Excess Policy is a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured, Cosmopolitan. The scheduled underlying insurance to the St. Paul Excess Policy is the Zurich Primary Policy.

9. The National Union Excess Policy is also a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured Cosmopolitan. The scheduled underlying insurance to the National Union Excess Policy is the Aspen Primary Policy.

10. Based on the aforementioned discussions herein, the St. Paul Excess Policy and the National Union Excess Policy contain nearly identical "other insurance" provisions. When two policies contain such language, neither policy shall be excess to the other. *See Everest Nat. Ins. Co. v. Evanston Ins. Co.*, No. 2:09-cv-2077-RLH-PAL, 2011 WL 534007 at *3 (D. Nev. Feb. 8, 2011) (ruling that judgment and defense costs were to be shared equally between insurers that contained the same amounts of limits and both contained Other Insurance clauses providing they were excess

to other available insurance); *CSE Ins. Group v. Northbrook Property & Cas. Co.*, 29 Cal. Rptr. 2d 120, 121-23 (Cal. Ct. App. 1994); *Century Surety Co. v. United Pac. Ins. Co.*, 135 Cal. Rptr. 2d 879, 884-85 (Cal. Ct. App. 2003).

11. The St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. Both St. Paul and National Union had independent obligations to Cosmopolitan, both discharged those obligations by settlement of the Underlying Action, both had the same limits of insurance, and neither is in an equitably superior position to the other.

12. Accordingly, St. Paul's Second Cause of Action For Subrogation – Breach of the Duty to Settle fails as a matter of law.

B. St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract

13. Although St. Paul is not a party to the National Union Excess Policy, in the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract ("Fourth Cause of Action"), St. Paul is pursuing a claim against National Union for an alleged breach of National Union's insurance contract as an alleged subrogee of Cosmopolitan.

14. However, for the same reasons proffered above in concluding that the Second Cause of Action fails as a matter of law, the Fourth Cause of Action must also fail as a matter of law. Specifically, the Nevada Supreme Court has never recognized the viability of an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

15. And even if equitable subrogation claims among carriers were viable in Nevada, for the reasons explained above, the St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. As such, St. Paul cannot pursue any claims against National Union based on an equitable subrogation theory of recovery.

16. The Fourth Cause of Action also fails as a matter of law because Nevada courts have expressly rejected contractual subrogation claims between insurers. In the insurance context, contractual subrogation generally is not applied by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No.

2:12-cv-01727-RFB-NJK, 2016 WL 3360943 at *6 (D. Nev. June 9, 2016). As noted by the *Colony* court, the Nevada Supreme Court has held that contractual subrogation in the context of insurers and insureds may contravene public policy and contractual subrogation may provide for windfalls in the insurance context. *Id.* (citing *Maxwell v. Allstate Ins. Cos.*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986)). As such, St. Paul cannot pursue claims against National Union based on a contractual subrogation theory of recovery.

17. The Second Cause of Action also fails as a matter of law for the separate and independent reason that Cosmopolitan has suffered no contractual damages.

18. General principles of subrogation allow an insurer to step into the shoes of its insured, but the insurer has no greater rights than the insured and is subject to all of the same defenses that can be asserted against the insured. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*, 49 Cal. Rptr. 3d 785, 790-91 (Cal. Ct. App. 2006).

19. A breach of contract claim requires (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *See Contreras v. American Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1224 (D. Nev. 2015) (*citing Richardson v. Jones*, 1 Nev. 405, 409 (1865)).

20. A claim for breach of contract is not actionable without damage. *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished) ("It is beyond cavil that a party must suffer actual loss before it is entitled to damages." (quoting *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1153 (1st Cir. 1992)); *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815, at *4 (Cal.Ct.App. May 18, 2018) (unpublished); *Bramalea California, Inc. v. Reliable Interiors, Inc.*, 14 Cal. Rptr. 3d 302, 306 (Cal. Ct. App. 2004). In the insurance context, damages for breach of an insurance policy are based on the failure to provide benefits owed under the policy. *Morris v. Paul Revere Life Ins. Co.*, 135 Cal. Rptr. 2d 718, 726 (Cal. Ct. App. 2003); *Avila v. Century Nat'l Ins. Co.*, No. 2:09-cv-00682-RCJ-GWF, 2010 WL 11579031 (D. Nev. Feb. 10, 2010). If the insured does not suffer "actual loss" from the insurer's breach of a duty under the policy, there can be no claim for

///

damages. *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished).

21. Here, St. Paul alleges that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy and seeks extra-contractual damages for such breach. However, it is undisputed that Cosmopolitan's defense and indemnity in the Underlying Action were fully paid for by insurers. The damages sought by St. Paul are not contract damages suffered by Cosmopolitan due to any failure to provide policy benefits, but are instead an attempt to recoup extra-contractual damages to reimburse St. Paul for the money it was required to pay under its policy in discharge of its separate obligation to Cosmopolitan.

