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

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APPENDIX TO APPELLANT'S OPENING BRIEF
VOLUME I of XVI

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 18th day of February, 2021 the foregoing ***APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME I of XVI*** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, 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 ~~[PROPOSED]~~ REDACTED 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 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, while a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino, he was 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.

11. During the course of the Underlying Action, Moradi put forth testimony, documentation, and expert opinion showing: 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; Marquee engaged in unreasonable and negligent conduct in the beating of Moradi; and that Marquee 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 was 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.

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 generally provides coverage for damages because of "personal and advertising injury," sustained by any one person or

organization.

19. Cosmopolitan is an insured to the Aspen Policy with respect to the Underlying Action.

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

21. Aspen acknowledged coverage for Cosmopolitan and Marquee under the Aspen Policy and provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a single defense firm.

22. During the course of the Underlying Action, Aspen took the position that its total limit to pay for a settlement or judgment on behalf of both Cosmopolitan and Marquee was $1,000,000 total, corresponding to only the $1,000,000 each occurrence limit.

23. Marquee is a named insured to AIG commercial umbrella liability policy number 35414413, effective October 6, 2011, to October 6, 2012.

24. The AIG policy includes limits of $25,000,000 each occurrence, and $25,000,000 general aggregate.

25. Cosmopolitan is an insured to the AIG Policy with respect to the Underlying Action.

26. Marquee and Cosmopolitan tendered the Underlying Action to AIG for coverage under the AIG policy.

27. Given the large exposure in the Underlying Action, AIG acknowledged coverage for Cosmopolitan and Marquee under the AIG Policy and also provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a single defense firm.

28. 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 stated $1,000,000 limit.

29. 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.

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

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

32. St. Paul's limit of liability with respect to the Underlying Action was $25,000,000.

33. The St. Paul Policy is excess to the Aspen Policy, the AIG Policy as well as other underlying insurance.

34. St. Paul was not notified of 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 March 23, 2017.

35. Throughout the Underlying Action Aspen and AIG controlled the defense and all settlement negotiations on behalf of Marquee and Cosmopolitan.

36. During the Underlying Action Carrier Defendants were aware of: facts, evidence and expert opinion supporting Moradi's allegations that Marquee engaged in unreasonable and negligent conduct while beating Moradi; 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 Marquee's actions.

37. 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.

38. 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, unreasonably and in bad faith refused to settle the Underlying Action despite multiple reasonable pre-trial settlement demands by Moradi at or within the stated available policy limits of $26,000,000, which was approximately only 1/12 of Cosmopolitan's compensatory damages exposure, as predicted by the defense attorneys.

39. 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. Defendant Carriers let the Offer of Judgment lapse without any counter-offer or further discussions regarding potential settlement.

40. Almost a year later, on November 2, 2016, Moradi made a settlement demand for $26,000,000 – the stated 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.

41. Shortly before trial, on March 9, 2017, Moradi made another settlement demand for $26,000,000 – the stated 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 Moradi's pre-trial settlement demand dated March 9, 2017, is attached hereto as **Exhibit B**. Carrier Defendants rejected the March 9, 2017 settlement demand.

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

43. 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.

44. 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, $79,5000 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.

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

46. 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.

47. 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 stated limit of $26,000,000.

48. St. Paul did not first learn of the March 9, 2017 settlement demand until after the demand had expired and trial had commenced.

49. 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 stated combined Carrier Defendant policy limit of $26,000,000.

50. 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 global demand to Marquee and Cosmopolitan for $REDACTED.

51. In response to the April 28, 2017 settlement demand, Aspen tendered its stated $REDACTED .

52. Finally, in the face of a $160,500,000 compensatory damages jury verdict, AIG tendered its $REDACTED towards the settlement demand.

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

54. 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 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 stated policy limits of $26,000,000, and given the $160,500,000 jury verdict, St. Paul tendered its $REDACTED REDACTED to consummate settlement of Underlying Action, thereby protecting Cosmopolitan from potential harm, and protecting its own interests.

55. 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

Equitable Subrogation –Breach Of The Duty To Settle
(Against Carrier Defendants Only)

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

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

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

59. As part of their duty to settle, Carrier Defendants had a duty in the Underlying Action to accept a reasonable settlement demand within the stated combined limits of $26,000,000 so as not to expose Cosmopolitan to a jury verdict in excess of the stated $26,000,000 limit. Breach of the duty to settle makes Carrier Defendants liable for all damages imposed against Cosmopolitan, both within, and in excess of the Carrier Defendants' policy limits.

60. Carrier Defendants breached the duty to settle by refusing to settle the Underlying Action despite multiple reasonable pre-trial settlement demands by Moradi at or within the stated available policy limits of $26,000,000. 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.

61. Carrier Defendants further breached the duty to settle by failing to initiate and/or attempt settlement of the Underlying Action with Moradi either before or during trial for an amount at or within the stated combined policy limit of $26,000,000.

62. Carrier Defendants' breach of the duty to settle at or within the stated combined $26,000,000 limit is especially actionable considering, among other things: the extent of damages recoverable (estimated to be no less than $310,000,000) in excess of the stated $26,000,000 limit; the extent of Cosmopolitan's exposure (estimated to be no less than $310,000,000) as compared to that of the Carrier Defendants (stated limit of $26,000,000); the probability of Cosmopolitan's liability; Carrier Defendants' lack of diligence in investigating the claims; and the failure of

Carrier Defendants to provide information relating to Moradi's claims and settlement negotiations in the Underlying Action.

63. As a direct result of Carrier Defendants' 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 Carrier Defendants would have been completely liable due to its breach of the duty to settle, if not for St. Paul's $REDACTEDcontribution to the post-verdict $REDACTED settlement.

64. St. Paul, as Cosmopolitan's high-level excess carrier, is subrogated by law and principles of equity to the rights of Cosmopolitan for claims against Carrier Defendants for breach of the duty to settle.

65. As a result of Carrier Defendants' breach of the duty to settle, St. Paul was forced to, and without acting as a volunteer pay its $REDACTED REDACTED to satisfy the post-verdict $REDACTED settlement demand and consummate settlement of the Underlying Action to protect Cosmopolitan's interests, as well as its own interests. St. Paul, therefore, has been damaged in the liquidated sum of $REDACTED.

66. Carrier Defendants are liable to St. Paul in equitable subrogation for breach of the duty to settle, and justice requires that Carrier Defendants, individually and/or collectively reimburse St. Paul's damages in the amount of $REDACTED.

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

SECOND CAUSE OF ACTION

Equitable Subrogation – Violations of NRS § 686A.310
(Against Carrier Defendants Only)

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

68. In addition to the duties imposed by law as alleged herein, Nevada Revised Statute ("NRS") § 686A.310 imposed certain duties and obligations on Carrier Defendants in the handling of the Underlying Action.

69. Based on the conduct and actions alleged herein, Carrier Defendants, individually,

and/or collectively violated multiple statutory prohibitions set forth under NRS § 686A.310 (1), including, but not necessarily limited to the following:

- Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue.
- Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

70. Per NRS § 686A.310 (2), Carrier Defendants are liable for all damages caused by the violations of NRS § 686.310 (1).

71. Per NRS § 686A.270, Carrier Defendants' officer, directors, and/or department heads had knowledge of, and/or or permitted the acts committed by Carrier Defendants, as herein alleged.

72. As a result of Carrier Defendants' violations of NRS § 686.310 (1), the Underlying Action went to trial without settling, resulting in a $160,500,000 compensatory damages verdict against Cosmopolitan.

73. St. Paul, as Cosmopolitan's high level excess carrier, is subrogated by law and principles of equity to the rights of Cosmopolitan for claims against Carrier Defendants for violations of NRS § 686A.310 (1).

74. As a result of Carrier Defendant's violations of NRS § 686A.310 (1), St. Paul was forced to, and without acting as a volunteer pay its $REDACTED to satisfy the post-verdict $REDACTED settlement demand and consummate settlement of the Underlying Action to protect Cosmopolitan's interests, as well as its own interests.

75. Carrier Defendants are liable to St. Paul in equitable subrogation for violations of NRS § 686A.310 (1), and justice requires that Carrier Defendants, individually and/or collectively reimburse St. Paul's damages in the amount of $REDACTED.

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

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THIRD CAUSE OF ACTION

Statutory Subrogation – Contribution Per NRS § 17.225

(Against Marquee Only)

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

77. 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.

78. 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.

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

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

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

82. 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.

83. 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.

84. 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.

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

FOURTH CAUSE OF ACTION

Equitable Subrogation – Express Indemnity
(Against Marquee Only)

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

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

87. 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.

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

89. Marquee did not provide indemnification to Cosmopolitan for the claims asserted against Cosmopolitan in the Underlying Action.

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

91. As a result of Marquee's failure to provide express indemnification, St. Paul was forced to, and without acting as a volunteer pay its $REDACTED to satisfy the post-verdict $REDACTED settlement demand and consummate settlement of the Underlying Action to protect Cosmopolitan's interests, as well as its own interests. St. Paul, therefore, has been damaged in the liquidated amount of $REDACTED.

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

93. 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.

PRAYER FOR RELIEF

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

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

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

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

5. For attorney's fees.

6. For costs of suit.

7. For pre-judgment interest.

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

Dated: September 12, 2017

MORALES FIERRO & REEVES

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, 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 **DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**

Comes now, Defendant National Union Fire Insurance Company of Pittsburgh, PA, by and through its attorneys of record, and hereby moves to dismiss Plaintiff St. Paul Fire & Marine Insurance Company's Complaint.

This Motion is made and based upon the Memorandum of Points and Authorities, the declaration of Michael F. Muscarella and the exhibit thereto, all papers and pleadings on file with the Court in this action, and any argument that may be heard at the hearing of this Motion.

DATED: December 4, 2017

HEROLD & SAGER

By: */s/ Andrew D. Herold*

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendant National Union Fire Insurance Company of Pittsburgh, PA will bring the foregoing Motion to Dismiss for hearing on the 09 day of JANUARY 2018, 2017 at the hour of 9:00A a.m./p.m. of said day, or as soon thereafter as counsel can be heard, in Department XXVI of the District Court for Clark County, Nevada, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada.

DATED: December 4, 2017

HEROLD & SAGER

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I.

INTRODUCTION

In this action, Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul") asserts two causes of action for equitable subrogation against Defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union") which it has no legal basis or standing to pursue and seeks to recover a settlement contribution which it was obligated to pay pursuant to its own policy. Equitable subrogation between insurers is not an established right in Nevada, but even if it were, St. Paul cannot show superior equity to National Union given (1) St. Paul and National Union are both excess insurers at the same level of coverage, and (2) St. Paul had its own independent obligation to Cosmopolitan and could have settled the underlying action prior to verdict but chose not to. Accordingly, St. Paul has no legal or equitable basis to pursue subrogation against National Union and its complaint should be dismissed with prejudice.

II.

FACTUAL ALLEGATIONS RELEVANT TO THIS MOTION

The allegations contained in St. Paul's complaint are accepted as true for the purposes of this motion. *Seput v. Lacayo*, 122 Nev. 499, 501 (2006). National Union does not accept or admit the truth of any of the allegations and restates the allegations as "fact" only for purposes of this motion.

A. <u>Underlying Action</u>

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"). (Redacted Complaint ("Comp.") ¶ 6.) Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. (Comp.) ¶¶ 6-7.) 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. (Comp. ¶¶ 8-10, Exhibit A.) 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.)

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 was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. (*Id*. ¶ 13.) The Court in the Underlying Action agreed with Moradi's position and imposed vicarious liability on Cosmopolitan for Marquee's actions. (*Id*.) The Court also ruled that Marquee and Cosmopolitan were jointly and severally liable for Moradi's damages claim. (*Id*. ¶ 14.)

The Underlying Action went to trial and, on April 28, 2017, the jury returned a verdict in Moradi's favor and awarded compensatory damages in the amount of $160,500,000. (Comp. ¶ 50.) During the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (*Id*.) National Union, St. Paul and other insurers contributed redacted amounts towards the settlement demand. (Comp. ¶¶ 51-54.)

B. <u>Insurance Policies</u>

Marquee is an insured under National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("National Union policy") (Comp. ¶ 23; *Declaration of Michael F. Muscarella* ("*Muscarella Decl.*"), ¶ 2, Exhibit A.) The National Union umbrella policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. (Comp. ¶ 24; *Muscarella Decl.*, ¶ 2, Ex. A.) Cosmopolitan was an additional insured to the National Union umbrella policy with respect to the Underlying Action. (Comp. ¶ 25.) National Union acknowledged coverage for Cosmopolitan and Marquee under the National Union umbrella policy and provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a single defense firm. (Comp. ¶ 27.)

Cosmopolitan is also an insured under St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 ("St. Paul policy") (Comp. ¶ 30.) The St. Paul umbrella policy provided for a limit of liability of $25,000,000 with respect to the

Underlying Action. (Comp. ¶ 32.)

C. St. Paul's Claims Against National Union

In the First Cause of Action for Equitable Subrogation – Breach of the Duty to Settle, St Paul alleges that National Union breached its duty to settle by refusing to settle the Underlying Action in response to pre-trial settlement demands within 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. (Comp. ¶¶ 60-61.) St. Paul further alleges that it is subrogated by law and principles of equity to the rights of Cosmopolitan for claims against 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 ¶¶ 64-66.)

In the Second Cause of Action for Equitable Subrogation – Violations of NRS § 686A.310, St. Paul alleges that National Union violated various portions of NRS § 686A.310(1), including: (1) misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue; (2) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; and (3) failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear. (Comp. ¶ 69.) St. Paul further alleges that, per NRS § 686A.310(2), National Union is liable for all damages caused by these violations and that St. Paul is subrogated by law and principles of equity to the rights of Cosmopolitan for claims against National Union for violations of NRS § 686A.310(1). (*Id*. at ¶ 70, 73.) St. Paul asserts that, as a result of National Union's alleged statutory violations, St. Paul was forced to, and without acting as a volunteer, to pay a redacted amount to satisfy the post-verdict settlement demand and consummate settlement of the Underlying Action to protect Cosmopolitan's interests as well as its own interests. (*Id.* at 74.)

As discussed below, both of these causes of action fail as a matter of law as neither the Nevada Supreme Court nor any other Nevada state courts have recognized an insurer's right to pursue equitable subrogation against another insurer. Even if such a right were recognized, St. Paul's claims against National Union fail as a matter of law given St. Paul and National Union

were both excess insurers at the same level of coverage, and St. Paul owed a separate concurrent duty to Cosmopolitan to settle the Underlying Action. Accordingly, St. Paul has no legal or equitable basis to pursue subrogation against National Union and National Union respectfully requests that the Court grant its motion to dismiss St. Paul's complaint with prejudice.

III.

LEGAL STANDARDS

A complaint may be dismissed under NRCP 12(b)(5) where it appears beyond a doubt that the complaint could prove no set of facts, which, if true, would entitle the plaintiff to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008). While courts must accept as true all material factual allegations in a complaint for purposes of a motion to dismiss, the factual grounds for plaintiff's entitlement to relief "require more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("on a motion to dismiss, courts are not bound to accept as true legal conclusions couched as factual allegations") (internal quotations omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth"); *Chaparro v. Carnival Corp.*, 693 F.3d 133, 1337 (11th Cir. 2012) ("if allegations are indeed more conclusory than factual, then the court does not have to assume their truth."). Further, a Plaintiff may not disguise insufficient claims with vague allegations so as to avoid dismissal. *See Clarendon American Ins. Co. v. Nev. Yellow Cab Corp.*, 2012 WL 786270, *3 (D. Nev. 2012) (dismissing breach of contract claim because Plaintiff neglected to cite the pertinent policy provisions which allegedly imposed a duty on the insurer).

While courts are generally limited to considering the complaint and materials that are submitted with and attached to the complaint, "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim," the "defendant may offer such document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (for example, "when a plaintiff's claim about insurance coverage is

based on the contents of a coverage plan"); s*ee also United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153, fn. 3 (2nd Cir. 2002); *Martinez v. Victoria Partners*, 2014 WL 1268705 at *1, fn. 3 (D. Nevada, Mar. 27, 2014); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998) (superseded by statute on other grounds); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

Further, given the Nevada Rules of Civil Procedure are "based in large part upon their federal counterparts, Nevada courts consider the federal courts' interpretation of the corresponding federal rule(s) as "strong persuasive authority" when interpreting the Nevada Rules of Civil Procedure. *See Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002) (citing *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119 (1990); *Nelson v. Heer*, 121 Nev. 832, 834 (2005); *Moseley v. Eighth Judicial Dist. Court ex rel County of Clark*, 124 Nev. 654, 662-663 (2008). In its complaint, St. Paul expressly referred to National Union's policy but failed to attach a copy of the policy to the complaint. Given the complaint's express reference to the policy, the Court may consider the National Union umbrella policy attached hereto in ruling on National Union's motion to dismiss without converting the motion into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076-1077 (9th Cir. 2005).

IV.

POINTS AND AUTHORITIES

A. <u>St. Paul Lacks Any Legal Basis to Assert a Claim for Equitable Subrogation for Failure to Settle against National Union.</u>

Neither the Nevada Supreme Court nor any other Nevada state courts have established an insurer's right to pursue a claim for equitable subrogation against another insurer, let alone allowed an insurer to pursue another insurer for failure to settle. Given equitable subrogation against other insurers is not an established right for insurers in Nevada, St. Paul has no legal basis to assert equitable subrogation claims against National Union. In support of its claim, National Union expects that St. Paul will likely assert authority from Nevada district courts or other states, such as California, which have allowed an insurer to pursue equitable subrogation against another insurer for failure to settle. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 (D.