22. It is undisputed that Cosmopolitan was indemnified by National Union when it exhausted its policy limit by participating in the settlement of the Underlying Action. Cosmopolitan's defense in the Underlying Action was funded entirely by insurers. Accordingly, Cosmopolitan suffered no contract damages as a matter of law and, as such, has no viable claim for breach of contract against National Union. As Cosmopolitan has no viable claim for breach of contract against National Union, neither does St. Paul under subrogation principles as it holds no greater rights than Cosmopolitan.

23. The facts of this case are similar to *California Capital*, in which an insurer sued another insurer to recover amounts it paid in settlement (and defense) of its named insureds in an underlying bodily injury action. Like St. Paul, California Capital asserted causes of action against a co-carrier for breach of contract and breach of the covenant of good faith and fair dealing, among others, alleging its named insureds were additional insureds under the defendant insurer's policy and that its named insureds had expressly assigned all of their rights under the defendant insurer's policy to California Capital. 2018 WL 2276815, at *2-4. California Capital alleged the defendant insurer breached its policy by refusing to provide the additional insureds the benefits due under the policy and also alleged defendant insurer breached its obligations of good faith by failing to defend and indemnify the insureds when it knew they were entitled to overage under the policy, withholding payments under the policy when defendant insurer knew plaintiff's claim was valid, failing to properly investigate the insureds' request for policy benefits, and failing to provide a

reasonable explanation of the factual basis for denial of the insureds' claim for benefits under the policy. *Id.* at *4. The trial court held that California Capital had no cause of action for breach of contract or breach of the covenant of good faith and fair dealing because the insureds had sustained no damage as a result of defendant insurer's alleged failure to defend and indemnify them or its failure to settle the claim within its policy limit. *Id.* Given the insureds' defense and post-judgment settlement had been fully paid by California Capital, the trial court found the essential element of contract damages was absent from the breach of contract cause of action such that the insureds had no viable claims to assign to California Capital. *Id.* The trial court further found that California Capital had no direct cause of action against the defendant insurer because it was not a party to defendant insurer's policy. *Id.* at *6. The trial court in *California Capital* found that both insurers provided primary coverage for the loss. *Id.* at *8. The Court of Appeal affirmed the foregoing findings by the trial court and held that California Capital could not pursue assigned claims for breach of contract or breach of the covenant of good faith and fair dealing against the defendant insurer. *Id.* at *1, *30.

24. Like the plaintiff insurer in *California Capital*, St. Paul is not a party to the National Union Excess Policy and has no direct cause of action against National Union for breach of contract or breach of the covenant of good faith and fair dealing. Both St. Paul and National Union had independent obligations to Cosmopolitan, and both insurers discharged those obligations by settlement of the Underlying Action. As such, neither insurer is in an equitably superior position as to the other. Further, given the cost of Cosmopolitan's defense and the post-verdict settlement was fully funded by insurers in the Underlying Action, Cosmopolitan has no contract damages for policy benefits against National Union. Therefore, Cosmopolitan has no viable breach-of-contract claim for St. Paul to step into its shoes to pursue against National Union. Accordingly, St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract fails as a matter of law.

C. **St. Paul's Eighth Cause of Action for Equitable Contribution**

25. The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of

insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy.

26. The National Union Excess Policy further provides the most National Union will pay for damages on behalf of any person or organization to whom the named insured is obligated to provide insurance is the lesser of the limits shown in the declarations or the minimum limits of insurance the named insured agrees to procure in a written insured contract.

27. Here, National Union exhausted its policy limit in contributing towards the settlement of the Underlying Action.

28. Given the National Union Excess Policy is exhausted, National Union has no further obligation under the policy. *See Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, No. 2:09-cv-01672-RCJ-RJJ, 2012 WL 870289 at *3 (D. Nev. Mar. 14, 2012) (concluding that "once the [limits are] reached, the insurer's duties under the policy are extinguished"); *Deere & Co. v. Allstate Ins. Co.*, 244 Cal. Rptr. 3d 100, 112 (Cal. Ct. App. 2019) (holding that "[a] 'policy limit' or 'limit of liability' is the maximum amount the insurer is obligated to pay in contract benefits on a covered loss." (internal quotation marks omitted)).

29. St. Paul seeks to step into Cosmopolitan's shoes to pursue extra-contractual damages outside National Union's policy benefits based a claim for equitable contribution. However, a claim for contribution is not available to pursue damages from a carrier that is in excess of the carrier's policy limit. Accordingly, St. Paul's Eighth Cause of Action for Equitable Contribution against National Union fails as a matter of law.

D. St. Paul's Seventh Cause of Action for Equitable Estoppel

30. In the FAC, St. Paul asserts the Seventh Cause of Action for Equitable Estoppel ("Seventh Cause of Action"), seeking to preclude National Union from asserting that: (1) National Union's policies were not primarily responsible for the defense and resolution of the Underlying Action; and (2) St. Paul, a non-defending carrier, had the same obligation to resolve the Underlying Action as Aspen and National Union. (FAC ¶ 135.)

///

///

31. Typically, equitable estoppel is raised as an affirmative defense. However, under Nevada Law, equitable estoppel can be treated as an affirmative claim under the appropriate circumstances.

32. To establish equitable estoppel, the plaintiff must prove the following: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must have relied to his detriment on the conduct of the party to be estopped. *See Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.,* 98 Nev. 609, 614, 655 P.2d 996, 999 (1982); I*n re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-1062 (2005).

33. Because the Second, Fourth, and Eighth Causes of Action fail as a matter of law, including for reasons that are unaffected by National Union's assertions that St. Paul seeks to estop, this Seventh Cause of Action must also fail.

E. St. Paul's Request for Discovery Per NRCP 56(d)

34. True and correct copies of the Nightclub Management Agreement ("NMA") and the St. Paul Excess Policy at issue in this matter have been provided as part of National Union's MSJ. As such, all necessary and potentially relevant exhibits to properly consider and determine National Union's MSJ are included in the moving papers and the record is complete.

35. There remains no genuine dispute of material facts with respect to National Union's MSJ that require further discovery.

36. Accordingly, St. Paul's Request for Discovery per NRCP 56(d) is denied.

F. Certification under NRCP 54(b)

37. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

///

///

38. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting National Union's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of National Union's Motion for Summary Judgment, and the arguments of the parties and good cause existing, National Union's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2019.

Honorable Gloria Sturman
District Judge, Department XXVI

NEOJ
Michael K. Wall (2098)
HUTCHISON & STEFFEN, PLLC
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Tel. (702) 385-2500
mwall@hutchlegal.com

Attorneys for Plaintiff
St. Paul Fire & Marine Ins. Co.

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, v. ASPEN SPECIALITY INSRUANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	Case No: A-17-758902-C Dept. No: XXVI **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT**

Please take notice the on the 14th day of May, 2020, the Court entered Findings of Fact, Conclusions of Law and Order Granting Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment in the above-entitled action. A copy of said Order is attached hereto.

DATED this 27 day of May, 2020.

HUTCHISON & STEFFEN, PLLC

By /s/ Michael K. Wall
Michael K. Wall (2098)
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
mwall@hutchlegal.com

Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 21st day of May, 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT** to be served as follows:

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

[ ] to be sent **via facsimile;** and/or

[X] to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

[ ] to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

Michael M. Edwards, Esq. (6281)
Nicholas L. Hamilton, Esq. (10893)
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
medwards@messner.com
nhamilton@messner.com
efile@messner.com
T: 702-363-5100
F: 702-363-5101
Attorneys for Defendant Aspen Specialty Company

Andrew D. Herold, Esq. (7378)
Nicholas B. Salerno, Esq. (6118)
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
aherold@heroldsagerlaw.com
nsalerno@herlodsagerlaw.com
T: 702-990-3624
F: 702-990-3835
Attorneys for Defendants National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

Jennifer L. Keller, Esq. (Pro Hac Vice)
Jeremy Stamelman, Esq. (Pro Hac Vice)
KELLER/ANDERLE LLP
18300 Von Karman Ave., Suite 930
Irvine CA 92612
jkeller@kelleranderle.com
jstamelman@kellweanderle.com
T: 949-476-8700
F: 949-476-0900
Attorneys for Defendants National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

An employee of Hutchison & Steffen, PLLC

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

FFCO
ANDREW D. HEROLD, ESQ.
Nevada Bar No. 7378
NICHOLAS B. SALERNO, ESQ.
Nevada Bar No. 6118
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Telephone: (702) 990-3624
Facsimile: (702) 990-3835
aherold@heroldsagerlaw.com
nsalerno@heroldsagerlaw.com

JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)
JEREMY STAMELMAN, ESQ. (Pro Hac Vice)
KELLER/ANDERLE LLP
18300 Von Karman Ave., Suite 930
Irvine, CA 92612
Telephone: (949) 476-8700
Facsimile: (949) 476-0900
jkeller@kelleranderle.com
jstamelman@kelleranderle.com

Attorneys for Defendants NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA. and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNON FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT.: XXVI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT

Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's ("Marquee") Motion for Summary Judgment ("MSJ") came on for hearing on October 15, 2019 in Department XXVI of this Court, the Honorable Gloria Sturman presiding. Nicholas A. Salerno of Herold & Sager and Jennifer L. Keller of Keller/Anderle LLP appeared for Defendant Marquee, William Reeves and Marc J. Derewetzky of Morales Fierro & Reeves appeared for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and Ryan A. Loosvelt of Messner Reeves LLP appeared for Defendant Aspen Specialty Insurance Company ("Aspen").

The Court, having reviewed and considered the voluminous pleadings and papers on file,[1] having heard and considered argument of counsel, and good cause appearing, hereby GRANTS Marquee's Motion for Summary Judgment.