Nev. June 9, 2016); *Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co.*, 938 F.Supp.2d 908, 916-917 (C.D. Cal. 2013); *Ace American Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal.App.5th 159 (2016). However, the circumstances of this matter are markedly different from the *Colony* case and the California cases where insurers have been allowed to pursue other insurers for failure to settle an underlying case.

The *Colony*, *Ace*, and *Am. Alternative* cases all involved actions between an excess insurer and a primary insurer in the same tower of coverage involving the same mutual insured. In the complaint, St. Paul asserts that its policy is excess to the National Union policy. (Comp. ¶ 33.) However, St. Paul's assertion of a legal conclusion does not make it true and the court does not have to assume it to be true. *See Iqbal*, 556 U.S. at 681; *Chaparro*, 693 F.3d at 1337. 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.*, 93 Cal.App.4th 1142, 1149 (2001) citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal.App.3d 593, 597-598 (1981); *Carmel Dev. Co. v. RLI Ins. Co.*, 126 Cal.App.4th 502, 513-514 (2005) (finding "umbrella coverage is generally regarded 'as true excess over and above any type of primary coverage, excess provisions arising in any manner, or escape clauses'.") (Citation omitted.)

It is undisputed that National Union is not a primary insurer. As St. Paul admits in the complaint and as shown by the National Union policy attached to this motion, St. Paul and National Union issued umbrella policies and, as such, are co-excess insurers which provided coverage to Cosmopolitan under two separate and distinct coverage towers, i.e. as a named insured under the St. Paul policy and as an additional insured under Marquee's National Union policy. (Comp. ¶¶ 23, 30; *Muscarella Decl.*, ¶ 2, Ex. A.) The National Union policy is excess over scheduled underlying primary insurance and other insurance providing coverage to the insured, including St. Paul. (*Muscarella Decl.*, ¶ 2, Ex. A.) Therefore, the St. Paul policy is not excess to the National Union policy. Both St. Paul and National Union had independent obligations to

Cosmopolitan, both discharged those obligations, and neither is in an equitably superior position as to the other. Accordingly, St. Paul has no legal basis to assert a claim for equitable subrogation against National Union for failure to settle.

B. <u>St. Paul's Equitable Subrogation Claim against National Union Fails Under the Doctrine of Superior Equities.</u>

While equitable subrogation allows an insurer to step into the shoes of its insured, the insurer's substitute position is subject to certain equitable principles, one of which is the doctrine of superior equities which prevents an insurer from recovering against a party whose equities are equal or superior to those of the insurer. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal.App.4th 1098, 1107 (2006). St. Paul asserts that its insurance coverage to Cosmopolitan is excess to that provided by National Union, however, such is not the case as discussed above. Further, Cosmopolitan was a named insured under the St. Paul policy and, as such, St. Paul owed an independent concurrent obligation to Cosmopolitan under its policy, separate and apart from any obligation owed by National Union. (Comp. ¶ 30.) St. Paul could have settled the case against Cosmopolitan prior to the verdict if it believed that an adverse verdict was going to occur. If St. Paul truly believed there was a substantial likelihood of an adverse verdict, then it should have settled the case on behalf of Cosmopolitan prior to the verdict. St. Paul chose not to do so and, therefore, has no superior equity to National Union.

While St. Paul may assert that Cosmopolitan was akin to an innocent bystander in this matter, neither the underlying allegations, nor the history of the litigation would support such a position. Cosmopolitan was facing its own liability for breaching its "non-delegable duty" to keep patrons safe, including Moradi. (Comp. ¶ 13.) The Court in the Underlying Action agreed with Moradi's position and Cosmopolitan was ultimately found to be jointly and severally liable with Marquee. (*Id.*) Cosmopolitan's liability for its own independent negligence is covered by its insurance provided by Zurich and St. Paul, which it placed on notice of the Underlying Action, and not by the National Union excess policy.

St. Paul also cannot establish superior equity to National Union as National Union did not cause St. Paul's loss. St. Paul asserts that National Union breached its duty to settle the Underlying

Action prior to verdict. (Comp. ¶¶ 60-61.) St. Paul also asserts that National Union's failure to do so resulted in an excess verdict against Cosmopolitan which ultimately required St. Paul's settlement contribution. (*Id.* at ¶ 63.) However, St. Paul owed an independent duty to Cosmopolitan to settle the Underlying Action under its own policy. Further, St. Paul also had the opportunity to settle the case prior to the verdict but chose not to do so. (*Id.* ¶¶ 34, 41.) Accordingly, St. Paul cannot assert superior equity to National Union and, therefore, its claim for equitable subrogation for failure to settle fails as a matter of law on this basis as well.

C. <u>St. Paul Lacks Any Legal Basis to Assert a Claim for Equitable Subrogation against National Union for Violations of NRS 686A.310.</u>

1. St. Paul Lacks Standing to Sue National Union for Unfair Claims Practices.

St. Paul lacks standing to assert an equitable subrogation claim against National Union for alleged violations of Nevada's Unfair Claims Practices Act, NRS 686A.310, as St. Paul is not an insured under the National Union umbrella policy. The original intent of the Unfair Claims Practices Act ("Act") when it was enacted in 1975 was to increase the regulatory power of the Insurance Commissioner over insurers. *Pioneer Chlor Alkali Co., Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 863 F.Supp. 1237, 1243 (D. Nev. 1994). In 1987, the Nevada Legislature amended the statute to provide insureds with a private cause of action against insurers. *Id.* Nothing in the statute authorizes an insurer to step into the shoes of its insured to assert a statutory claim for claims handling violations against another insurer. Further, Nevada courts have held that third party claimants have no private cause of action under the statute. *Tweet v. Webster*, 614 F.Supp. 1190, 1195 (D. Nev. 1985); *Gunny v. Allstate Ins. Co.*, 108 Nev. 344 (1992); *Burley v. National Union Fire Ins. Co. of Pittsburgh PA*, 2016 WL 475208, at *4 (D. Nev. February 5, 2016). Given St. Paul is not an insured under the National Union policy and further given the statute does not authorize an insurer to step into the shoes of the insured to assert a claim against another insurer for violation of the Act and third parties have no right to pursue claims under the statute, St. Paul has no standing to assert an equitable subrogation clam against National Union for violation of the Act and the claim should be dismissed with prejudice.

///

2. Notwithstanding St. Paul's Lack of Standing, Its Claim for Equitable Subrogation for Violations of NRS 686A.310 Fails Because It Has Not Alleged Any Facts to Support the Claim.

St. Paul alleges no facts to support its claim that National Union violated the Unfair Claims Practices Act. Instead, St. Paul merely asserts that National Union "violated multiple statutory prohibitions set forth under NRS 686A.310(1)" including (1) misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue; (2) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; and (3) failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear. (Comp. ¶ 69.) This mere formulaic recitation of the pertinent statutory language and bare assertion that National Union violated the statute are not entitled to an assumption of truth. *See Iqbal*, 556 U.S. at 681; *Twombly*, 550 U.S. at 555; *Robinson v. Westinghouse Air Brake Techs. Corp.*, 2010 WL 1416892, *2 (D. Nev. April 1, 2010). Courts have dismissed NRS 686A.310 claims where plaintiffs have made similar conclusory allegations without any factual support. *See Sandoval v. Hartford Underwriters Ins. Co.*, 2011 WL 2790173, *2 (D. Nev. July 14, 2011); *Winkler v. Hartford Fin. Servs. Group*, 2011 WL 1705559, *3 (D. Nev., May 3, 2011) (dismissing NRS 686A.310 claim where plaintiff merely alleged that defendant violated Act with actual and/or imputed knowledge and pled "no facts whatsoever"). Given St. Paul merely parrots the statutory language but does not allege any facts as to how National Union purportedly violated the Act, the complaint does not adequately plead that St. Paul is entitled to any relief.

Moreover, to state a claim for violation of the Act, the Act requires the insured to have sustained damages as a result of an enumerated unfair practice by the insurer. *NRS 686A.310(2)*. In its complaint, St. Paul does not allege any damages suffered by Cosmopolitan. Rather, St. Paul asserts that, as a result of National Union's alleged statutory violations, St. Paul was forced to satisfy the post-verdict settlement demand to protect Cosmopolitan's interests as well as its own. (Comp. ¶ 74.) Given the lack of any damages sustained by Cosmopolitan, St. Paul's claim against National Union for violations of the Act fails as a matter of law. Accordingly, St. Paul's equitable subrogation claim for violation of the Unfair Claim Practices Act should be dismissed with

prejudice.

V.

CONCLUSION

For the foregoing reasons, St. Paul has no legal basis to pursue its claims against National Union and its complaint should be dismissed with prejudice.

DATED: December 4, 2017 HEROLD & SAGER

By: */s/ Andrew D. Herold*

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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 **DECLARATION OF MICHAEL F. MUSCARELLA IN SUPPORT OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**

I, Michael F. Muscarella, declare as follows:

1. I am the Vice President of Excess Specialty Claims at AIG Property Casualty, a related entity to Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). I am authorized to make this declaration on behalf of National Union.

2. Attached hereto as Exhibit A is a true and correct copy of National Union policy number BE25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al., with premium information redacted.

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

Dated this 4 day of December, 2017.

Michael F. Muscarella

EXHIBIT A

EXHIBIT A

POLICY CERTIFICATION

The undersigned is a Manager of Risk Specialists Companies Insurance Agency, Inc. and hereby certifies that the attached material is a true and correct copy of National Union Fire Insurance Company of Pittsburgh, PA Policy No. 25414413, including all endorsements thereto, as determined from the records of National Union Fire Insurance Company of Pittsburgh, PA, issued to, The Restaurant Group, ETAL 888 7th Ave, 34th Floor, New York, NY 10106 with an effective date of October 6, 2011.

I have hereunto subscribed my name this December 1, 2017.

Richard C Perkins
Global Operations Executive
Risk Specialists Companies Insurance Agency, Inc.

POLICYHOLDER NOTICE

Thank you for purchasing insurance from the Chartis companies. Chartis insurance companies generally pay compensation to brokers and independent agents, and may have paid compensation in connection with your policy. You can review and obtain information about the nature and range of compensation paid by Chartis insurance companies to brokers and independent agents in the United States by visiting our website at www.chartisinsurance.com/producercompensation or by calling 1-800-706-3102.

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CrisisResponse® is a crisis management enhancement bui t-in to our commercia umbre a po icies, providing professiona support, inc uding a 24-hour hot ine with access to c aims specia ists, and immediate first do ar coverage outside of the umbre a imit in the event of a catastrophic casua ty crisis.

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- An optiona coverage enhancement that amends the definition of CrisisResponse costs to inc ude expenses incurred by the reca , inspection or disposa of a product that resu ts in a crisis event.

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Value-Added Policyholder Advantages

Continued

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Contact

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FORMS SCHEDULE

Named Insured: THE RESTAURANT GROUP, ETAL

Policy Number: BE 25414413
Effective 12:01 AM: October 6, 2011

End't. No.	Form Name	Form Number/ Edition Date	
	UMB PRIME DEC	80518	(11/09)
	POLICYHOLDER DISC - NOTICE OF TERRORISM INS COVG	96556	(01/08)
	UMB PRIME JACKET	80517	(11/09)
	SCHEDULE OF UNDERLYING	UNDSCH	(05/99)
1	CRISISRESPONSE COVERAGE ENHANCEMENT ENDORSEMENT	94621	(05/07)
2	COVERAGE TERRITORY ENDT.	89644	(07/05)
3	VIOLATION OF ECONOMIC OR TRADE SANCTIONS COND. AM	99497	(06/08)
4	Duties in the Event of an Occurrence, Claim, or Su	83687	(01/10)
5	ACT OF TERRORISM SIR ENDORSEMENT	83049	(03/06)
6	NEW YORK AMENDATORY ENDORSEMENT	69898	(09/06)
7	AUTOMOBILE LIABILITY EXCLUSION	80399	(07/02)
8	Employee Benefits Liability Follow Form Endorsemen	95124	(07/07)
9	GARAGE KEEPERS LEGAL LIAB EXCL	83080	(09/03)
10	COMMERCIAL GENERAL LIABILITY LIMIT. ENDT	87043	(11/04)
11	LEAD EXCLUSION ENDORSEMENT	86471	(02/06)
12	PROFESSIONAL LIABILITY EXCLUSION ENDORSEMENT	83093	(05/05)
13	FUNGUS EXCLUSION ENDT	82449	(06/03)
14	FOREIGN LIABILITY EXCLUSION	80431	(07/02)
15	BROAD FORM NAMED INSURED AMENDATORY ENDORSEMENT	95581	(09/07)
16	EMPLOYERS LIABILITY EXCLUSION	83070	(09/03)
17	LIQUOR LIABILITY LIMITATION ENDT	83085	(09/03)

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Commercial Umbrella Liability Policy With CrisisResponse®

DECLARATIONS

The company issuing this po icy is indicated by an "X" in the box to the eft of the company's name.

- ☐ Chartis Property Casua ty Company
- ☐ American Home Assurance Company
- ☐ Chartis Casua ty Company
- ☐ Commerce & Industry Insurance Company
- ☐ Granite State Insurance Company
- ☐ I inois Nationa Insurance Company
- ☒ Nationa Union Fire Insurance Company of Pittsburgh, Pa.
- ☐ New Hampshire Insurance Company
- ☐ The Insurance Company of the State of Pennsy vania

(each of the above being a capita stock company)

Administrative/Mailing Address: 175 Water Street, New York, NY 10038
Telephone No. 212-458-5000

POLICY NUMBER: BE 25414413 **RENEWAL OF:** NEW

ITEM 1. NAMED INSURED: THE RESTAURANT GROUP, ETAL

MAILING ADDRESS: 888 7TH AVE, 34TH FLOOR
NEW YORK, NY 10106

ITEM 2. POLICY PERIOD: FROM: October 6, 2011 **TO:** October 6, 2012
(At 12:01 A.M., standard time, at the address of the Named Insured stated above.)

ITEM 3. LIMITS OF INSURANCE

The Limits of Insurance, subject to the terms of this po icy, are:

A.	$25,000,000	**Each Occurrence**
B.	$25,000,000	**General Aggregate** (in accordance with Section IV. Limits of Insurance)
C.	$25,000,000	**Products-Completed Operations Aggregate** (in accordance with Section IV. Limits of Insurance)
D.	$250,000	**CrisisResponse Sublimit of Insurance**
E.	$50,000	**Excess Casualty CrisisFund Limit of Insurance**

ITEM 4. SCHEDULED UNDERLYING INSURANCE - See Schedule of Underlying Insurance

ITEM 5. SELF-INSURED RETENTION - $10,000 **Each Occurrence**

ITEM 6. PREMIUM AND PREMIUM COMPUTATION

ESTIMATED TOTAL ANNUAL EXPOSURE
RATES PER
MINIMUM PREMIUM
ADVANCE PREMIUM

[redacted]

ITEM 7. THIS POLICY INCLUDES THESE ENDORSEMENTS AT INCEPTION DATE: SEE ATTACHED SCHEDULE

PRODUCER NAME: AMWINS INSURANCE BROKERAGE OF CALIFORNIA
ADDRESS: 601 S. FIGUEROA STREET
SUITE 4350
LOS ANGELES, CA 90017

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Christopher G. Kopser
Authorized Representative or Countersignature (Where Applicable)

Date

Issue Date: 10/26/11

80518 (11/09)
AH2698 2 - 13000

POLICYHOLDER DISCLOSURE
NOTICE OF TERRORISM INSURANCE COVERAGE

Coverage for acts of terrorism is included in your policy. You are hereby notified that under the Terrorism Risk Insurance Act, as amended, that you have a right to purchase insurance coverage for losses resulting from acts of terrorism, as defined in Section 102(1) of the Act: The term "act of terrorism" means any act that is certified by the Secretary of the Treasury in concurrence with the Secretary of State, and the Attorney General of the United States to be an act of terrorism; to be a violent act or an act that is dangerous to human life, property, or infrastructure; to have resulted in damage within the United States, or outside the United States in the case of certain air carriers or vessels or the premises of a United States mission; and to have been committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion. Under your coverage, any losses resulting from certified acts of terrorism may be partially reimbursed by the United States Government under a formula established by the Terrorism Risk Insurance Act, as amended. However, your policy may contain other exclusions which might affect your coverage, such as an exclusion for nuclear events. Under the formula, the United States Government generally reimburses 85% of covered terrorism losses exceeding the statutorily established deductible paid by the insu rance company providing the coverage. The Terrorism Risk Insurance Act, as amended, contains a $100 billion cap that limits U.S. Government reimbursement as well as insurers' liability for losses resulting from certified acts of terrorism when the amount of such losses exceeds $100 billion in any one calendar year. If the aggregate insured losses for all insurers exceed $100 billion, your coverage may be reduced.

The portion of your annual premium that is attributable to coverage for acts of terrorism is [redacted] and does not include any charges for the portion of losses covered by the United States government under the Act.

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Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the **Named Insured** shown in the Declarations and any other person or organization qualifying as a **Named Insured** under this policy. The words "we," "us" and "our" refer to the company providing this insurance.

The word **Insured** means any person or organization qualifying as such under Section VII. Definitions.

Except for headings, words that appear in bold print have special meaning. See Section VII. Definitions.

In consideration of the payment of the premium and in reliance upon the statements in the Declarations, we agree to provide coverage as follows:

I. INSURING AGREEMENT - COMMERCIAL UMBRELLA LIABILITY

A. We 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 Injury 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**.