On October 15, 2019, the Court issued a minute order granting Marquee's Motion for Summary Judgment. However, the Court's decision set out herein is not based solely on the contents of the minute order, but is also based on the record on file herein. The Court hereby issues the following Findings of Facts and Conclusions of Law.

I.

FINDINGS OF FACT

A. The Underlying Action

1. This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). (*See* Plaintiff's First Amended Complaint ("FAC") ¶ 6.)

---

[1] Marquee's Motion for Summary Judgment, Marquee's Request for Judicial Notice in Support of Motion for Summary Judgment, Marquee's Appendix of Exhibits in Support of Motion for Summary Judgment, Declaration of Nicholas B. Salerno in Support of Motion for Summary Judgment, Declaration of Bill Bonbrest in Support of Motion for Summary Judgment, St. Paul's Opposition to Motion for Summary Judgment and Countermotion re: Duty to Indemnify, St. Paul's Response to Statement of Undisputed Facts, St. Paul's Consolidated Appendix of Exhibits in Support of Opposition to Motions for Summary Judgment, Declaration of Marc J. Derewetzky in Support of Opposition to Motion for Summary Judgment, Declaration of William Reeves in Support of Opposition to Motion for Summary Judgment, National Union's (defined below) Opposition to St. Paul's Countermotion for Summary Judgment, Marquee's Reply in Support of Motion for Summary Judgment, and Marquee's Objections to Facts Not Supported by Admissible Evidence Filed in Support of Opposition to Motion for Summary Judgment and Countermotion re: Duty to Indemnify.

2. Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was beaten by Marquee employees. (FAC ¶¶ 6-7.)

3. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (FAC ¶¶ 8-10, Exhibit A.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit A.)

5. Roof Deck Entertainment, LLC owns and operates the Marquee Nightclub. (FAC ¶ 4.)

6. Nevada Property 1, LLC owns and operates The Cosmopolitan of Las Vegas. (*Id.* ¶ 10.)

7. Cosmopolitan is the owner of the subject property where the Marquee Nightclub is located and leased the nightclub location to its subsidiary, Nevada Restaurant Venture 1, LLC ("NRV1"). (FAC ¶ 10.)

8. NRV1 entered into a written agreement (discussed *infra* Section I.D) with Marquee to manage the nightclub. (FAC ¶ 10.)

9. Marquee is a named insured under the National Union Excess Policy defined below. (FAC ¶ 30.)

10. Cosmopolitan is a named insured under the St. Paul Excess Policy defined below. Cosmopolitan is also an additional insured to the National Union Excess Policy defined below. (FAC ¶¶ 40 and 44.)

11. Marquee is not an insured to the St. Paul Excess Policy defined below. (FAC ¶ 41.)

12. Aspen Insurance Company, which issued a primary insurance policy, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union subsequently

///

appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

13. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

14. The Court held in the Underlying Action that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (*See* Request for Judicial Notice in Support of Marquee's Motion for Summary Judgment, Ex. 3.)

15. After a five-week trial, the jury in the Underlying Action issued a special verdict on April 26, 2017, finding that Moradi established his claims for assault, battery, false imprisonment and negligence jointly and severally against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the judgment would have been joint and several against Marquee and Cosmopolitan. *See* NRS 41.141(5)(b). (FAC, Ex. C.)

16. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

17. Aspen and National Union Fire Insurance Company of Pittsburgh PA ("National Union") as the primary and excess insurers of Marquee, and Zurich American Insurance Company ("Zurich") and St. Paul as the primary and excess insurers of Cosmopolitan, accepted the settlement demand and resolved the Underlying Action with the confidential contributions set forth in the FAC filed by St. Paul under seal. (FAC ¶¶ 67-70.)

18. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money toward the settlement. (FAC ¶¶ 67-70.)

///

B. **Insurance Policies and Insured Parties**

19. Cosmopolitan is a named insured to a primary policy issued by Zurich American Insurance Company to Nevada Property 1 LLC, under policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012, with limits of $1,000,000 per occurrence and $2 million general aggregate (the "Zurich Primary Policy"). (FAC ¶ 69; MSJ p. 14, Undisputed Fact No. ("UF") 25.)

20. Cosmopolitan is also a named insured to the St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group (the "St. Paul Excess Policy"), which is excess to the Zurich Primary Policy. (FAC ¶ 40; MSJ pp. 13-14, UF 24 and 25.)

21. Marquee is a named insured to a primary policy issued by Aspen Specialty Insurance Company to The Restaurant Group et al., under policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 (the "Aspen Primary Policy"). (FAC ¶ 15.)

22. Marquee is also a named insured to the National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. (the "National Union Excess Policy"), which is excess to the Aspen Primary Policy (FAC ¶ 30; MSJ p. 13, UF 23.) Cosmopolitan was an additional insured under the Aspen Primary Policy and the National Union Excess Policy. (FAC ¶¶ 24 and 30; MSJ p. 14, UF 26.)

23. The St. Paul Excess Policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery of such payment. (MSJ p. 14, UF 27.)