The amount we will pay for damages is limited as described in Section IV. Limits of Insurance.

B. This policy applies, only if:

1. the **Bodily Injury** or **Property Damage** is caused by an **Occurrence** that takes place anywhere, and the **Bodily Injury** or **Property Damage** occurs during the **Policy Period**; and

2. the **Personal Injury and Advertising Injury** is caused by an **Occurrence** that takes place anywhere arising out of your business, but only if the **Occurrence** was committed during the **Policy Period**.

C. 1. This policy applies to **Bodily Injury** or **Property Damage**, only if prior to the **Policy Period**, no **Insured** listed under subparagraphs 2a., 2b., 2c. or 2e. of Paragraph M. of Section VII., no executive officer or director listed under subparagraph 2d. of Paragraph M. of Section VII. and no employee authorized by you to give or receive notice of an **Occurrence**, claim or **Suit**, knew that the **Bodily Injury** or **Property Damage** had occurred, in whole or in part. If such an **Insured** or authorized employee knew, prior to the **Policy Period**, that the **Bodily Injury** or **Property Damage** had occurred, then any continuation, change or resumption of such **Bodily Injury** or **Property Damage** during or after the **Policy Period** will be deemed to have been known prior to the **Policy Period**.

2. **Bodily Injury** or **Property Damage** which occurs during the **Policy Period** and was not, prior to the **Policy Period**, known to have occurred by any **Insured** listed under subparagraphs 2a., 2b., 2c. or 2e. of Paragraph M. of Section VII., any executive officer or director listed under subparagraph 2d. of Paragraph M. of Section VII. or any employee authorized by you to give or receive notice of an **Occurrence** or claim, includes any continuation, change or resumption of that **Bodily Injury** or **Property Damage** after the end of the **Policy Period**.

D. **Bodily Injury** or **Property Damage** will be deemed to have been known to have occurred at the earliest time when any **Insured** listed under subparagraphs 2a., 2b., 2c. or 2e. of Paragraph M. of Section VII, any executive officer or director listed under subparagraph 2d. of Paragraph M. of Section VII. or any employee who was authorized by you to give or receive notice of an **Occurrence**, claim or **Suit**:

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1. reports all, or any part, of the **Bodily Injury** or **Property Damage** to us or any other insurer;

2. receives a written or verbal demand or claim for damages because of the **Bodily Injury** or **Property Damage**; or

3. becomes aware by any other means that **Bodily Injury** or **Property Damage** has occurred or has begun to occur.

E. Damages because of **Bodily Injury** include damages claimed by any person or organization for care, loss of services or death resulting at any time from the **Bodily Injury**.

F. If we are prevented by law or statute from paying damages covered by this policy on behalf of the **Insured**, then we will indemnify the **Insured** for those sums in excess of the **Retained Limit**.

II. INSURING AGREEMENT-CRISISRESPONSE® AND EXCESS CASUALTY CRISISFUND®

A. **CrisisResponse**

We will advance **CrisisResponse Costs** directly to third parties on behalf of the **Named Insured**, regardless of fault, arising from a **Crisis Management Event** first commencing during the **Policy Period**, up to the amount of the **CrisisResponse Sublimit of Insurance**.

B. **Excess Casualty CrisisFund**

We will pay **Crisis Management Loss** on behalf of the **Named Insured** arising from a **Crisis Management Event** first commencing during the **Policy Period**, up to the amount of the **Excess Casualty CrisisFund Limit of Insurance**.

C. A **Crisis Management Event** will first commence at the time during the **Policy Period** when a **Key Executive** first becomes aware of an **Occurrence** that gives rise to a **Crisis Management Event** and will end when we determine that a crisis no longer exists or when the **CrisisResponse Sublimit of Insurance** has been exhausted, whichever occurs first.

D. There will be no **Retained Limit** applicable to **CrisisResponse Costs** or **Crisis Management Loss**.

E. Any advancement of **CrisisResponse Costs** or payment of **Crisis Management Loss** that we make under the coverage provided by this Section II. will not be a determination of our obligations under this policy, nor create any duty to defend any **Suit** under any other part of this policy.

III. DEFENSE PROVISIONS

A. We will have the right and duty to defend any **Suit** against the **Insured** that seeks damages for **Bodily Injury**, **Property Damage** or **Personal Injury and Advertising Injury** covered by this policy, even if the **Suit** is groundless, false or fraudulent when:

1. the total applicable limits of **Scheduled Underlying Insurance** have been exhausted by payment of **Loss** to which this policy applies and the total applicable limits of **Other Insurance** have been exhausted; or

2. the damages sought because of **Bodily Injury**, **Property Damage** or **Personal Injury and Advertising Injury** would not be covered by **Scheduled Underlying Insurance** or any applicable **Other Insurance**, even if the total applicable limits of either the **Scheduled Underlying Insurance** or any applicable **Other Insurance** had not been exhausted by the payment of **Loss**.

If we are prevented by law or statute from assuming the obligations specified under this provision, we will pay any expenses incurred with our consent.

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B. We will have no duty to defend the **Insured** against any **Suit** seeking damages for **Bodily Injury**, **Property Damage** or **Personal Injury and Advertising Injury** to which this insurance does not apply.

C. When we assume the defense of any **Suit** against the **Insured** that seeks damages covered by this policy, we will:

1. investigate, negotiate and settle the **Suit** as we deem expedient; and

2. pay the following supplementary payments to the extent that such payments are not covered by **Scheduled Underlying Insurance** or any applicable **Other Insurance**:

   a. premiums on bonds to release attachments for amounts not exceeding the applicable Limits of Insurance of this policy, but we are not obligated to apply for or furnish any such bond;

   b. premiums on appeal bonds required by law to appeal a judgment in a **Suit** for amounts not exceeding the applicable Limits of Insurance of this policy, but we are not obligated to apply for or furnish any such bond;

   c. all court costs taxed against the **Insured** in the **Suit**;

   d. pre-judgment interest awarded against the **Insured** on that part of the judgment within the applicable Limits of Insurance of this policy we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any pre-judgment interest accruing after we make such offer;

   e. post-judgment interest that accrues after entry of judgment on that part of the judgment within the applicable Limits of Insurance of this policy we pay and before we have paid, offered to pay or deposited in court that part of the judgment that is within the applicable Limits of Insurance of this policy; and

   f. the **Insured's** expenses incurred at our request or with our consent.

D. Except as provided in Paragraph A. above, we will have no duty to defend any **Suit** against the **Insured.** We will, however, have the right, but not the duty, to participate in the defense of any **Suit** and the investigation of any claim to which this policy may apply. If we exercise this right, we will do so at our own expense.

E. We will not defend any **Suit**, or pay any attorney fees or litigation expenses including, without limitation, the expenses described in Paragraph C. above that accrue after the applicable Limits of Insurance of this policy have been exhausted by the payment of **Loss** and we will have the right to withdraw from the further defense of such **Suit** by tendering control of said defense to the **Insured**.

IV. LIMITS OF INSURANCE

A. The Limits of Insurance shown in Item 3. of the Declarations and the rules below state the most we will pay for all damages under this policy regardless of the number of:

1. **Insureds**;

2. claims made or **Suits** brought;

3. persons or organizations making claims or bringing **Suits**; or

4. coverages provided under this policy.

B. The General Aggregate Limit stated in Item 3. of the Declarations is the most we will pay for all damages under this policy, except for:

1. damages included within the **Products-Completed Operations Hazard**; and

2. damages because of **Bodily Injury** or **Property Damage** to which this policy applies, caused by an **Occurrence** and resulting from the ownership, maintenance or use of an **Auto** covered under **Scheduled Underlying Insurance**.

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C. The Products-Completed Operations Aggregate Limit stated in Item 3C. of the Declarations is the most we will pay for all damages included in the **Products-Completed Operations Hazard**.

D. Subject to Paragraphs B. and C. above, the Each Occurrence Limit stated in Item 3A. of the Declarations is the most we will pay for the sum of all damages arising out of any one **Occurrence**.

E. Subject to Paragraphs B. and C. above, the most we will pay for damages under this policy on behalf of any person or organization to whom you are obligated by written **Insured Contract** to provide insurance such as is afforded by this policy is the lesser of the Limits of Insurance shown in Item 3. of the Declarations or the minimum Limits of Insurance you agreed to procure in such written **Insured Contract**.

F. This policy applies only in excess of the **Retained Limit**. If however, a policy shown in the Schedule of Underlying Insurance forming a part of this policy has a limit of insurance:

1. greater than the amount shown in such schedule, this policy will apply in excess of the greater amount of valid and collectible insurance; or

2. less than the amount shown in such schedule, this policy will apply in excess of the amount shown in the Schedule of Underlying Insurance forming a part of this policy.

G. If the total applicable limits of **Scheduled Underlying Insurance** are reduced or exhausted by the payment of **Loss** to which this policy applies and the total applicable limits of applicable **Other Insurance** are reduced or exhausted, we will:

1. in the event of reduction, pay excess of the remaining total applicable limits of **Scheduled Underlying Insurance** and any applicable **Other Insurance**; and

2. in the event of exhaustion, continue in force as underlying insurance.

H. Expenses incurred to defend any **Suit** or to investigate any claim will be in addition to the applicable Limits of Insurance of this policy. Provided, however, that if such expenses reduce the applicable limits of **Scheduled Underlying Insurance**, then such expenses will reduce the applicable Limits of Insurance of this policy.

I. The **CrisisResponse Sublimit of Insurance** is the most we will pay for all **CrisisResponse Costs** under this policy, regardless of the number of **Crisis Management Events** first commencing during the **Policy Period**. This **CrisisResponse Sublimit of Insurance** will be part of, not in addition to, the applicable Limit of Insurance.

J. The **Excess Casualty CrisisFund Limit of Insurance** is the most we will pay for all **Crisis Management Loss** under this policy, regardless of the number of **Crisis Management Events** first commencing during the **Policy Period**. This **Excess Casualty CrisisFund Limit of Insurance** will be in addition to the applicable Limit of Insurance.

K. We will have no obligation to advance **CrisisResponse Costs** when we determine that a **Crisis Management Event** has ended or when the **CrisisResponse Sublimit of Insurance** has been exhausted, whichever occurs first.

L. The Limits of Insurance of this policy apply separately to each consecutive annual period and to any remaining period of less than twelve (12) months, beginning with the inception date of the **Policy Period** shown in the Declarations, unless the **Policy Period** is extended after issuance for an additional period of less than twelve (12) months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance of this policy.

M. We will not make any payment under this policy unless and until:

1. the total applicable limits of **Scheduled Underlying Insurance** have been exhausted by the payment of **Loss** to which this policy applies and any applicable, **Other Insurance** have been exhausted by the payment of **Loss**, or

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2. the total applicable **Self-Insured Retention** has been satisfied by the payment of **Loss** to which this policy applies.

When the amount of **Loss** has been determined by an agreed settlement or a final judgment, we will promptly pay on behalf of the **Insured** the amount of such **Loss** falling within the terms of this policy. A agreed settlement means a settlement and release of liability signed by us, the **Insured** and the claimant or the claimant's legal representative.

V. EXCLUSIONS

A. Aircraft and Watercraft

This insurance does not apply to **Bodily Injury** or **Property Damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft or watercraft owned or operated by or rented or loaned to any **Insured**. Use includes operation and loading and unloading.

This exclusion applies even if the claims against any **Insured** allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that **Insured**, if the **Occurrence** which caused the **Bodily Injury** or **Property Damage** involved the ownership, maintenance, use or entrustment to others of any aircraft or watercraft that is owned or operated by or rented or loaned to any **Insured**.

This exclusion does not apply to a watercraft you do not own that is:

1. less than 26 feet long; and

2. not being used to carry persons or property for a charge.

B. Asbestos

This insurance does not apply to any liability arising out of:

1. the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of or exposure to asbestos, asbestos containing products or materials, asbestos fibers or asbestos dust;

2. any obligation of the **Insured** to indemnify any party because of damages arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of or exposure to asbestos, asbestos products, asbestos fibers or asbestos dust; or

3. any obligation to defend any **Suit** or claim against the **Insured** that seeks damages if such **Suit** or claim arises as the result of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of or exposure to asbestos, asbestos products, asbestos fibers or asbestos dust.

C. Contractual Liability

This insurance does not apply to any liability for which the **Insured** is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

1. that the **Insured** would have in the absence of a contract or agreement; or

2. assumed in an **Insured Contract**, provided **Bodily Injury** or **Property Damage** occurs subsequent to the execution of the **Insured Contract**. Solely for the purposes of liability assumed in an **Insured Contract**, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an **Insured** are deemed to be damages because of **Bodily Injury** or **Property Damage** and included in the Limits of Insurance of this policy, provided:

   a. liability to such party for, or for the cost of, that party's defense has also been assumed in the same **Insured Contract**; and

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b. such attorney fees and litigation expenses are for the defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this policy applies are alleged.

D. **Damage to Impaired Property or Property Not Physically Injured**

This insurance does not apply to **Property Damage** to **Impaired Property** or property that has not been physically injured, arising out of:

1. a defect, deficiency, inadequacy or dangerous condition in **Your Product** or **Your Work**; or

2. a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to **Your Product** or **Your Work** after it has been put to its intended use.

E. **Damage to Property**

This insurance does not apply to **Property Damage** to:

1. property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

2. premises you sell, give away or abandon, if the **Property Damage** arises out of any part of those premises;

3. property loaned to you;

4. personal property in the care, custody or control of the **Insured**;

5. that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the **Property Damage** arises out of those operations; or

6. that particular part of any property that must be restored, repaired or replaced because **Your Work** was incorrectly performed on it.

Paragraph 2. of this exclusion does not apply if the premises are **Your Work** and were never occupied, rented or held for rental by you.

Paragraphs 3., 4., 5. and 6. of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph 6. of this exclusion does not apply to **Property Damage** included in the **Products-Completed Operations Hazard**.

F. **Damage to Your Product**

This insurance does not apply to **Property Damage** to **Your Product** arising out of it or any part of it.

G. **Damage to Your Work**

This insurance does not apply to **Property Damage** to **Your Work** arising out of it or any part of it and included in the **Products-Completed Operations Hazard**.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

H. **Electronic Chatrooms or Bulletin Boards and Electronic Data**

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This insurance does not apply to **Personal Injury and Advertising Injury** arising out of an electronic chatroom or bulletin board the **Insured** hosts, owns, or over which the **Insured** exercises control. Additionally, this insurance does not apply to damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, "electronic data" means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

I. **Employees and Volunteers**

This insurance does not apply to liability of any employee or volunteer qualifying as an **Insured** under this policy arising out of **Bodily Injury**, **Property Damage** or **Personal Injury and Advertising Injury**:

1. to you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to an employee of yours while in the course of his or her employment or performing duties related to the conduct of your business, or to another volunteer of yours while performing duties related to the conduct of your business;

2. to the spouse, child, parent, brother or sister of such injured employee or volunteer as a consequence of subparagraph 1. above;

3. for which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in subparagraphs 1. or 2. above; or

4. arising out of his or her providing or failing to provide professional health care services.

Paragraphs 1., 2. and 3. shall not apply to any liability arising out of **Bodily Injury** or **Personal Injury and Advertising Injury** if such coverage is provided by **Scheduled Underlying Insurance.** Coverage under this policy for **Bodily Injury** or **Personal Injury and Advertising Injury** will follow the terms, definitions, conditions and exclusions of **Scheduled Underlying Insurance**, subject to the **Policy Period**, Limits of Insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by **Scheduled Underlying Insurance**.

J. **Employment Practices**

This insurance does not apply to any liability arising out of:

1. failure to hire any prospective employee or any applicant for employment;

2. dismissal, discharge or termination of any employee;

3. failure to promote or advance any employee; or

4. employment-related practices, policies, acts, omissions or misrepresentations directed at a present, past, future or prospective employee, including, but not limited to:

   a. coercion, harassment, humiliation or discrimination;
   b. demotion, evaluation, reassignment, discipline, or retaliation;
   c. libel, slander, humiliation, defamation, or invasion of privacy; or
   d. violation of civil rights.

This exclusion applies:

1. whether the **Insured** may be liable as an employer or in any other capacity; and

2. to any obligation to share damages with or repay someone else who must pay damages because of the injury.

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K. **Expected or Intended Injury**

This insurance does not apply to **Bodily Injury** and **Property Damage** expected or intended from the standpoint of the **Insured**. However, this exclusion does not apply to **Bodily Injury** or **Property Damage** resulting from the use of reasonable force to protect persons or property.

L. **Infringement of Copyright, Patent, Trademark or Trade Secret**

This insurance does not apply to **Personal Injury and Advertising Injury** arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

However, this exclusion does not apply to infringement, in your **Advertisement**, of copyright, trade dress or slogan.

M. **Liquor Liability**

This insurance does not apply to **Bodily Injury** or **Property Damage** for which any **Insured** may be held liable by reason of:

1. causing or contributing to the intoxication of any person;

2. the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

3. any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

However, this exclusion will not apply if coverage is provided for such **Bodily Injury** or **Property Damage** by **Scheduled Underlying Insurance**.

Coverage under this policy for such **Bodily Injury** or **Property Damage** will follow the terms, definitions, conditions and exclusions of **Scheduled Underlying Insurance**, subject to the **Policy Period**, Limits of Insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by **Scheduled Underlying Insurance**.