C. **St. Paul's Claims Against Marquee**

24. In the Fifth Cause of Action of the FAC for Statutory Subrogation – Contribution Per NRS 17.225 ("Fifth Cause of Action"), St. Paul asserts a subrogation right against Marquee under NRS 17.225 for contribution to recoup a share of St. Paul's settlement payment. (FAC ¶ 113.)

St. Paul asserts that Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct rather than any affirmative actions or unreasonable conduct on the part of Cosmopolitan. (FAC ¶¶ 117-118.) St. Paul further asserts that Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages. (FAC ¶ 118.) St. Paul alleges that its settlement payment on behalf of Cosmopolitan was in excess of Cosmopolitan's equitable share of this common liability such that St. Paul is entitled to subrogate to Cosmopolitan's contribution rights against Marquee pursuant to NRS 17.225 and NRS 17.275 for all sums paid by St. Paul as part of the settlement of the Underlying Action. (FAC ¶¶ 119-120.)

25. In the Sixth Cause of Action of the FAC for Subrogation – Express Indemnity ("Sixth Cause of Action"), St. Paul asserts that "[p]er written agreement," Marquee was obligated to "indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (*Id.* ¶ 122.) St. Paul further alleges that Marquee did not provide indemnification to Cosmopolitan for the claims asserted in the Underlying Action and that, as a result, St. Paul was forced to contribute to the settlement of the Underlying Action to protect Cosmopolitan's interests as well as its own. (*Id.* ¶¶ 125, 127.) St. Paul further alleges that "[p]er the terms of the written agreement," Marquee is liable to St. Paul for its attorneys' fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (*Id.* ¶ 129.)

D. Nightclub Management Agreement

26. Marquee and NRV1 entered the Nightclub Management Agreement ("NMA"), dated April 21, 2010, with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (MSJ p. 8, UF 17.) In the NMA, Marquee agreed to manage and operate the Marquee nightclub in The Cosmopolitan Hotel & Casino.

27. Cosmopolitan is identified as the Project Owner in the Recitals section of the NMA and is also a signatory to the agreement both on behalf of itself and NRV1, for which Cosmopolitan is the Managing Member. (MSJ p. 8, UF 13.)

28. The NMA provides in pertinent part:

1. Definitions

. . .

"Losses" shall mean any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance, including, without limitation, all reasonable attorneys' fees and all other reasonable professional or consultants' expenses incurred in investigating, preparing for, serving as a witness in, or defending against any action or proceeding, whether actually commenced or threatened.

(MSJ p. 9, UF 18.)

29. Section 12 of the NMA sets out the insurance requirements among the parties, and provides, in pertinent, part as follows:

12. Insurance

12.1 [NRV1's] Insurance. During the Term of this Agreement, [NRV1] shall provide and maintain the following insurance coverage, at its sole cost and expense . . .

. . .

12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage, with a combined single limit of not less than Two Million Dollars ($2,000,000) for each occurrence, and at least Four Million Dollars ($4,000,000) in the aggregate, including excess coverage; and

12.1.3 Any coverage required under the terms of the Lease to the extent such coverage is not the responsibility of [Marquee] to provide pursuant to Section 12.2 below.

12.2 [Marquee's] Insurance.

12.2.1 During the Term of this Agreement, [Marquee] shall provide and maintain the following insurance coverage (the "[Marquee] Policies"), the cost of which shall be an Operating Expense:

12.2.1.1 Commercial general liability insurance (occurrence form), including broad form contractual liability coverage, with minimum coverages as follows: general aggregate - $4,000,000; products-completed operations aggregate - $4,000,000 personal and advertising injury - $5,000,000; liquor liability - $1,000,000 with $4,000,000 liquor liability annual aggregate each occurrence - $2,000,000; . . . and medical expense (any one person) - $5,000;

12.2.1.2 Excess liability insurance (follow form excess or umbrella), liquor liability, commercial general liability, automobile liability and employers liability), with minimum coverages as follows: each occurrence - $25,000,000; aggregate - $25,000,000;

. . .

12.2.3 Except with respect to workers compensation and the employee practices liability insurance, [NRV1], [Cosmopolitan], the landlord and tenant under the Lease, Hotel Operator, their respective parents, subsidiaries and Affiliates, and their respective officers, directors, officials, managers, employees and agents (collectively "Owner Insured Parties"), shall all be named as additional insureds on all other [Marquee] Policies.

(MSJ pp. 9-11, UF 19.)

30. Section 12.2.6 of the NMA includes the following provision requiring that any insurance required under the NMA by both NRV1 and Marquee include a waiver of subrogation:

All Owner Policies and [Marquee] Policies shall contain a waiver of subrogation against the Owner Insured Parties and [Marquee] and its officers, directors, officials, managers, employees and agents and the [Marquee] Principals. The coverages provided by [NRV1] and [Marquee] shall not be limited to the liability assumed under the indemnification provisions of this Agreement.

(MSJ p. 11, UF 19.) (emphasis added).

31. Section 13 of the NMA includes the following express indemnity provision:

13. Indemnity

13.1 By [Marquee]. [Marquee] shall indemnify, hold harmless and defend [NRV1] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("Owner Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [Marquee] of any term or condition of this Agreement, or (ii) the negligence or willful misconduct of [Marquee] or any of its owners, principals, officers, directors, agents, employees, Staff, members, or managers ("[Marquee] Representatives") **and not otherwise covered by the insurance required to be maintained hereunder**. [Marquee's] indemnification obligation hereunder shall include liability for any deductibles and/or self retained insurance retentions to the extent permitted hereunder, and shall terminate on the termination of the Term; provided however that such indemnification obligation shall continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

13.2 By [NRV1]. [NRV1] shall indemnify, hold harmless and defend [Marquee] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("[Marquee] Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [NRV1] of any term or condition of this Agreement or (ii) the negligence or willful misconduct of [NRV1] or any of its owners, principals, officers, directors, agents, employees, members, or managers **and not otherwise covered by the insurance required to be maintained hereunder**. [NRV1's] indemnification obligation hereunder shall terminate on the termination of the

> Term; provided, however, that such indemnification obligation shall continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

(MSJ pp. 11-12, UF 20.)

32. Section 13 of the NMA expressly provides that any express indemnity obligation owed by Marquee to Cosmopolitan applies only to the extent any and all Losses (as defined above) are not reimbursed by insurance.

33. Section 17.2 of the Lease attached as Exhibit D to the NMA provides, in relevant part, that Cosmopolitan shall procure "all insurance required to be obtained by" NRV1 under Section 12.1 of the NMA. (Ex. 1 to MSJ, at T000183.)

34. Section 20 of the NMA provides as follows:

> **20. Third Party Beneficiary**
>
> Except as otherwise expressly provided herein, the Parties acknowledge and agree that [NRV1] may assign, delegate or jointly exercise any or all of its rights and obligations hereunder to or with any one or more of the following: [Cosmopolitan], Hotel Operator, Casino Operator and/or their Affiliates, or any successors thereto (collectively "Beneficiary Parties"). All such Beneficiary Parties to whom certain rights and obligations of [NRV1] have been assigned shall, to the extent of such assigned, delegated or shared rights and obligations, be an express and intended third-party beneficiary of this Agreement. Without limiting the generality of the foregoing, Beneficiary Parties shall have the right to enforce the obligations of [NRV1] to the extent of the rights and obligations assigned to, delegated to or shared with the Beneficiary Party by [NRV1]. Except as provided above, nothing in this Agreement, express or implied, shall confer upon any person or entity, other than the Parties, their authorized successors and assigns, any rights or remedies under or by reason of this Agreement.

(MSJ pp. 12-13, UF 21.)

II.

MARQUEE'S MOTION FOR SUMMARY JUDGMENT

1. On September 13, 2019, Marquee filed Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment. Marquee's MSJ asserts that the NMA entered between Marquee and NRV1 contains a waiver of subrogation provision that prevents Cosmopolitan from pursuing any claims against Marquee. As such, St. Paul cannot not step into

///

Cosmopolitan's shoes to pursue the subrogation claims against Marquee set forth in the Fifth and Sixth Causes of Action of the FAC as a matter of law.

2. Marquee's MSJ further asserts as a separate and independent ground to grant summary judgment that the Sixth Cause of Action in the FAC for express indemnity fails because the express indemnity provisions set out in Section 13 of the NMA applies by its express terms only to losses not reimbursed by insurance. As such, Marquee contends the Sixth Cause of Action fails as a matter of law because the damages sought by St. Paul under the Sixth Cause of Action pertain to a loss that was reimbursed by insurance.

3. Marquee's MSJ also asserts as a separate and independent ground to grant summary judgment that that the Fifth Cause of Action fails as a matter of law because Cosmopolitan was found jointly and severally liable with Marquee in the Underlying Action for the intentional torts of assault, battery, and false imprisonment, and NRS 17.255 provides "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury." Marquee further asserts as a separate and independent ground to grant summary judgment that that the Fifth Cause of Action fails as a matter of law because Nevada common law and NRS 17.265 provide that "[w]here one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation." As such, Marquee contends the Fifth Cause of Action in the FAC for Statutory Subrogation – Contribution Per NRS 17.225 fails as a matter of law based on the application of NRS 17.255 and NRS 17.265.

III.

CONCLUSIONS OF LAW

A. Standard of Review

1. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in

the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. St. Paul's Fifth And Sixth Causes of Action For Subrogation Are Barred By The Subrogation Waiver Provisions Contained In The Nightclub Management Agreement And The St. Paul Excess Policy

2. St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated to the rights of Cosmopolitan for contribution and express indemnity against Marquee. (FAC ¶¶ 116 and 126.)

3. Pursuant to Section 12.2.6 of the NMA, however, the insurance policies required under the NMA must "contain a waiver of subrogation against the Owner Insured Parties and [Marquee] and its officers, directors, officials, managers, employees and agents and the [Marquee] Principals" as defined in the NMA.