N. **Media and Internet Type Businesses**

This insurance does not apply to **Personal Injury and Advertising Injury** committed by any **Insured** whose business is:

1. advertising, broadcasting, publishing or telecasting;

2. designing or determining content of web-sites for others; or

3. an Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs U1., U2. and U3. of Section VII.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

O. "**No-Fault**, " "**Uninsured Motorist**" or "**Underinsured Motorist**" **Laws**

This insurance does not apply to any obligation of the **Insured** under any "No-Fault," "Uninsured Motorist" or "Underinsured Motorist" law, or any similar law.

P. **Nuclear Liability**

This insurance does not apply to:

1. any liability:

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a. with respect to which the **Insured** is also an **Insured** under a nuclear energy liability policy issued by the Nuclear Energy Liability-Property Insurance Association, Mutual Atomic Energy Liability Underwriters or the Nuclear Insurance Association of Canada, or would be an **Insured** under any such policy but for its termination upon exhaustion of its limit of liability;

b. resulting from the hazardous properties of nuclear material and with respect to which (1) any person or any organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any amendment or revision thereto, or any similar law; (2) the **Insured** is, or had this policy not been available would be, entitled to indemnity from the United States of America or any agency thereof under any agreement entered into by the United States of America or an agency thereof with any person or organization;

c. for **Bodily Injury** or **Property Damage** resulting from the hazardous properties of nuclear material if:

i) the nuclear material (1) is at any nuclear facility owned by the **Insured** or operated by the **Insured** or on the **Insured's** behalf or (2) has been discharged or dispensed therefrom;

ii) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by the **Insured** or on the **Insured's** behalf; or

iii) the **Bodily Injury** or **Property Damage** arises out of the furnishing by the **Insured** of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion c. applies only to **Property Damage** to such nuclear facility and any property thereat.

2. As used in this exclusion:

a. "hazardous properties" includes radioactive, toxic or explosive properties;

b. "nuclear material" means source material, special nuclear material or by-product material;

c. "source material," "special nuclear material" and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or any amendment or revision thereto ;

d. "spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

e. "waste" means any waste material (1) containing by-product material and (2) resulting from the operation by any person or organization of a nuclear facility included within the definition of nuclear facility below;

f. "nuclear facility" means:

i) any nuclear reactor;

ii) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel or (3) handling, processing or packaging wastes;

iii) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the **Insured's** custody at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235; or

iv) any structure, basin, excavation, premises or place prepared or used for storage or disposal of waste, and

includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

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g. "nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

h. **Property Damage** includes all forms of radioactive contamination of property.

Q. **Pollution**

This insurance does not apply to:

1. Any **Bodily Injury**, **Property Damage** or **Personal Injury and Advertising Injury** arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of **Pollutants** anywhere at any time;

2. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that the **Insured** or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of **Pollutants**; or

3. Any loss, cost or expense arising out of any claim or **Suit** by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing or in any way responding to, or assessing the effects of **Pollutants**.

However, Paragraph 1 of this exclusion will not apply if coverage for such **Bodily Injury** or **Property Damage** as is described in subparagraphs 1) through 6) below is provided by **Scheduled Underlying Insurance**:

1) **Products-Completed Operations Hazard**

Paragraph 1. of this exclusion does not apply with respect to **Bodily Injury** or **Property Damage** included within the **Products-Completed Operations Hazard** provided that **Your Product** or **Your Work** has not at any time been:

a) discarded, dumped, abandoned, thrown away; or

b) transported, handled, stored, treated, disposed of or processed as waste;

by anyone.

2) **Hostile Fire**

Paragraph 1. of this exclusion does not apply with respect to **Bodily Injury** or **Property Damage** arising out of heat, smoke or fumes from a **Hostile Fire**.

3) **Equipment to Cool, Dehumidify, or Heat the Building and Contractor/Lessee Operations**

Paragraph 1. of this exclusion does not apply to:

a) **Bodily Injury** sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment used to heat water for personal use, by the building's occupants or their guests;

b) **Bodily Injury** or **Property Damage** for which you may be held liable if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional **Insured** with respect to your ongoing operations performed for that additional **Insured** at such premises, site or location, and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any **Insured**, other than the additional **Insured**.

4) **Fuels, Lubricants and Other Operating Fluids - Mobile Equipment**

Paragraph 1. of this exclusion does not apply to:

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a) **Bodily Injury** or **Property Damage** arising out of the escape of fuels, lubricants or other operating fluids that are needed to perform normal electrical, hydraulic or mechanical functions necessary for the operation of **Mobile Equipment** or its parts if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the **Bodily Injury** or **Property Damage** arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured contractor or subcontractor; or

b) **Bodily Injury** or **Property Damage** sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you o on your behalf by a contractor or subcontractor.

5) **Fuels, Lubricants, Fluids, etc. - Auto**

Paragraph 1. of this exclusion does not apply to fuels, lubricants, fluids, exhaust gases or other similar **Pollutants** that are needed for or result from the normal electrical, hydraulic or mechanical functioning of an **Auto** covered by **Scheduled Underlying Insurance** or its parts, if:

a) the **Pollutants** escape, seep, migrate, or are discharged, dispersed or released directly from an **Auto** part designed by its manufacturer to hold, store, receive or dispose of such **Pollutants**; and

b) the **Bodily Injury** or **Property Damage** does not arise out of the operation of any equipment shown in Paragraphs 6b and 6c of the definition of **Mobile Equipment**.

6) **Upset, Overturn or Damage of an Auto**

Paragraph 1. of this exclusion does not apply to **Occurrences** that take place away from premises owned by or rented to an **Insured** with respect to **Pollutants** not in or upon an **Auto** covered by **Scheduled Underlying Insurance** if:

a) the **Pollutants** or any property in which the **Pollutants** are contained are upset, overturned or damaged as a result of the maintenance or use of an **Auto** covered by **Scheduled Underlying Insurance**; and

b) the discharge, dispersal, seepage, migration, release or escape of the **Pollutants** is caused directly by such upset, overturn or damage.

Coverage under this policy for such **Bodily Injury** or **Property Damage** as is described in subparagraphs 1) through 6) above will follow the terms, definitions, conditions and exclusions of **Scheduled Underlying Insurance**, subject to the **Policy Period**, Limits of Insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by **Scheduled Underlying Insurance**.

R. **Recall of Your Product, Your Work or Impaired Property**

This insurance does not apply to damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

1. **Your Product**;

2. **Your Work**; or

3. **Impaired Property;**

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

S. **Securities**

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This insurance does not apply to any liability arising out of:

1. any violation of any securities law or similar law or any regulation promulgated thereunder;

2. the purchase, sale, offer of sale or solicitation of any security, debt, insurance policy, bank deposit or financial interest or instrument;

3. any representations made at any time in relation to the price or value of any security, debt, insurance policy, bank deposit or financial interest or instrument; or

4. any depreciation or decline in price or value of any security, debt, insurance policy, bank deposit or financial interest or instrument.

T. **Unauthorized Use of Another's Name or Product**

This insurance does not apply to **Personal Injury and Advertising Injury** arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

U. **Various Personal Injury and Advertising Injury**

This insurance does not apply to **Personal Injury and Advertising Injury**:

1. caused by or at the direction of the **Insured** with the knowledge that the act would violate the rights of another and would inflict **Personal Injury and Advertising Injury**;

2. arising out of oral, written or electronic publication, in any manner, of material if done by or at the direction of any **Insured** with knowledge of its falsity;

3. arising out of oral, written or electronic publication, in any manner, of material whose first publication took place before the beginning of the **Policy Period**;

4. arising out of a criminal act committed by or at the direction of the **Insured**;

5. for which the **Insured** has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the **Insured** would have in the absence of the contract or agreement;

6. arising out of a breach of contract, except an implied contract to use another's advertising idea in your **Advertisement**;

7. arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your **Advertisement**; or

8. arising out of the wrong description of the price of goods, products or services stated in your **Advertisement**.

V. **Various Laws**

This insurance does not apply to any obligation of the **Insured** under any of the following:

1. the Employee Retirement Income Security Act of 1974 (including amendments relating to the Consolidated Omnibus Budget Reconciliation Act of 1985), or any amendment or revision thereto, or any similar law; or

2. any workers' compensation, disability benefits or unemployment compensation law, or any similar law.

W. **Violation of Communication or Information Law**

This insurance does not apply to any liability arising out of any act that violates any statute, ordinance or regulation of any federal, state or local government, including any amendment of or addition to such laws, that prohibits or limits the sending, transmitting or communicating of material or information.

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X. **War**

This insurance does not apply to **Loss**, costs, injury, damage, claim, dispute and/or or suit arising therefrom, caused directly or indirectly, in whole or in part, as a result of or in connection with war, whether declared or not, or any act or condition incident to war. War includes:

1. Civil war; or

2. Armed conflict between two or more nations, armed conflict between military forces of any origin, or warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

3. Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

VI. CONDITIONS

A. **Appeals**

If the **Insured** or the **Insured's** underlying insurers do not appeal a judgment in excess of the total applicable limits of **Scheduled Underlying Insurance**, we may elect to do so. If we appeal, we will be liable for, in addition to the applicable Limits of Insurance of this policy, all court costs, expenses incurred and interest on that amount of any judgment which does not exceed the applicable Limits of Insurance of this policy incidental to such an appeal.

B. **Audit**

We may audit and examine your books and records as they relate to this policy at any time during the period of this policy and for up to three (3) years after the expiration or termination of this policy.

C. **Bankruptcy or Insolvency**

Your bankruptcy, insolvency or inability to pay or the bankruptcy, insolvency or inability to pay of any of your underlying insurers will not relieve us from the payment of **Loss** covered by this policy. But under no circumstances will such bankruptcy, insolvency or inability to pay require us to drop down, replace or assume any obligation under **Scheduled Underlying Insurance**.

D. **Cancellation**

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancellation is to take effect.

2. We may cancel this policy. If we cancel because of non-payment of premium, we must mail or deliver to you not less than ten (10) days advance written notice stating when the cancellation is to take effect. If we cancel for any other reason, we must mail or deliver to you not less than ninety (90) days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Declarations will be sufficient to prove notice.

3. The **Policy Period** will end on the day and hour stated in the cancellation notice.

4. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final Premium will not be less than the pro rata share of the Minimum Premium shown in Item 6. of the Declarations.

5. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force and increased by our short rate cancellation table and procedure. Final premium will not be less than the short rate share of the Minimum Premium shown in Item 6 of the Declarations.

6. Premium adjustment may be made at the time of cancellation or as soon as practicable thereafter, but the cancellation will be effective even if we have not made or offered any refund of unearned premium. Our check

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or our representative's check, mailed or delivered, will be sufficient tender of any refund due you.

7. The first **Named Insured** in Item 1. of the Declarations will act on behalf of all other **Insureds** with respect to the giving and receiving of notice of cancellation and the receipt of any refund that may become payable under this policy.

8. Any of these provisions that conflict with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with that law.

E. **Change In Control**

If during the **Policy Period**:

1. the first **Named Insured** designated in Item 1. of the Declarations consolidates with or merges into, or sells all or substantially all of its assets to any person or entity; or

2. any person or entity acquires an amount of the outstanding ownership interests representing more than 50% of the voting or designation power for the election of directors of the first **Named Insured** designated in Item 1. of the Declarations, or acquires the voting or designation rights of such an amount of ownership interests;

this policy will continue in full force and effect as to **Bodily Injury** and **Property Damage** that occur prior to the effective date of such transaction and **Personal Injury and Advertising Injury** caused by an **Occurrence** that takes place prior to the effective date of such transaction.

Coverage will be afforded by this policy for **Bodily Injury** or **Property Damage** that occurs on or after the effective date of such transaction and **Personal Injury and Advertising Injury** caused by an **Occurrence** that takes place on or after the effective date of such transaction if the **Named Insured** notifies us of the transaction no later than ninety (90) days after the effective date of the transaction.

If the **Named Insured** fails to notify us within ninety (90) days of the effective date of such transaction coverage afforded by this policy will cease on the ninetieth (90th) day after the effective date of such transaction at 12:01 am standard time of the address of the **Named Insured** shown in Item 1. of the Declarations or the end of the **Policy Period**, whichever is earlier.

The provisions of paragraph E. shall only apply to transactions with third parties not under control or ownership of the **Named Insured** on the inception date of this policy.

F. **Changes**

Notice to any agent or knowledge possessed by any agent or any other person will not effect a waiver or change in any part of this policy. This policy can be changed only by a written endorsement that we make to this policy.

G. **Duties in the Event of an Occurrence, Claim or Suit**

1. You must see to it that we are notified as soon as practicable of an **Occurrence** that may result in a claim or **Suit** under this policy. To the extent possible, notice should include:

   a. how, when and where the **Occurrence** took place;

   b. the names and addresses of any injured persons and any witnesses; and

   c. the nature and location of any injury or damage arising out of the **Occurrence**.

2. If a claim is made or **Suit** is brought against any **Insured** which is reasonably likely to involve this policy, you must notify us in writing as soon as practicable.

   Written notice should be mailed, delivered, faxed or emailed to:

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Chartis Claims, Inc.
Excess Casualty Claims Department
Segmentation Unit
175 Water Street, 22nd Floor
New York, NY 10038
Fax: (866) 743-4376
Email: excessfnol@chartisinsurance.com

3. You and any other involved **Insured** must:

   a. immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or **Suit**;

   b. authorize us to obtain records and other information;

   c. cooperate with us in the investigation, settlement or defense of the claim or **Suit**; and

   d. assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the **Insured** because of injury or damage to which this insurance may also apply.

4. No **Insured** will, except at that **Insured's** own cost, voluntarily make a payment, assume any obligation or incur any expense, other than for first aid, without our consent.

H. **Headings**

The descriptions in the headings of this policy are solely for convenience and form no part of the terms and conditions of coverage.

I. **Inspection**

We have the right, but are not obligated, to inspect your premises and operations at any time. Our inspections are not safety inspections. They relate only to the insurability of your premises and operations and the premiums to be charged. We may give you reports on the conditions that we find. We may also recommend changes. We do not, however, undertake to perform the duty of any person or organization to provide for the health or safety of your employees or the public. We do not warrant the health and safety conditions of your premises or operations or represent that your premises or operations comply with laws, regulations, codes or standards.

J. **Legal Actions Against Us**

No person or organization has a right under this policy:

1. to join us a a party or otherwise bring us into a **Suit** asking for damages from an **Insured**; or

2. to sue us under this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an **Insured**; but we will not be liable for damages that are not payable under this policy or that are in excess of the applicable Limits of Insurance of this policy. An agreed settlement means a settlement and release of liability signed by us, the **Insured** and the claimant or the claimant's legal representative.

K. **Maintenance of Scheduled Underlying Insurance**

You agree that during the **Policy Period**:

1. you will keep **Scheduled Underlying Insurance** in full force and effect;

2. the terms, definitions, conditions and exclusions of **Scheduled Underlying Insurance** will not materially change;

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3. the total applicable limits of **Scheduled Underlying Insurance** will not decrease, except for any reduction or exhaustion of aggregate limits by payment of **Loss** to which this policy applies; and

4. any renewals or replacements of **Scheduled Underlying Insurance** will provide equivalent coverage to and afford limits of insurance equal to or greater than the policy being renewed or replaced.

If you fail to comply with these requirements, we will be liable only to the same extent that we would have, had you fully complied with these requirements.

L. **Other Insurance**

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.

M. **Premium**

The first **Named Insured** designated in Item 1. of the Declarations will be responsible for payment of all premiums when due.

The premium for this policy will be computed on the basis set forth in Item 6. of the Declarations. At the beginning of the **Policy Period**, you must pay us the Advance Premium shown in Item 6. of the Declarations.

When this policy expires or if it is cancelled, we will compute the earned premium for the time this policy was in force. If this policy is subject to audit adjustment, the actual exposure base will be used to compute the earned premium. If the earned premium is greater than the Advance Premium, you will promptly pay us the difference. If the earned premium is less than the Advance Premium, we will return the difference to you. But in any event, we will retain the Minimum Premium as shown in Item 6. of the Declarations for each twelve months of the **Policy Period**.

N. **Separation of Insureds**

Except with respect to the Limits of Insurance of this policy and rights or duties specifically assigned to the first **Named Insured** designated in Item 1. of the Declarations, this insurance applies:

1. as if each **Named Insured** were the only **Named Insured**; and

2. separately to each **Insured** against whom claim is made or **Suit** is brought.

O. **Transfer of Rights of Recovery**

1. If any **Insured** has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The **Insured** must do nothing after loss to impair these rights and must help us enforce them.

2. Any recoveries will be applied as follows:

   a. any person or organization, including the **Insured**, that has paid an amount in excess of the applicable Limits of Insurance of this policy will be reimbursed first;

   b. we then will be reimbursed up to the amount we have paid; and

   c. lastly, any person or organization, including the **Insured** that has paid an amount over which this policy is excess is entitled to claim the remainder.

Expenses incurred in the exercise of rights of recovery will be apportioned among the persons or organizations, including the **Insured** in the ratio of their respective recoveries as finally settled.

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3. If, prior to the time of an **Occurrence**, you waive any right of recovery against a specific person or organization for injury or damage as required under an **Insured Contract**, we will also waive any rights we may have against such person or organization.

P. **Transfer of Your Rights and Duties**

Your rights and duties under this policy may not be transferred without our written consent.

If you die or are legally declared bankrupt, your rights and duties will be transferred to your legal representative, but only while acting within the scope of duties as your legal representative. However, notice of cancellation sent to the first **Named Insured** designated in Item 1 of the Declarations and mailed to the address shown in this policy will be sufficient notice to effect cancellation of this policy.

Q. **Unintentional Failure to Disclose**

Your failure to disclose all hazards existing as of the inception date of the policy will not prejudice you with respect to the coverage afforded by this policy, provided that any such failure or omission is not intentional.

R. **Violation of Economic or Trade Sanctions**

If coverage for a claim or **Suit** under this Policy is in violation of any United States of America economic or trade sanctions, including but not limited to, sanctions administered and enforced by the United States Treasury Department's Office of Foreign Assets Control ("OFAC"), then coverage for that claim or **Suit** will be null and void.

VII. DEFINITIONS

A. **Advertisement** means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

1. notices that are published include material placed on the Internet or on similar electronic means of communication; and

2. regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

B. **Auto** means:

1. a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

2. any other land vehicle that is subject to a compulsory or financial responsibility law in the state where it is licensed or principally garaged.

However, **Auto** does not include **Mobile Equipment**.

C. **Bodily Injury** means bodily injury, sickness or disease sustained by any person, including death, mental anguish, mental injury, shock or humiliation resulting from any of these at any time.

D. **Crisis Management Event** means an **Occurrence** that in the good faith opinion of a **Key Executive** of the **Named Insured**, in the absence of **Crisis Management Services**, has or may result in:

1. damages covered by this policy that are in excess of the total applicable limits of **Scheduled Underlying Insurance** or the **Self-Insured Retention**; and

2. significant adverse regional or national media coverage.

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Crisis Management Event will include, without limitation, man-made disasters such as explosions, major crashes, multiple deaths, burns, dismemberment, traumatic brain injury, permanent paralysis, or contamination of food, drink or pharmaceuticals, provided that any damages arising out of any of the aforementioned must be covered under this policy.

E. **Crisis Management Firm** means any firm that is shown in Schedule A, Approved Crisis Management Firms attached to and forming part of this policy, which is hired by you to perform **Crisis Management Services** in connection with a **Crisis Management Event**.

F. **Crisis Management Loss** means the following amounts incurred during a **Crisis Management Event**:

1. amounts for the reasonable and necessary fees and expenses incurred by a **Crisis Management Firm** in the performance of **Crisis Management Services** for the **Named Insured** solely arising from a covered **Crisis Management Event**; and

2. amounts for reasonable and necessary printing, advertising, mailing of materials, or travel by directors, officers, employees or agents of the **Named Insured** or a **Crisis Management Firm** incurred at the direction of a **Crisis Management Firm**, solely arising from a covered **Crisis Management Event**.

G. **Crisis Management Services** means those services performed by a **Crisis Management Firm** in advising the **Named Insured** on minimizing potential harm to the **Named Insured** from a covered **Crisis Management Event** by maintaining and restoring public confidence in the **Named Insured**.

H. **CrisisResponse Costs** means the following reasonable and necessary expenses incurred during a **Crisis Management Event** directly caused by a **Crisis Management Event**, provided that such expenses have been pre-approved by us and may be associated with damages that would be covered by this policy:

1. medical expenses;

2. funeral expenses;

3. psychological counseling;

4. travel expenses;

5. temporary living expenses;

6. expenses to secure the scene of a **Crisis Management Event**; and

7. any other expenses pre-approved by the Company.

CrisisResponse Costs does not include defense costs or **Crisis Management Loss**.

I. **CrisisResponse Sublimit of Insurance** means the CrisisResponse Sublimit of Insurance shown in Item 3D. of the Declarations.

J. **Excess Casualty CrisisFund Limit of Insurance** means the Excess Casualty CrisisFund Limit of Insurance shown in Item 3E of the Declarations.

K. **Hostile Fire** means a fire that becomes uncontrollable or breaks out from where it was intended to be.

L. **Impaired Property** means tangible property, other than **Your Product** or **Your Work**, that cannot be used or is less useful because:

1. it incorporates **Your Product** or **Your Work** that is known or thought to be defective, deficient, inadequate or dangerous; or

2. you have failed to fulfill the terms of a contract or agreement;

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if such property can be restored to use by:

1. the repair, replacement, adjustment or removal of **Your Product** or **Your Work**; or

2. your fulfilling the terms of the contract or agreement.

M. **Insured** means:

1. the **Named Insured**;

2. if you are designated in the declarations as:

   a. an individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner;

   b. a partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

   c. a limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers;

   d. an organization other than a partnership, joint venture or limited liability company, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders;

   e. a trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees;

3. your employees other than your executive officers (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business;

4. your volunteer workers only while performing duties related to the conduct of your business;

5. any person (other than your employee or volunteer worker) or organization while acting as your real estate manager;

6. your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy;

7. any person or organization, other than the **Named Insured**, included as an additional insured under **Scheduled Underlying Insurance**, but not for broader coverage than would be afforded by such **Scheduled Underlying Insurance**.

Notwithstanding any of the above:

a. no person or organization is an **Insured** with respect to the conduct of any current, past or newly formed partnership, joint venture or limited liability company that is not designated as a **Named Insured** in Item 1 of the Declarations; and

b. no person or organization is an **Insured** under this policy who is not an **Insured** under applicable **Scheduled Underlying Insurance**. This provision shall not apply to any organization set forth in the definition of **Named Insured** in Paragraph R. 2 and 3.

N. **Insured Contract** means that part of any contract or agreement pertaining to your business under which any **Insured** assumes the tort liability of another party to pay for **Bodily Injury** or **Property Damage** to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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Insured Contract does not include that part of any contract or agreement:

1. that indemnifies a railroad for **Bodily Injury** or **Property Damage** arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

2. that indemnifies an architect, engineer or surveyor for injury or damage arising out of:

   a. preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

   b. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

3. under which the **Insured**, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the **Insured's** rendering or failure to render professional services, including those shown in subparagraph 2. above and supervisory, inspection, architectural or engineering activities.

O. **Key Executive** means the Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, President, General Counsel or general partner (if the **Named Insured** is a partnership) of the **Named Insured** or sole proprietor (if the **Named Insured** is a sole proprietorship). A **Key Executive** also means any other person holding a title designated by you and approved by us, which title is shown in Schedule B, Additional Key Executives attached to and forming part of this policy.

P. **Loss** means those sums actually paid as judgments or settlements, provided, however, that if expenses incurred to defend a **Suit** or to investigate a claim reduce the applicable limits of **Scheduled Underlying Insurance**, then **Loss** shall include such expenses.

Q. **Mobile Equipment** means any of the following types of land vehicles, including any attached machinery or equipment:

1. bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

2. vehicles maintained for use solely on or next to premises you own or rent;

3. vehicles that travel on crawler treads;

4. vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

   a. power cranes, shovels, loaders, diggers or drills; or

   b. road construction or resurfacing equipment such as graders, scrapers or rollers;

5. vehicles not described in Paragraph 1., 2., 3. or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

   a. air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

   b. cherry pickers and similar devices used to raise or lower workers;

6. vehicles not described in Paragraph 1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not **Mobile Equipment**, but will be considered **Autos**:

a. equipment designed primarily for

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i) snow removal;

ii) road maintenance, but not construction or resurfacing; or

iii) street cleaning;

b. cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

c. air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, **Mobile Equipment** does not include any land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law are considered **Autos.**

R. **Named Insured** means:

1. any person or organization designated in Item 1. of the Declarations;

2. as of the inception date of this policy, any organization, except for a partnership, joint venture or limited liability company, in which you maintain an interest of more than fifty percent (50%) as of the effective date of this policy, provided that coverage provided to such organization under this paragraph does not apply to any **Bodily Injury** or **Property Damage** that occurred or any **Personal Injury and Advertising Injury** that was caused by an **Occurrence** that was committed before you acquired or formed such organization or after you ceased to maintain an interest of more than fifty percent (50%) in such organization; and

3. after the inception date of this policy, any organization, except for a partnership, joint venture or limited liability company, that you acquire or form during the **Policy Period** in which you maintain an interest of more than fifty percent (50%), provided that:

   a. coverage provided to such organization under this paragraph does not apply to any **Bodily Injury** or **Property Damage** that occurred or any **Personal Injury and Advertising Injury** that was caused by an **Occurrence** that was committed before you acquired or formed such organization or after you ceased to maintain an interest of more than fifty percent (50%) in such organization; and

   b. you give us prompt notice after you acquire or form such organization.

   Subject to the provisions of Paragraphs 3a. and 3b. above, a partnership, joint venture or limited liability company that you acquire or form during the **Policy Period** may be added as an **Insured** only by a written endorsement that we make a part of this policy.

   We may, at our option, make an additional premium charge for any organization that you acquire or form during the **Policy Period.**

You agree that any organization to which paragraphs 2. and 3. above apply, will be required to be included as an **Insured** under applicable **Scheduled Underlying Insurance**. If you fail to comply with this requirement, coverage under this policy will apply as though the organization was included as an **Insured,** under the highest applicable limit of **Scheduled Underlying Insurance**.

S. **Occurrence** means:

1. as respects **Bodily Injury** or **Property Damage**, an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one **Occurrence**.

2. as respects **Personal Injury and Advertising Injury**, an offense arising out of your business that causes **Personal Injury and Advertising Injury**. All damages that arise from the same, related or repeated injurious

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

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material or act will be deemed to arise out of one **Occurrence**, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants.

T. **Other Insurance** means a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy.

However, **Other Insurance** does not include **Scheduled Underlying Insurance,** the **Self-Insured Retention** or any policy of insurance specifically purchased to be excess of this policy affording coverage that this policy also affords.

U. **Personal Injury and Advertising Injury** means injury arising out of your business, including consequential **Bodily Injury**, arising out of one or more of the following offenses:

1. false arrest, detention or imprisonment;

2. malicious prosecution;

3. the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or on behalf of its owner, landlord or lessor;

4. oral or written publication, in any manner, of material that slanders or libels a person or organization, or disparages a person's or organization's goods, products or services;

5. oral or written publication, in any manner, of material that violates a person's right of privacy;

6. the use of another's advertising idea in your **Advertisement**; or

7. infringement upon another's copyright, trade dress or slogan in your **Advertisement**.

V. **Policy Period** means the period of time from the inception date shown in Item 2. of the Declarations to the earlier of the expiration date shown in Item 2. of the Declarations or the effective date of termination of this policy.

W. **Pollutants** means any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

X. **Products-Completed Operations Hazard** means all **Bodily Injury** and **Property Damage** occurring away from premises you own or rent and arising out of **Your Product** or **Your Work** except:

1. products that are still in your physical possession; or

2. work that has not yet been completed or abandoned. However, **Your Work** will be deemed completed at the earliest of the following times:

   a. when all of the work called for in your contract has been completed;

   b. when all of the work to be done at the job site has been completed if your contract calls for work at more than one job site; or

   c. when that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

   Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

Products-Completed Operations Hazard does not include **Bodily Injury** or **Property Damage** arising out of:

1. the transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the loading or unloading of that vehicle by any **Insured**;

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2. the existence of tools, uninstalled equipment or abandoned or unused materials.

Y. **Property Damage** means:

1. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use will be deemed to occur at the time of the physical injury that caused it; or

2. loss of use of tangible property that is not physically injured. All such loss of use will be deemed to occur at the time of the **Occurrence** that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

Z. **Retained Limit** means:

1. the total applicable limits of **Scheduled Underlying Insurance** and any applicable **Other Insurance** providing coverage to the **Insured**; or

2. the **Self-Insured Retention** applicable to each **Occurrence** that results in damages not covered by **Scheduled Underlying Insurance** nor any applicable **Other Insurance** providing coverage to the **Insured**.

AA. **Scheduled Underlying Insurance** means:

1. the policy or policies of insurance and limits of insurance shown in the Schedule of Underlying Insurance forming a part of this policy; and

2. automatically any renewal or replacement of any policy in Paragraph 1. above, provided that such renewal or replacement provides equivalent coverage to and affords limits of insurance equal to or greater than the policy being renewed or replaced.

Scheduled Underlying Insurance does not include a policy of insurance specifically purchased to be excess of this policy affording coverage that this policy also affords.

BB. **Self-Insured Retention** means the amount that is shown in Item 5. of the Declarations.

CC. **Suit** means a civil proceeding in which damages because of **Bodily Injury**, **Property Damage**, or **Personal Injury and Advertising Injury** to which this policy applies are alleged. **Suit** includes:

1. an arbitration proceeding in which such damages are claimed and to which the **Insured** must submit or does submit with our consent; or

2. any other alternative dispute resolution proceeding in which such damages are claimed and to which the **Insured** submits with our consent.

DD. **Your Product** means:

1. any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

   a. you;

   b. others trading under your name; or

   c. a person or organization whose business or assets you have acquired; and

2. containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or

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products.

Your Product includes:

1. warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **Your Product**; and

2. the providing of or failure to provide warnings or instructions.

Your Product does not include vending machines or other property rented to or located for the use of others but not sold.

EE. **Your Work** means:

1 work or operations performed by you or on your behalf; and

2. materials, parts or equipment furnished in connection with such work or operations.

Your Work includes:

1. warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **Your Work**; and

2. the providing of or failure to provide warnings or instructions.

IN WITNESS WHEREOF, the Insurer has caused this Policy to be signed by its President, Secretary and Authorized Representative.

SECRETARY PRESIDENT

This Policy shall not be valid unless signed below at the time of issuance by an authorized representative of the insurer.

Christopher G. Kopser
Authorized Representative

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SCHEDULE OF UNDERLYING INSURANCE

Issued to: THE RESTAURANT GROUP, ETAL

Policy Number: BE 25414413

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

TYPE OF POLICY OR COVERAGE	INSURER, POLICY NO. AND POLICY PERIOD	LIMITS
GENERAL LIABILITY	Aspen Specia ty Ins Co 10/06/11 10/06/12	$1,000,000 EACH OCCURRENCE $2,000,000 GENERAL AGGREGATE $2,000,000 PER LOCATION AGGREGATE $2,000,000 PRODUCTS/C. OPS. AGGREGATE Defense Expenses are in addition to the imit
LIQUOR LIABILITY	Aspen Specia ty Ins Co 10/06/11 10/06/12	$1,000,000 EACH COMMON CAUSE $2,000,000 AGGREGATE Defense Expenses are in addition to the imit
EMPLOYEE BENEFITS LIABILITY	Aspen Specia ty Ins Co 10/06/11 10/06/12	$1,000,000 EACH EMPLOYEE $1,000,000 AGGREGATE RETRO DATE: 10/5/2011 Defense Expenses are in addition to the imit

Christopher G. Kopser
AUTHORIZED REPRESENTATIVE

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

ENDORSEMENT No. 1

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

CrisisResponse Coverage Enhancement Endorsement

This policy is amended as follows:

It is understood and agreed that in every instance in which the phrase "CrisisResponse Sublimit of Insurance" is referenced in this policy and/or its endorsements, the phrase "CrisisResponse Limit of Insurance" shall be substituted.

Section IV. LIMITS OF INSURANCE, Paragraph I. is deleted in its entirety and replaced by the following:

I. The **CrisisResponse Limit of Insurance** is the most we will pay for all **CrisisResponse Costs** under this policy, regardless of the number of **Crisis Management Events** first commencing during the **Policy Period**. This **CrisisResponse Limit of Insurance** will be i addition to the applicable Limit of Insurance.

All other terms, conditions, definitions and exclusions of this policy remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

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Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

ENDORSEMENT No. 2

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

COVERAGE TERRITORY ENDORSEMENT

This endorsement modifies insurance provided under the following:

Payment of loss under this policy shall only be made in full compliance with all United States of America economic or trade sanction laws or regulations, including, but not limited to, sanctions, laws and regulations administered and enforced by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC").

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89644 (7/05)
AH2421
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Christopher G. Kopser
Authorized Representative

ENDORSEMENT No. 3

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy With CrisisResponse®

Violation of Economic or Trade Sanctions Condition Amendment Endorsement

This policy is amended as follows:

Section VI. CONDITIONS, Paragraph R. **Violation of Economic or Trade Sanctions** is deleted in its entirety.

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

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Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

ENDORSEMENT No. 4

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Duties in the Event of an Occurrence, Claim or Suit and
Schedule A - Approved Crisis Management Firms

Solely as respects coverage provided by **Section II INSURING AGREEMENT - CRISISRESPONSE℠ AND EXCESS CASUALTY CRISIS FUND®**, the following conditions are added to Section VI. Conditions, Paragraph G. Duties i the Event of an Occurrence, Claim or Suit:

You must report any **Crisis Management Event** to us within twenty-four (24) hours of the time that a **Key Executive** first becomes aware of an **Occurrence** that gives rise to a **Crisis Management Event** or as soon as practicable to be eligible for the advancement of **CrisisResponse Costs** and the payment of **Crisis Management Loss**.

Notice of a **Crisis Management Event** may be given by calling 1-877-244-3100. If notice is given by telephone, written notice will be given as soon as practicable thereafter. Written notice should include:

1. how, when and where the **Crisis Management Event** is taking o took place;
2. the names and addresses of any injured persons and any witnesses; and
3. the nature and location of any injury or damage arising out of the **Crisis Management Event**.