4. Section 12.2.3 of the NMA defines "Owner Insured Parties" to include the Owner (NRV1), the Project Owner (Cosmopolitan), the landlord and tenant under the Lease (also Cosmopolitan and NRV1), their respective parents, subsidiaries, affiliates, and other related persons and entities.

5. Section 12.2.6 of the NMA also provides that the waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies."

6. "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance maintained by any "Owner Insured Parties."

7. In accordance with the requirement under Section 12.2.6 of the NMA, the St. Paul Excess Policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if the Named Insured has agreed in a written contract to waive its rights to

recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery for such payment. (Ex. 2 to MSJ, at T000038.)

8. Cosmopolitan is a Named Insured under the St. Paul Excess Policy pursuant to the Designated Premises Limitation endorsement. (Ex. 2 to MSJ, at T000057.)

9. Waiver of subrogation provisions are universally enforced. *See Davlar Corp. v. Superior Court*, 62 Cal. Rptr. 2d 199, 201-02 (Cal. Ct. App. 1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 32 Cal. Rptr. 2d 144, 146-49 (Cal. Ct. App. 1994) (waiver of rights for damages covered by insurance barred insurer's subrogation suit.); *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 86 Cal. Rptr. 3d 715, 718-20 (Cal. Ct App. 2008) (holding tenant's failure to obtain the full amount of liability insurance required by lease did not preclude enforcement of subrogation waiver); *Commerce & Indus. Ins. Co. v. Orth*, 458 P.2d 926, 929 (Or. 1969) (holding insurer waived its subrogation rights against various contractors); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 831 P.2d 724, 728 (Wash. 1992) (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, No. 14-cv-890 GBW/CG, 2016 WL 4425095, *7 (D. N.M. Feb. 29, 2016) (finding subrogation waivers serve important public policy goals, such as "encouraging parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity" (internal quotation marks omitted)).

10. The intent of the parties to the NMA to waive subrogation rights for losses paid by insurance proceeds is clear and unambiguous as expressed in Section 12.2.6 of the NMA. To find otherwise would be inconsistent with the terms of the NMA and the Waiver of Rights of Recovery Endorsement contained within the St. Paul Excess Policy.

11. In opposition to Marquee's MSJ, St. Paul asserts that the subrogation waiver requirements of the NMA and the St. Paul Excess Policy do not apply because Cosmopolitan, as the Project Owner, only agreed to be bound with respect to certain provision of the NMA, which did not include the subrogation waiver provision contained in 12.2.6 of the NMA. This argument fails because it ignores that Section 17.2 of the Lease attached as Exhibit D to the NMA delegated

NRV1's insurance requirements under the NMA to Cosmopolitan. Section 17.2 of the Lease provides that Cosmopolitan shall procure "all insurance required to be obtained by" NRV1 under Section 12.1 of the NMA. (*See* National Union's Appendix of Exhibits in Support of MSJ, Ex. 1, T000172, T000183.) Thus, Cosmopolitan assumed NRV1's obligation to provide the insurance as required by Section 12.1 of the NMA. Accordingly, Cosmopolitan assumed the obligation to procure insurance that complied with all of the terms of Section 12, including the waiver of subrogation obligation set out in Section 12.2.6. Regardless of whether Cosmopolitan agreed to be bound by the subrogation waiver provision contained in 12.2.6 of the NMA or assumed NRV1's insurance obligations under the NMA, the clear intent of the parties to the NMA was to waive any claims for losses against each other that were paid by insurance proceeds including claims against the Owner Insured Parties (as defined in NMA), which includes Cosmopolitan.

12. St. Paul nonetheless contends that Cosmopolitan is not a party to the NMA. Even if St. Paul's subrogation rights under the NMA are not based on Cosmopolitan's status as a party to the NMA, Cosmopolitan is still a third-party beneficiary of the NMA and is bound by its terms. (*See* NMA, Section 20); *See also Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005) (recognizing that "an intended third-party beneficiary is bound by the terms of a contract even if she is not a signatory"); *Gibbs v. Giles*, 96 Nev. 243, 246-247, 607 P.2d 118, 120 (1980) (recognizing that "a third-party beneficiary takes subject to any defense arising from the contract that is ascertainable against the promisee"). St. Paul is pursuing subrogation claims by attempting to step into Cosmopolitan's shoes as a third-party beneficiary of the NMA and the intent of the parties to the NMA was to waive such subrogation rights.

13. Accordingly, St. Paul's subrogation claims set forth in the Fifth and Sixth Causes of Action of the FAC fail as a matter of law.

C. **St. Paul's Sixth Cause of Action For Subrogation – Express Indemnity Also Fails Because Cosmopolitan Did Not Sustain Any Uninsured Losses**

14. The Sixth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that Cosmopolitan did not sustain any uninsured losses.