Written notice should be mailed, e-mailed, or delivered to:

Chartis Claims, Inc.
Excess Casualty Claims Department
Segmentation Unit
175 Water Street, 22nd Floor
New York, NY 10038
Fax: (866) 743-4376
E-mail: excessfnol@chartisinsurance.com

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

Christopher G. Kopser
Authorized Representative or
Countersignature (Where Applicable)

SCHEDULE A

THE FOLLOWING PUBLIC RELATIONS FIRMS ARE APPROVED CRISIS RESPONSE VENDORS:

FIRM ADDRESS	CONTACT INFORMATION	EMERGENCY TELEPHONE	SERVICES OFFERED
Abernathy MacGregor Group			
501 Madison Avenue New York, NY 10022	**James T. MacGregor** (212) 371-5999 Office (646) 236-3271 Cell (212) 752-0723 Fax (212) 343-0818 Home jtm@abmac.com **Rhonda Barnat** (212) 371-5999 Office (917) 912-6378 Cell (212) 752-0723 Fax (646) 478-8740 Home rb@abmac.com	(917) 912-6378	Public Relations. Crisis Management and Threat & Vulnerability Assessment.
611 W. Sixth Street, Suite 1880 Los Angeles, CA 90017	**Ian D. Campbell** (213) 630-6550 Office (213) 489-3443 Cell (213) 489-3443 Fax (818) 957-5650 Home (818) 541-0954 Home Fax idc@abmac.com	(818) 750-4392 (917) 940-3476	
Ann Barks Public Relations (Southeastern United States)			
896 Cross Gates Boulevard Slidell, LA 70461	**Ann W. Barks** (985) 847-0750 Direct (985) 290-8304 Cell abarkspr@bellsouth.net	(985) 290-8304	Public Relations and Crisis Management
Bright Light Marketing Group (Hawaii Only)			
1001 Bishop Street, Suite 900 Honolulu, Hawaii 96813-3429	**Charlene Lo Chan** (808) 275-3007 Direct (808) 524-6441 Office (808) 781-7733 Cell (808) 524-8115 Fax charlene@brightlightmarketing.com		Public Relations and Crisis Management
Dix & Eaton			
Dix & Eaton 200 Public Square Suite 1400 Cleveland, OH 44114-2316	**Matt Barkett** (216) 241-3073 Direct (216) 241-3073 Cell mbarkett@dix-eaton.com	(216) 241-3073	Public Relations. Crisis Management and Threat & Vulnerability Assessment

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FIRM ADDRESS	CONTACT INFORMATION	EMERGENCY TELEPHONE	SERVICES OFFERED
Edelman			
200 E. Randolf Drive Chicago, IL 60601	**William R. Keegan** (312) 240-2624 Direct (312) 240-3000 Office (312) 240-2900 Fax (312) 927-8424 Cell bill.keegan@edelman.com	(312) 927-8424	Public Relations. Crisis Management and Threat & Vulnerability Assessment
Edward Howard and Company			
1100 Superior Ave., Suite 1600 Cleveland, OH 44114	**Wayne Hill** (216) 298-4630 Direct (216) 781-2400 Office (216) 408-1211 Cell whill@edwardhoward.com **Kathy Cupper Obert** (216) 298-4620 Direct (216) 781-2400 Office (330) 730-5500 Cell kobert@edwardhoward.com **Chuck Vella** (937) 223-7386 Direct (973) 228-1141 Office (937) 603-5795 Cell cvella@edwardhoward.com **Allen Pfenninger** (216) 298-4653 Direct (216) 781-2400 Office (216) 554-4455 Cell apfenninger@edwardhoward.com	(216) 408-1211	Public Relations. Crisis Management and Threat & Vulnerability Assessment
Fleishman-Hilliard International Communications, Inc.			
John Hancock Center 875 N. Michigan Avenue, Suite 3300 Chicago, IL 60611-1901	**David Saltz** (312) 751-3530 Direct (312) 751-8878 Office (312) 203-2114 Cell (312) 751-8191 Fax david.saltz@fleishman.com		Public Relations. Crisis Management and Threat & Vulnerability Assessment
1615 L Street NW, Suite 1000 Washington, D.C. 20036-5610	**Benjamin (Ben) Kincannon** (617) 69200501 Office (508) 314-4154 Cell (617) 267-5905 Fax ben.kincannon@fleishman.com		
Levick Strategic Communications, LLC			
1900 M Street NW Washington, D.C. 20036	**Gene Grabowski** (202) 973-1351 Direct (202) 270-6560 Cell (202) 973-1301 Fax ggrabowski@levick.com	(202) 270-6560	Public Relations. Crisis Management and Threat & Vulnerability Assessment

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FIRM ADDRESS	CONTACT INFORMATION	EMERGENCY TELEPHONE	SERVICES OFFERED
Lexicon Communications Corp.			
520 Bellmore Way Pasadena, CA 91103	**Steven B. Fink** (626) 683-9333 Direct (626) 683-9200 Ext. 225 Office (626) 253-1519 Cell (626) 449-7659 Fax sfink@lexiconcorp.com	(626) 683-9333	Public Relations. Crisis Management and Threat & Vulnerability Assessment
Marsh, Inc. (Reputational Risk & Crisis Management Group f/k/a Kroll Associates)			
1166 Avenue of the Americas New York, NY 10036	**Ilene Merdinger** (212) 345-1690 Direct (914) 924-1040 Cell (212) 948-8638 Fax ilene.merdinger@marsh.com	(914) 924-1040	Public Relations. Crisis Management and Threat & Vulnerability Assessment
	Larry Walsh (212) 345-2765 Direct (917) 841-8839 Cell (212) 948-8638 Fax larry.walsh@marsh.com		
1255 23rd Street NW Washington, D.C. 20037	**Robert Wilkerson** (202) 263-7920 Direct (202) 256-4931 Cell (202) 263-7900 Fax robert.wilkerson@marsh.com		
Robinson Lerer & Montgomery			
1345 Avenue of the Americas 4th Floor New York, NY 10105	**Michael Gross** (646) 805-2003 Direct (646) 805-2000 Office (917) 853-0620 Cell (718) 788-5281 Home mgross@rlmnet.com	(646) 805-2000	Public Relations. Crisis Management and Threat & Vulnerability Assessment
	Patrick S. Gallagher (646) 805-2007 Direct (646) 805-2000 Office (917) 328-9333 Cell (646) 805-2829 Fax (914) 232-4256 Home pgallagher@rlmnet.com		
Sard Verbinnen & Co.			
630 Third Avenue, 9th Floor New York, NY 10017	**George Sard** (212) 687-8080 Office (212 687-8344 Fax gsard@sardverb.com	(917) 750-4392	Public Relations. Crisis Management and Threat & Vulnerability Assessment

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FIRM ADDRESS	CONTACT INFORMATION	EMERGENCY TELEPHONE	SERVICES OFFERED
Sard Verbinnen & Co. (cont.)			
190 S. LaSalle Street, Suite 1600 Chicago, IL 60603	**Brad Wilks** (312) 895-4740 Direct (312) 895-4700 Office (312) 895-4747 Fax bwilks@sardverb.com		
275 Battery Street, Suite 480 San Francisco, CA 94111	**Paul Kranhold** (415) 618-8750 Office (415) 568-9580 Fax pkranhold@sardverb.com		
Sitrick and Company, Inc.			
655 Third Avenue, 22nd Floor New York, NY 10017	**Jeffrey S. Lloyd** (212) 660-6393 Direct (212) 573-6100 Office (310) 963-2850 Cell (212) 573-6165 Fax jeff_lloyd@sitrick.com	(310) 358-1011	Public Relations. Crisis Management and Threat & Vulnerability Assessment
1840 Century Park East, Suite 800 Los Angeles, CA 90067	**Michael S. Sitrick** (310) 788-2850 Direct (310) 788-2855 Fax mike_sitrick@sitrick.com		
The Rogers Group			
1875 Century Park East, Suite 300 Los Angeles, CA 90067	**Lynne M. Doll** (310) 552-4108 Direct (310) 552-6922 Office (310) 552-9052 Fax ldoll@rogerspr.com	(310) 552-6922	Public Relations. Crisis Management and Threat & Vulnerability Assessment
The Torrenzano Group			
The Lincoln Building 200 East 4 nd Street, Suite 2112 New York, NY 10165-2112	**Richard Torrenzano** (212) 681-1700 Ext. 111 Direct (212) 681-6961 Fax richard@torrenzano.com		Public Relations. Crisis Management and Threat & Vulnerability Assessment
	Edward A. Orgon (212) 681-1700 Ext. 102 Direct (917) 539-4000 Cell (212) 681-6961 Fax ed@torrenzano.com		

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THE FOLLOWING NON-PUBLIC RELATIONS FIRMS ARE APPROVED CRISIS RESPONSE VENDORS:

FIRM ADDRESS	CONTACT INFORMATION	EMERGENCY TELEPHONE	SERVICES OFFERED
Coventry Health Care, Inc.			
3200 Highland Ave. Downers Grove, IL 60515	**Michael Lacroix** (914) 223-4463 Cell (786) 513-7690 Fax jxlacroix@cvty.com	(888) 552-5378	Psychological Counseling, Medical Case Management, Medical Cost Projection and Containment.
D.A.R., Inc.			
4 Iris Drive Scarborough, Maine 04074	**David W. Hunt** (207) 415-0735 Direct (207) 883-0493 Home (207) 883-2436 Fax dhunt12348@aol.com	(207) 415-0735	Crisis Management, Global Investigative Services, Access to National & International Intelligence Agencies, Crisis Management, Threat and Vulnerability Assessment.
GAB Robbins North America, Inc.			
560 Peoples Plaza, Suite 215 Newark, Delaware 19702	**Gail Oliver** (302) 838-1684 Direct (302) 521-4985 Cell (302) 838-1685 Fax oliverg@gabrobbins.com		Claims Investigative Services, Appraisal Services, Emergency Claims Services and Loss Call Center Operations.
Lombardi Associates			
277 Fairfield Road, Suite 305A Fairfield, NJ 07004	**Anthony Nastasi** (973) 271-8928 Direct (800) 550-0095 Office (310) 552-9052 Fax anthony.nastasi@lombardiassociates.com	(877) 715-2440	Psychological Counseling, Medical Case Management, Medical Cost Projection and Containment.
Meagher & Geer, P.L.L.P.			
33 S. Sixth Street, Suite 4400 Minneapolis, MN 55402	**Russell D. Melton** (612) 371-1317 Direct (612) 338-0661 Office (612) 338-8384 Fax (612) 964-1882 Cell rmelton@meagher.com	(612) 347-9118	Crisis Management and Threat & Vulnerability Assessment

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FIRM ADDRESS	CONTACT INFORMATION	EMERGENCY TELEPHONE	SERVICES OFFERED
T. J. Russo Consultants (Nationwide)			
99 Hillside Avenue, Suite X Williston Park, NY 11596	**Michael W. Russo** (516) 294-8644 Ext. 15 Direct (516) 747-1009 Fax (516) 456-3900 Cell mwrusso123@aol.com	(516) 456-3900	Fire Investigation and Analysis Services.

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ENDORSEMENT No. 5

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Policy with CrisisResponse®

Act of Terrorism Self-Insured Retention Endorsement

Solely with respect to any **Act of Terrorism**, this policy is amended as follows:

The **DECLARATIONS**, **ITEM 5. SELF-INSURED RETENTION** is amended to include the following additional Self-Insured Retention:

ACT OF TERRORISM SELF-INSURED RETENTION - $1,000,000 Each **Occurrence** (As respects all liability covered under this policy arising out of any **Act of Terrorism**.) The **Act of Terrorism Self-Insured Retention** will not be reduced or exhausted by **Defense Expenses**.

ITEM 6. OF THE DECLARATIONS, PREMIUM AND PREMIUM COMPUTATION is amended to include the following:

ACT OF TERRORISM PREMIUM [redacted]

Section IV. LIMITS OF INSURANCE, is amended to include the following additional provision:

The **Act of Terrorism Self-Insured Retention** applies whether or not there is any available **Scheduled Underlying Insurance** or **Other Insurance** providing coverage to the **Insured**. If there is **Scheduled Underlying Insurance** or **Other Insurance** providing coverage to the **Insured**, amounts received through such **Scheduled Underlying Insurance** or **Other Insurance** for payment of the **Loss** may be applied to reduce or exhaust the **Act of Terrorism Self-Insured Retention**. However, in no event will amounts received through such **Scheduled Underlying Insurance** or **Other Insurance** for the payment of **Defense Expenses** reduce the **Act of Terrorism Self-Insured Retention**.

Section III. DEFENSE PROVISIONS, Paragraphs A. 1. and A. 2., and D. are deleted in their entireties, and Paragraph A. is replaced by the following:

A. We will have no duty to defend any **Suit** against the **Insured.** We will, however, have the right, but not the duty, to participate in the defense of any **Suit** and the investigation of any claim to which this policy may apply. If we exercise this right, we will do so at our own expense.

Section VII. DEFINITIONS is amended to include the following additional definition:

Act of Terrorism means:

1. any act which is verified or recognized by the United States Government as an act of terrorism, including a certified "act of terrorism" defined by Section 102. Definitions., of the Terrorism Risk Insurance Act of 2002 and any revisions, amendments, or extensions thereto; or

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2. the use or threatened use of force or violence against person or property, or commission of an act dangerous to human life or property, or commission of an act that interferes with or disrupts an electronic or communication system, undertaken by any person or group, whether or not acting on behalf of or in connection with any organization, government, power, authority or military force, when the effect is to intimidate, coerce or harm a government, the civilian population or any segment thereof, or to disrupt any segment of the economy.

Defense Expenses means any payment allocated to a specific loss, claim or **Suit** for its investigation, settlement or defense, including but not limited to:

1. Attorney's fees and all other investigation, loss adjustment and litigation expenses;
2. Premiums on bonds to release attachments;
3. Premiums on appeal bonds required by law to appeal any claim or **Suit**;
4. Costs taxed against the **Insured** in any claim or **Suit**;
5. Pre-judgment interest awarded against the **Insured**;
6. Interest that accrues after entry of judgment.

It is understood and agreed that if any other endorsement to this policy excludes terrorism liability arising in one or more specified countries, the provisions of such exclusion shall supersede this endorsement.

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

2 - 13000

Christopher G. Kopser

Authorized Representative
or Countersignature (in States Where Applicable)

ENDORSEMENT No. 6

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

NEW YORK AMENDATORY ENDORSEMENT

Wherever used in this endorsement: 1)"Insurer" means the insurance company which issued this policy; and 2) "Insured" means the Named Corporation, Named Organization, Named Sponsor, Named Insured, Named Entity or Insured stated in the declarations page;

The policy is hereby amended as follows:

I. The Cancellation and When We Do Not Renew provisions are deleted and replaced by the following:

(a) CANCELLATION BY THE INSURED

This policy may be cancelled by the Insured by surrender of this policy to the Insurer or by giving written notice to the Insurer stating when thereafter such cancellation shall be effective. The Policy Period terminates at the date and hour specified in such notice, or at the date and time of surrender.

(b) CANCELLATION, NONRENEWAL AND CONDITIONAL RENEWAL BY THE INSURER

(i) If this policy has been in effect for sixty (60) or fewer days when cancellation notice is mailed, and this policy is not a renewal of a policy issued by the Insurer, then this policy may be cancelled by the Insurer by mailing or delivering to the Insured, and to his authorized insurance agent or broker, written notice stating when not less than twenty (20) days thereafter (fifteen (15) days thereafter if cancellation is because of one of the reasons for cancellation set forth in subsection (ii) below) the cancellation shall be effective. Notice of cancellation issued by the Insurer shall specify the grounds for cancellation.

(ii) If this policy has been in effect for more than sixty (60) days when notice of cancellation is mailed, or if this policy is a renewal of a policy issued by the Insurer, then this policy may be cancelled by the Insurer by mailing or delivering to the Insured, and to his authorized insurance agent or broker, written notice stating when not less than fifteen (15) days thereafter the cancellation shall be effective; however, such cancellation must be based on one or more of the following:

(A) nonpayment of premium, provided, however, that a notice of cancellation on this ground shall inform the first Named Insured of the amount due;
(B) conviction of a crime arising out of acts increasing the hazard insured against;
(C) discovery of fraud or material misrepresentation in the obtaining of the policy or in the presentation of a claim thereunder;
(D) after issuance of the policy or after the last renewal date, discovery of an act or omission, or a violation of any policy condition, that substantially and materially increases the hazard insured against, and which occurred subsequent to inception of the current Policy Period;
(E) material change in the nature or extent of the risk, occurring after issuance or last annual renewal anniversary date of the policy, which causes the risk of loss to be substantially and materially increased beyond that contemplated at the time the policy was issued or last renewed;
(F) required pursuant to a determination by the New York Superintendent of Insurance that continuation of the present premium volume of the Insurer would jeopardize the Insurer's solvency or be hazardous to the interests of Insureds of the Insurer, its creditors or the public;

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.
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(G) a determination by the New York Superintendent of Insurance that the continuation of the policy would violate, or would place the Insurer in violation of, any provision of the New York Insurance Law;

(H) revocation or suspension of an Insured's license to practice his profession; or

(I) where the Insurer has reason to believe that there is a probable risk or danger that the Insured will destroy or permit the destruction of the insured property for the purpose of collecting the insurance proceeds, provided, however, that:

(1) a notice of cancellation on this ground shall inform the Insured in plain language that the Insured must act within ten days if review by the department of the ground for cancellation is desired pursuant to item (3) of this subparagraph (I);

(2) notice of cancellation on this ground shall be provided simultaneously by the Insurer to the department; and

(3) upon written request of the Insured made to the department within ten days from the Insured's receipt of notice of cancellation on this ground, the department shall undertake a review of the ground for cancellation to determine whether or not the Insurer has satisfied the criteria for cancellation specified in this subparagraph; if after such review the department finds no sufficient cause for cancellation on this ground, the notice of cancellation on this ground shall be deemed null and void.

Notice of cancellation by the Insurer shall specify the grounds for cancellation.

(iii)

(A) The Insurer shall mail to the Insured, and to his authorized insurance agent or broker, written notice indicating the Insurer's intention:

(1) not to renew this policy;

(2) to condition its renewal upon change of limits, change in type of coverage, reduction of coverage, increased deductible or addition of exclusions or upon increased premiums in excess of ten percent; (exclusive of any premium increase generated as a result of increased exposure units or as a result of experience rating, loss rating, or audit);

(3) that the policy will not be renewed or will not be renewed upon the same terms, conditions or rates; such alternative renewal notice must be mailed or delivered on a timely basis and advise the Insured that a second notice shall be mailed at a later date indicating the Insurer's intention as specified in subparagraph (1) or (2) of this paragraph (A) and that coverage shall continue on the same terms, conditions and rates as expiring, until the later of the expiration date or sixty (60) days after the second notice is mailed or delivered; such alternative renewal notice also shall advise the insured of the availability of loss information and, upon written request, the request, the insurer shall furnish such loss information within ten (10) days to the insured.

(B) A nonrenewal notice as specified in subparagraph (1), a conditional renewal notice as specified in subparagraph (2), and the second notice described in subparagraph (3) of paragraph (A) of this subsection (iii) shall contain the specific reason or reasons for nonrenewal or conditional renewal, and set forth the amount of any premium increase and nature of any other proposed changes.

(C) The notice required by paragraph (A) of this subsection (iii) shall be mailed at least sixty (60) but not more than one hundred twenty (120) days in advance of the end of the Policy Period.

(D)

(1) If the Insurer employs an alternative renewal notice as authorized by subparagraph (3) of paragraph (A) of this subsection (iii), the Insurer shall provide coverage on the same terms, conditions, and rates as the expiring policy, until the later of the expiration date or sixty (60) days after the mailing of

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the second notice described in such subparagraph.

(2) Prior to the expiration date of the policy, in the event that an incomplete or late conditional renewal notice or a late nonrenewal notice is provided by the Insurer, the Policy Period shall be extended, at the same terms and conditions as the expiring policy, except that the annual aggregate limit of the expiring policy shall be increased in proportion to the policy extension, and at the lower of the current rates or the prior period's rates, until sixty (60) days after such notice is mailed, unless the Insured elects to cancel sooner.

(3) In the event that a late conditional renewal notice or a late nonrenewal notice is provided by the insurer on or after the expiration date of the policy, coverage shall remain in effect on the same terms and conditions of the expiring policy for another required policy period, and at the lower of the current rates or the prior period's rates unless the insured during the additional required policy period has replaced the coverage or elects to cancel, in which event such cancellation shall be on a pro rata premium basis.

(iv) Nothing herein shall be construed to limit the grounds for which the Insurer may lawfully rescind this policy or decline t pay a claim under this policy.

(v) Notice required herein to be mailed to the Insured shall be mailed to the Insured at the address shown in Item 1 of the Declarations.

Notice required herein to be mailed by the Insurer shall be sent by registered, certified or other first class mail. Delivery of written notice shall be equivalent to mailing.

Proof of mailing of such notice as aforesaid shall be sufficient proof of notice. The Policy Period shall terminate at the effective date and hour of cancellation or nonrenewal specified in such notice.

(vi) If this policy shall be cancelled by the Insured, the Insurer shall retain the customary short rate proportion of the premium hereon.

If this policy shall be cancelled by the Insurer, the Insurer shall retain the pro rata proportion of the premium hereon.

Payment or tender of any unearned premium by the Insurer shall not be a condition of cancellation, but such payment shall be made as soon as practicable.

All other terms, conditions and exclusions shall remain unchanged.

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2 - 13000

Christopher G. Kopser
Authorized Representative

ENDORSEMENT No. 7

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse℠

Automobile Liability Exclusion

This policy is amended as follows:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Automobile Liability

This insurance does not apply to any liability arising out of the ownership, maintenance, use or entrustment to others of any **Auto** owned or operated by or rented or loaned to any **Insured**se U includes operation and loading and unloading.

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.
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80399 (07/02)
AH0886

ENDORSEMENT No. 8

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Employee Benefits Liability Follow Form Endorsement

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Employee Benefits Liability

This insurance does not apply to any liability arising out of:

1. any violation of any of the responsibilities, obligations or duties imposed upon fiduciaries by **ERISA** or any similar law regarding workers' compensation, unemployment insurance, Social Security or any government-mandated disability benefits; or

2. any act, error or omission committed by or on behalf of the **Insured** solely in the performance of one or more of the following administrative duties or activities:

   a. giving counsel to employees with respect to a **Plan**;

   b. interpreting a **Plan**;

   c. handling of records in connection with a **Plan**;

   d. effecting enrollment, termination or cancellation of employees under a **Plan**; or

   e. any claim against an **Insured** solely by reason of his, her or its status as an administrator, the **Plan** or you as sponsor of the **Plan**.

However, this exclusion will not apply only if and to the extent that coverage for such liability is provided by **Scheduled Underlying Insurance**.

Coverage under this policy for such liability will follow the terms, definitions, conditions and exclusions of **Scheduled Underlying Insurance**, subject to the **Policy Period**, Limits of Insurance, premium and retentions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by **Scheduled Underlying Insurance.**

Section VII. DEFINITIONS is amended to include the following additional definitions:

ERISA as used in this endorsement means the Employee Retirement Income Security Act of 1974 (including amendments relating to the Consolidated Omnibus Budget Reconciliation Act of 1985), and including any amendment or revisions thereto, or any similar common or statutory law of the United States, Canada or any state or jurisdiction anywhere in the world to which a **Plan** is subject.

Plan as used in this endorsement means any plan, fund or program established anywhere in the world, regardless of whether it is subject to regulation under Title 1 of **ERISA** or meets the requirements for qualification under Section 401 of the Internal Revenue Code of 1986, as amended and which is:

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1. a welfare plan, as defined in **ERISA** or any similar law regarding workers' compensation, unemployment insurance, Social Security or any government-mandated disability benefits;

2. a pension plan as defined in **ERISA** or any similar law regarding workers' compensation, unemployment insurance, Social Security or any government-mandated disability benefits; or

3. a combination of 1. and 2. above.

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

2 - 13000

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

ENDORSEMENT No. 9

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no.: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Garage Keepers Legal Liability Exclusion Endorsement

This policy is amended as follows:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Garage Keepers Legal Liability

This insurance does not apply to any **Property Damage** to any **Auto** while such vehicle is on the **Insured's** premises or in any other way in the care, custody or control of the **Insured.**

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

ENDORSEMENT No. 10

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Commercial General Liability Limitation Endorsement

This policy is amended as follow:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Commercial General Liability

This insurance does not apply to Commercial General Liability.

However, if insurance for Commercial General Liability is provided by a policy listed in **Scheduled Underlying Insurance**:

1. This exclusion shall not apply; and
2. Coverage under this policy will follow the terms, definitions, conditions and exclusions of **Scheduled Underlying Insurance**, subject to the **Policy Period**, Limits of Insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be n broader than the coverage provided by **Scheduled Underlying Insurance**.

All other terms, definitions, conditions and exclusions remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

87043 (11/04)
AH1472
2 - 13000

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

ENDORSEMENT No. 11

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Lead Exclusion Endorsement

This policy is amended as follows:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Lead

This insurance does not apply to any liability arising out of lead or the lead content of products.

It is understood that to the extent any coverage may otherwise be provided under this policy or any of its endorsements, the provisions of this exclusion will supersede.

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

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2 - 13000

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

ENDORSEMENT No. 12

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Professional Liability Exclusion Endorsement

This policy is amended as follows:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Professional Liability

This insurance does not apply to any liability arising out of any act, error, omission, malpractice or mistake of a professional nature committed by the **Insured** or any person for whom the **Insured** is legally responsible.

It is understood this exclusion applies even if the claims against any **Insured** allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that **Insured.**

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

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83093 (05/05)
AH1668
2 - 13000

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

ENDORSEMENT No. 13

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no.: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Fungus Exclusion Endorsement

This policy is amended as follows:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

This insurance does not apply to:

Bodily Injury, **Property Damage** or **Personal Injury and Advertising Injury** or any other loss, injury, damage, cost or expense, including, but not limited to, losses, costs or expenses related to, arising from or associated with clean-up, remediation, containment, removal or abatement, caused directly or indirectly, in whole or in part, by:

a. Any **Fungus(i)**, **Molds(s)**, mildew or yeast, or

b. Any **Spore(s)** or toxins created or produced by or emanating from such **Fungus(i)**, **Mold(s)**, mildew or yeast, or

c. Any substance, vapor , gas, or other emission or organic or inorganic body or substance produced by or arising out of any **Fungus(i)**, **Mold(s)**, mildew or yeast, or

d. Any material, product, building component, building or structure, or any concentration of moisture, water or other liquid within such material, product, building component, building or structure, that contains, harbors, nurtures or acts as a medium for any **Fungus(i)**, **Mold(s)**, mildew, yeast, or **Spore(s)** or toxins emanating therefrom.

Paragraphs a., b., c. and d. above apply regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that loss, injury, damage, cost or expense.

It is understood that to the extent any coverage may otherwise be provided under this policy or any of its endorsements, the provisions of this exclusion will supercede.

Section VII. DEFINITIONS is amended to include the following additional definitions:

Fungus(i) includes, but is not limited to, any of the plants or organisms belonging to the major group Fungi, lacking chlorophyll, and including molds, rusts, mildews, smuts and mushrooms.

Mold(s) includes, but is not limited to, any superficial growth produced on damp or decaying organic matter or on living organisms, and fungi that produce molds.

Spore(s) means any dormant or reproductive body produced by or arising or emanating out of any **Fungus(i), Mold(s)**, mildew, plants, organisms or microorganisms.

All other terms, definitions, conditions and exclusions of this policy remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

2 - 13000

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

ENDORSEMENT No. 14

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse℠

Foreign Liability Exclusion

This policy is amended as follows:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Foreign Liability

This insurance does not apply to **Bodily Injury, Property Damage** or **Personal Injury and Advertising Injury** caused by an **Occurrence** that takes place outside the United States of America, its territories or possessions, Puerto Rico or Canada.

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.
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80431 (07/02)
AH0917

ENDORSEMENT No. 15

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy With CrisisResponse®

Broad Form Named Insured Amendatory Endorsement

This policy is amended as follows:

Section VII. Definitions, Paragraph R. Named Insured is deleted in its entirety and replaced by the following:

Named Insured means:

The person or organization first named as the **Named Insured** on the Declarations Page of this policy (the "First Named Insured"). **Named Insured** also includes:

1. any other person or organization named as a **Named Insured** on the Declarations Page;

2. any subsidiary or acquired company or corporation (including subsidiaries thereof) and any other legal entities (including joint ventures, limited liability companies and partnerships) in which:

   a. any **Insured** named as the **Named Insured** on the Declarations Page has more than 50% ownership in; or

   b. any **Named Insured** or its subsidiaries have entered into a contract or agreement to place insurance for each such entity; or

   c. any **Named Insured** or its subsidiaries exercise management or financial control.

The insurance afforded under this endorsement shall not be subject to any requirement of **Section VII.** Paragraph M. that the partnership, joint venture, or limited liability company be shown as a **Named Insured** in Item 1. o the Declarations.

Notwithstanding any of the above, no person or organization is an **Insured** under this policy who is not an **Insured** under applicable **Scheduled Underlying Insurance.**

All other terms, conditions, definitions and exclusions of this policy remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

95581 (9/07)
AH2262
2 - 13000

Christopher G. Kopser
Authorized Representative
or Countersignature (Where Applicable)

ENDORSEMENT No. 16

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no.: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Employers' Liability Exclusion Endorsement

This policy is amended as follows:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Employers' Liability

This insurance does not apply to **Bodily Injury** to any employee of the **Insured** arising out of and in the course of the employee's employment by the **Insured.**

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

ENDORSEMENT No. 17

This endorsement, effective 12:01 AM: October 6, 2011

Forms a part of policy no.: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Liquor Liability Limitation Endorsement

This policy is amended as follows:

Section V. EXCLUSIONS, Paragraph M. is deleted in its entirety and replaced by the following:

M. Liquor Liability

This insurance does not apply to **Bodily Injury** or **Property Damage** for which any **Insured** may be held liable by reason of:

1. causing or contributing to the intoxication of any person;

2. the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

3. any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

However, if insurance for such **Bodily Injury** or **Property Damage** is provided by a policy listed in the **Scheduled Underlying Insurance:**

1. This exclusion shall not apply; and

2. Coverage under this policy for such **Bodily Injury** or **Property Damage** will follow the terms, definitions, conditions and exclusions of **Scheduled Underlying Insurance,** subject to the **Policy Period,** Limits of Insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by **Scheduled Underlying Insurance.**

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

Christopher G. Kopser

Authorized Representative
or Countersignature (Where Applicable)

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

FORMS SCHEDULE

Named Insured: THE RESTAURANT GROUP, ETAL

Policy Number: BE 25414413
Effective 12:01 AM: April 2, 2012

End't. No.	Form Name	Form Number/ Edition Date
18	AMENDATORY ENDORSEMENT (CHANGE OF ADDRESS)	95577 (09/07)

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

CIFMSC
CI0226

ENDORSEMENT No. 18

This endorsement, effective 12:01 AM: April 2, 2012

Forms a part of policy no: BE 25414413

Issued to: THE RESTAURANT GROUP, ETAL

By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Commercial Umbrella Liability Policy with CrisisResponse®

Amendatory Endorsement (Change of Address)

This policy is amended as follows:

DECLARATIONS, **Item 1** is amended to read as follows:

NAMED INSURED: THE RESTAURANT GROUP, ETAL

MAILING ADDRESS: C/O JEANETTE STRANG
1350 AVENUE OF THE AMERICAS, SUITE 710
MANHATTAN, NY 10019

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

95577 (9/07)
AH2299
2 - 13000

Christopher G. Kopser
Authorized Representative
or Countersignature (Where Applicable)

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Attorneys for Defendants NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA. and ROOF DECK ENTERTAINMENT, LLC d/b/a 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 **DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**

Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub, by and through its attorneys of record, hereby submits the following Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's Complaint. This Motion is made and based upon the Memorandum of Points and Authorities, the Declaration of Bill Bonbrest, Appendix of Exhibits, all papers and pleadings on file herein, and any argument that may be heard.

DATED: December 4, 2017

HEROLD & SAGER

By: */s/ Andrew D. Herold*

ANDREW D. HEROLD, ESQ.
Nevada Bar No. 7378
NICHOLAS B. SALERNO, ESQ.
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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub. will bring the foregoing Motion to Dismiss for hearing on the 30th day of January, ~~2017~~ 2018 at the hour of 9:30 AM a.m./p.m. of said day, or as soon thereafter as counsel can be heard, in Department 26 of the District Court for Clark County, Nevada, located at the _____, Las Vegas, Nevada.

DATED: December 4, 2017

HEROLD & SAGER

By: */s/ Andrew D. Herold*

ANDREW D. HEROLD, ESQ.
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I.

INTRODUCTION

In this action, Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul") seeks to step into shoes (which are not available to it) to pursue claims for equitable subrogation and statutory subrogation against Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") (which it has no legal basis to pursue) and recover a settlement contribution (for which it had its own obligation to its insured to pay). While Marquee's Nightclub Management Agreement is referenced in St. Paul's complaint, St. Paul failed to attach a copy of the agreement to the complaint or set forth verbatim the provisions it relies upon in support of its claims. Instead, St. Paul paraphrased the provisions of the agreement in a misleading and incomplete manner, omitting crucial portions of the agreement which are fatal to its claims. As discussed herein, Marquee's Nightclub Management Agreement with St. Paul's insured contains a waiver of subrogation provision and an indemnity provision limited to uninsured losses. Pursuant to these provisions, St. Paul is precluded from bringing its equitable subrogation and statutory subrogation claims against Marquee. Accordingly, St. Paul has no legal or equitable basis to pursue subrogation against Marquee and its complaint should be dismissed with prejudice and without leave to amend.

II.

FACTUAL ALLEGATIONS RELEVANT TO THIS MOTION

The allegations contained in St. Paul's complaint are accepted as true for the purposes of this motion. *Seput v. Lacayo*, 122 Nev. 499, 501 (2006). Marquee does not accept or admit the truth of any of the allegations and restates the allegations as "fact" only for purposes of this motion.

A. <u>Underlying Action</u>

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"). (Redacted Complaint ("Comp.") ¶ 6.) Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee

Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. (Comp. ¶¶ 6-7.) 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. (*Id.* ¶¶ 8-10, Exhibit A.) 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.)

The Underlying Action went to trial and, on April 28, 2017, the jury returned a verdict in Moradi's favor and awarded compensatory damages in the amount of $160,500,000. (*Id.* ¶ 50.) During the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (*Id.*) National Union, St. Paul and other insurers contributed redacted amounts towards the settlement demand. (Comp. ¶¶ 51-54.)

B. <u>St. Paul's Claims Against Marquee</u>

In St. Paul's Third Cause of Action for Statutory Subrogation – Contribution Per NRS § 17.225, St. Paul alleges that per NRS § 17.225, it has a subrogation right against Marquee for contribution for a share of St. Paul's settlement payment. (Comp. ¶ 77.) St. Paul alleges that Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct and not by any affirmative actions or unreasonable conduct on the part of Cosmopolitan. (Comp. ¶¶ 81-82.) St. Paul further alleges that Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages. (*Id.* ¶ 82.) St. Paul alleges that its settlement payment on behalf of Cosmopolitan was in excess of Cosmopolitan's equitable share of Marquee and Cosmopolitan's common liability and, per NRS §§ 17.225 and 12.275, Marquee is liable to St. Paul for all sums paid by St. Paul as part of the settlement of the Underlying Action. (Comp. ¶¶ 83-84.)