///

15. Pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify, hold harmless and defend NRV1 and its parents, subsidiaries and affiliates (including Cosmopolitan), from and against Losses (as defined in the NMA) to the extent incurred as a result of the breach or default by Marquee of any term or condition of the Agreement, or the negligence or willful misconduct of Marquee that is "not otherwise covered by the insurance required to be maintained" under the NMA. (Emphasis added.)

16. The NMA defines "Losses", in pertinent part, as "liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance." (Emphasis added.)

17. Nevada courts strictly construe indemnity obligations and will enforce them in accordance with the terms of the contracting parties' agreement. *See United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 673, 289 P.3d 221, 226 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 339-40, 255 P.3d 268, 274 (2011); *Contreras v. American Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1231 (D. Nev. 2015); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F. Supp. 2d 1262, 1268 (D. Nev. 2008) ("It is well settled that a court should enforce a contract as it is written, should not create a new contract by rewriting unambiguous terms, and has no power to create a new contract.").

18. As explained by the Nevada Supreme Court in *United Rentals Highway Technologies*:

> [T]his court will not attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations. Additionally, every word in a contract must be given effect if at all possible.

128 Nev. at 677, 289 P.3d at 229 (internal quotation marks and citations omitted).

19. The exclusion of insurance payments from the definition of "Losses" in Section 1 of the NMA and the indemnity provision set out in Section 13.1 expressly limits any purported indemnity obligation by Marquee to Cosmopolitan to uninsured losses. (UF 18, 20.)

20. Cosmopolitan's defense in the underlying action and its joint-and-several liability for the verdict and resulting settlement were paid for by insurance. Thus, there is no uninsured loss for which Cosmopolitan could pursue indemnity against Marquee.

21. Accordingly, St. Paul has no valid subrogation claim for express indemnity, and thus, the Sixth Cause of Action against Marquee fails as a matter of law.

D. St. Paul's Fifth Cause of Action For Statutory Subrogation For Contribution Pursuant To NRS 17.225 Also Fails Pursuant to NRS 17.255 Because Cosmopolitan Was Found Liable In The Underlying Action For Intentional Torts

22. The Fifth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that Cosmopolitan was found jointly and severally liable in the underlying action for intentional torts.

23. NRS 17.255 provides, in relevant part, that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death."

24. In the trial of the Underlying Action, Cosmopolitan was found liable with Marquee on all of Moradi's asserted claims, including the intentional tort claims for assault, battery, and false imprisonment, which made Cosmopolitan jointly and severally liable with Marquee. *See* NRS 41.141(5)(b). Prior to trial, the Court held that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan can be jointly and severally liable for Moradi's injuries. (*See* Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.) Cosmopolitan had its own obligation pursuant to the nondelegable duty to keep patrons of The Cosmopolitan Hotel & Casino safe. *Rockwell v. Sun Harbor Budget Suites,* 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) ("[I]n the situation where a property owner hires security personnel to protect his or her premises and patrons, that property owner has a personal and nondelegable duty to provide responsible security personnel.")

25. Given that the jury in the Underlying Action found Cosmopolitan liable with Marquee for the intentional tort claims of assault, battery, and false imprisonment that contributed to Moradi's injury, Cosmopolitan is precluded from pursuing a contribution from Marquee pursuant to the application of NRS 17.255. As such, St. Paul's subrogation claim for contribution set out in the Fifth Cause of Action premised on stepping into the shoes of Cosmopolitan is also precluded as a matter of law.

E. **St. Paul's Fifth Cause of Action For Statutory Subrogation For Contribution Pursuant To NRS 17.225 Also Fails Pursuant to NRS 17.265 Because A Claim For Contribution Is Not Available When The Parties Have Contracted For Express Indemnity**

26. The Fifth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that the parties have contracted for express indemnity.

27. When a tortfeasor has a right to indemnity from another tortfeasor, there is no right to contribution under the Uniform Contribution Act. NRS 17.265 (Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation."); *Calloway v. City of Reno*, 113 Nev. 564, 578, 939 P.2d 1020, 1029 (1997) ("[I]mplied indemnity theories are not viable when an express indemnity agreement exists between the parties.")

28. Section 13 of the NMA contains an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was paid by insurance.

29. Given the existence of the contractually bargained for right to indemnity set out in Section 13 of the NMA, Cosmopolitan has no statutory or equitable right to contribution under Nevada common law or the Uniform Contribution Act pursuant to NRS 17.265. St. Paul asserts the contribution claim is permitted because it is an alternative theory of recovery in the event the express indemnity claim does not prevail. However, a contribution theory of recovery is not permitted when a contract for express indemnity exists to govern the obligations of the respective parties. Accordingly, St. Paul cannot pursue a contribution claim against Marquee based on the alleged subrogation principles as a matter of law.

F. **Certification under NRCP 54(b)**

30. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

31. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting Marquee's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of Marquee's Motion for Summary Judgment, and the arguments of the parties and good cause existing, Marquee's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2020.

Honorable Gloria Sturman
District Judge, Department XXVI