In the Fourth Cause of Action for Equitable Subrogation – Express Indemnity, St. Paul alleges that "[p]er written agreement," Marquee was obligated to "indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (*Id.* ¶ 86.) St. Paul further

alleges that Marquee did not provide indemnification to Cosmopolitan for the claims asserted against it 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.* ¶¶ 89, 91.) St. Paul also alleges that "[p]er the terms of the written agreement", Marquee is liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (*Id.* ¶ 93.)

As discussed below, both of these causes of action fail as a matter of law because the Nightclub Management Agreement that St. Paul relies on as the basis for its equitable subrogation claim against Marquee, in actuality, precludes its claim and the Uniform Contribution Act relied upon by St. Paul does not allow for the relief sought against Marquee. Accordingly, St. Paul has no legal basis to pursue equitable subrogation or statutory subrogation against Marquee and Marquee respectfully requests that the Court grant its motion to dismiss St. Paul's complaint with prejudice.

C. <u>Nightclub Management Agreement</u>

As noted above, St. Paul's complaint expressly references a written agreement entered into between Marquee and Cosmopolitan (Comp. ¶¶ 86, 88, 93) and its equitable subrogation claim for express indemnity is based on same. Specifically, St. Paul's complaint alleges that "[p]er written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (Comp. ¶ 86.) St. Paul also alleges that "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." (Comp. ¶ 93.)

St. Paul's complaint does not attach the written agreement as an exhibit to the complaint nor does it set forth the provisions of the agreement verbatim. The written agreement referenced in St. Paul's complaint is a Nightclub Management Agreement, effective April 21, 2010, entered into between Marquee and Nevada Restaurant Venture 1, LLC ("NRV1") with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (Declaration of Bill Bonbrest ("Bonbrest Decl."), ¶ 3, Ex. A.) Cosmopolitan is identified as the Project Owner in the Recitals section of the Management Agreement. (*Id.*)

The Nightclub Management Agreement contains the following pertinent provisions:

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.

…

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.

. . .

12.2.5 All insurance coverages maintained by [Marquee] shall be primary to any insurance coverage maintained by any Owner Insured Parties (the "Owner Policies"), and any such Owner Policies shall be in excess of, and not contribute towards, [Marquee] Policies. The [Marquee] Policies shall apply separately to each insured against whom a claim is made, except with respect to the limits of the insurer's liability.

12.2.6 **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.

13. <u>Indemnity</u>

13.1 <u>By [Marquee]</u>. [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 <u>By [NRV1]</u>. [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.

. . .

20. <u>Third Party Beneficiary</u>

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.

…

28. <u>Attorneys' Fees</u>

In the event of a dispute between the Parties concerning the enforcement or interpretation of this Agreement, the prevailing party in such dispute, whether by legal proceedings or otherwise, shall be reimbursed immediately by the other party to such dispute for reasonably incurred attorneys' fees and other costs and expenses. In the event it becomes necessary for any party to retain legal counsel for the representation of its rights hereunder in or in connection with the bankruptcy of another party, such party, if successful therein, shall be reimbursed immediately by the party in bankruptcy for reasonably incurred attorneys' fees and other costs and expenses.

(Bonbrest Decl., ¶ 3, Ex.A.) (Emphasis added.)

III.

LEGAL STANDARDS

A complaint may be dismissed under NRCP 12(b)(5) where it appears beyond a doubt that the complaint could prove no set of facts, which, if true, would entitle the plaintiff to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008). While courts must accept as true all material factual allegations in a complaint for purposes of a motion to dismiss, the factual grounds for plaintiff's entitlement to relief "require more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("on a motion to dismiss, courts are not bound to accept as true legal conclusions couched as factual allegations") (internal quotations omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("It is the

conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth"); *Chaparro v. Carnival Corp.*, 693 F.3d 133, 1337 (11th Cir. 2012) ("if allegations are indeed more conclusory than factual, then the court does not have to assume their truth.")

While courts are generally limited to considering the complaint and materials that are submitted with and attached to the complaint, "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim," the "defendant may offer such document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (for example, "when a plaintiff's claim about insurance coverage is based on the contents of a coverage plan"); s*ee also United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153, fn. 3 (2nd Cir. 2002); *Martinez v. Victoria Partners*, 2014 WL 1268705 at *1, fn. 3 (D. Nev., Mar. 27, 2014); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998) (superseded by statute on other grounds); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

Further, given the Nevada Rules of Civil Procedure are "based in large part upon their federal counterparts, Nevada courts consider the federal courts' interpretation of the corresponding federal rule(s) as "strong persuasive authority" when interpreting the Nevada Rules of Civil Procedure. *See Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002) (citing *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119 (1990); *Nelson v. Heer*, 121 Nev. 832, 834 (2005); *Moseley v. Eight Judicial Dist. Court ex rel County of Clark*, 124 Nev. 654, 662-663 (2008). As discussed herein, the Management Agreement between Marquee and Cosmopolitan is integral to St. Paul's equitable subrogation claim for express indemnity against Marquee and, based on St. Paul's failure to attach the agreement to its complaint, Marquee is permitted to attach the agreement to the instant motion to show that St. Paul has failed to state a claim against Marquee for which relief can be granted pursuant to NRCP 12(b)(5). This "incorporation by reference" doctrine allows the Court to consider the Management Agreement attached to this motion without converting the motion into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068,

1076-1077 (9th Cir. 2005).

IV.

POINTS AND AUTHORITIES

A. St. Paul's Claim for Equitable Subrogation Based On Express Indemnity Against Marquee Is Barred By The Management Agreement and St. Paul's Policy.

St. Paul asserts that, as an insurer for Cosmopolitan, St. Paul is subrogated by law and principles of equity to the rights of Cosmopolitan for claims for express indemnity against Marquee. (Comp. ¶ 90.) However, pursuant to Section 12.2.6 of the Management Agreement, all policies issued to Cosmopolitan and Marquee are required to contain a waiver of subrogation against Cosmopolitan, Marquee and NRV1. (Bonbrest Decl., ¶ 3, Ex. A.) Upon information and belief, Marquee understands that the St. Paul policy contains a Waiver of Rights of Recovery Endorsement in which St. Paul agrees to waive its right to recovery for any payment it makes if Cosmopolitan agreed to waive its rights of recovery in a written contract.

Waiver of subrogation provisions have been universally enforced. *See Davlar Corp. v. Superior Court*, 53 Cal.App.4th 1121, 1125 (1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 26 Cal.App.4th 1194 (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.*, 169 Cal.App.4th 415 (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*, 254 Or. 226 (1969) (holding insurer waived its subrogation rights against various contractors); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 119 Wn.2d 334, 342 (1992) (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, 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.") (Citation omitted.) Pursuant to the waiver of subrogation provision in the Management Agreement, Marquee and Cosmopolitan agreed that the insurance policies issued to Marquee and Cosmopolitan would contain a waiver of subrogation against Marquee and Cosmopolitan, among

others. As noted above, it is Marquee's understanding that the St. Paul policy contains a waiver of subrogation endorsement in which St. Paul waives its right to recover any payments made on behalf of Cosmopolitan if agreed to by Cosmopolitan in a written contract.

Given the waiver of subrogation provision in the Management Agreement and the waiver of subrogation endorsement to the St. Paul policy, any rights to subrogation against Marquee have been expressly waived. To find otherwise would defeat the purpose of the waiver of subrogation provision and would be inconsistent with the terms of St. Paul's policy. Accordingly, St. Paul's claim for equitable subrogation for express indemnity fails as a matter of law.

B. St. Paul's Claim for Equitable Subrogation Against Marquee Also Fails As Marquee's Indemnity Obligation, If Any, Only Applies to Losses Not Covered By Insurance.

St. Paul alleges that, per written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action. (Comp. ¶ 86.) However, St. Paul's limited paraphrasing of the indemnity provision in the Management Agreement is inaccurate and misleading. Specifically, pursuant to Section 13.1 of the Management Agreement, Marquee agreed to indemnify, hold harmless and defend NRV1 and its respective parents, subsidiaries and affiliates (including Cosmopolitan), from and against losses 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 and not otherwise covered by the insurance required to be maintained under the Management Agreement. (Bonbrest Decl., ¶ 3, Ex. A) (Emphasis added.) The Management Agreement further 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." (Bonbrest Decl., ¶ 3, Ex. A) (Emphasis added.) St. Paul's failure to accurately cite the indemnity provision in the Management Agreement, including the underlined portion of the provision, is crucial as it clearly defeats St. Paul's claim.

As noted above, in considering Marquee's motion to dismiss, the Court is not bound by St. Paul's self-serving limited paraphrasing of the agreement set forth in the Complaint. *See Branch v.*

Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). Rather, the actual language of the indemnity provision in the Management Agreement may be properly considered by the Court for purposes of ruling on the instant motion as this provision is the basis for St. Paul's cause of action for equitable subrogation based upon express indemnity.

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. Adv. Op. 59 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331 (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.") As explained by the Nevada Supreme Court in *United Rentals*:

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

Id. at 229.

The exclusion of insurance payments from the definition of "losses" in the Management Agreement and the inclusion of the phrase "and not otherwise covered by the insurance required to be maintained hereunder" in the indemnity provision expressly limit any purported indemnity obligation by Marquee to uninsured losses. (Bonbrest Decl., ¶ 3, Ex. A, Sections 1, 13.1.) Further, construing the waiver of subrogation provision in Section 12.2.6 with the mutual indemnity provisions in Section 13 of the Management Agreement, it is clear that it was the intent of the parties to the Management Agreement to limit their respective indemnity obligations to losses paid out-of-pocket by the respective indemnitees and not losses paid by their insurers. (Bonbrest Decl., ¶ 3, Ex. A.) Cosmopolitan's defense in the underlying action and its joint and several liability for the verdict and resulting settlement were paid for by insurance. (Comp. ¶¶ 14, 21, 27, 51-54.) As Cosmopolitan has no losses that were not reimbursed by insurance, Cosmopolitan has no right to

indemnity from Marquee. Given Cosmopolitan has no right to indemnity from Marquee, St. Paul has no shoes to step into to pursue Marquee. Accordingly, given the expressed intent of the indemnity provision, the waiver of subrogation provision and the fact Cosmopolitan's insurers paid the settlement in the Underlying Action, not Cosmopolitan, St. Paul has no valid claim for express contractual indemnity and, therefore, its claim against Marquee fails on this basis as well.

C. <u>St. Paul's Claim for Statutory Subrogation for Contribution Against Marquee Pursuant to NRS 17.225 (Uniform Contribution Act) Fails As a Matter of Law.</u>

As with St. Paul's equitable subrogation claim based on express indemnity, its subrogation claim for contribution under the Uniform Contribution Act is similarly barred by the waiver of subrogation provision in the Management Agreement and the waiver of subrogation endorsement to the St. Paul policy. In addition, St. Paul's statutory subrogation claim for contribution fails as there is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death. *NRS 17.255*. In the Underlying Action, Cosmopolitan was found jointly and severally liable with Marquee on all of Moradi's asserted claims, including the intentional tort claims for assault, battery, and false imprisonment. (Comp., ¶ 14, Ex. B.) Given Cosmopolitan was found to have intentionally caused or contributed to Moradi's injury along with Marquee, such finding precludes Cosmopolitan (and St. Paul) from pursuing contribution from Marquee.

In addition, pursuant to NRS 17.265, when a tortfeasor has a right to indemnity from another tortfeasor, his claim is for indemnity and he has no right to contribution under the Uniform Contribution Act. As set forth above, the Management Agreement contained an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was covered by insurance. Given the existence of Cosmopolitan's contractually defined right to indemnity from Marquee, it has no right to contribution under the Uniform Contribution Act pursuant to NRS 17.265. Further, although St. Paul asserts a claim against Marquee under NRS 17.275, that statute is of no benefit to St. Paul as it only allows the insurer to be subrogated to the tortfeasor's right of contribution. Given Cosmopolitan has no statutory right of contribution against Marquee, St. Paul also has no statutory right of contribution

against Marquee. Accordingly, St. Paul's claim for statutory subrogation for contribution fails as a matter of law.

D. <u>Marquee Is Entitled to Recover Attorneys' Fees from St. Paul.</u>

In the complaint, St. Paul asserts that, pursuant to the written agreement, Marquee is liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (Comp. ¶ 93.) St. Paul is likely referring to Section 28 of the Management Agreement which provides that, in the event of a dispute regarding the enforcement or interpretation of the agreement, the prevailing party shall be reimbursed for reasonably incurred attorneys' fees and other costs and expenses. (Bonbrest Decl., ¶ 3, Ex. A.) However, for the reasons discussed above, St. Paul's claims against Marquee fail as a matter of law. Marquee previously informed St. Paul of its position and the baseless nature of its claims but St. Paul decided to file its frivolous complaint anyway. Given St. Paul's complaint fails to state a claim against Marquee upon which relief can be granted pursuant to NRCP 12(b)(5), this motion to dismiss should be granted and the Court should award Marquee its attorneys' fees and costs as the prevailing party under the terms of the Management Agreement and pursuant to NRCP 18.010.

V.

CONCLUSION

For foregoing reasons, St. Paul's complaint against Marquee should be dismissed with prejudice and without leave to amend.

DATED: December 4, 2017 HEROLD & SAGER

By: */s/ Andrew D. Herold*

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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 **DECLARATION OF BILL BONBREST IN SUPPORT OF DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**

I, Bill Bonbrest, declare as follows:

1. I am the Chief Operating Officer for TAO Group, a related entity to Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"). I am authorized to make this

declaration on behalf of Marquee.

2. The following declaration is based upon my personal knowledge of the facts and matters stated herein and could and would competently testify thereto if sworn as a witness in this matter.

3. Marquee entered into a Nightclub Management Agreement with Nevada Restaurant Venture 1, LLC with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. A true and correct copy of the Nightclub Management Agreement is filed under temporary seal as Exhibit A to Marquee's Appendix of Exhibits in support of its Motion to Dismiss Plaintiff's Complaint.

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

Dated this 4th day of December, 2017.

Bill Bonbrest

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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 **DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S APPENDIX OF EXHIBITS IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT** **[FILED UNDER TEMPORARY SEAL PURSUANT TO S.C.R. PART VII, RULE 3.2]**

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Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub, by and through its counsel, hereby submits the following Appendix of Exhibits in support of its Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's Complaint which has been filed under temporary seal pursuant to S.C.R. Part VII, Rule 3.2.

Exhibit A: Nightclub Management Agreement Between Nevada Restaurant Venture 1, LLC and Roof Deck Entertainment, LLC

DATED: December 4, 2017

HEROLD & SAGER

By: */s/ Andrew D. Herold*

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[FILED UNDER TEMPORARY SEAL PURSUANT TO S.C.R. PART VII, RULE 3.2]

EXHIBIT A

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DISTRICT COURT
CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1-25; inclusive, Defendants.	Case No. A-17-758902-C Dept. No. XXVI **DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**

COMES NOW, Defendant ASPEN SPECIALTY INSURANCE COMPANY, by and through their counsel, MESSNER REEVES LLP, and hereby moves to dismiss Plaintiff St. Paul Fire & Marine Insurance Company's Complaint.

This Motion is made and based upon the Memorandum of Points and Authorities, the declaration of Michael Uzenski and the exhibits thereto, all papers and pleadings on file with the Court in this action, and any argument that may be heard at the hearing of this Motion.

DATED this 13 day of December, 2017.

MESSNER REEVES LLP

Nicholas Hamilton

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Attorneys for Defendant Aspen Specialty Insurance Company

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendant Aspen Specialty Insurance Company will bring the foregoing Motion to Dismiss for hearing on 13 day of Feb., 2018 at the hour of 9:30 a.m. of said day, or as soon thereafter as counsel can be heard, in Department XXVI of the District Court for Clark County, Nevada, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada.

DATED this 13 day of December, 2017.

MESSNER REEVES LLP

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I.
INTRODUCTION

The present litigation filed by plaintiff, St. Paul Fire & Marine Insurance Company ("St. Paul"), contains two (2) causes of action against Aspen Specialty Insurance Company ("Aspen"). Both causes of action pled against Aspen are entitled "Equitable Subrogation". However, applying Nevada law to the underlying facts and causes of action pled against Aspen, dictates that *both* of St. Paul's putative causes of action must be dismissed. Specifically, St. Paul has neither standing nor any recognized legal basis in Nevada upon which to sue Aspen for recovery of settlement money that St. Paul, as an excess carrier, was obligated to pay, and voluntarily did pay, under the express terms and conditions of its own contract of insurance with its insured.

A. EQUITABLE SUBROGATION CLAIM BY EXCESS CARRIER AGAINST PRIMARY IS NOT RECOGNIZED IN NEVADA AND ALSO FAILS AS A MATTER OF LAW

First, St. Paul has no cognizable claim for Equitable Subrogation against Aspen as this is not a recognized cause of action in the State of Nevada as between excess and primary insurers when the insured has not suffered any non-covered damages. Further, if this Court were inclined to rule, as an issue of first impression in Nevada, that an excess carrier may maintain a cause of action for equitable subrogation against a primary carrier, as a matter of law, then St. Paul fails to plead any facts which could support its claim that the primary carrier, Aspen, failed to fulfill any duties to the excess carrier or the alleged insured, or that the insured suffered any damages which the excess carrier, St. Paul, has a right to pursue through a claim for equitable subrogation.

B. "STATUTORY" EQUITABLE SUBROGATION CLAIM BY EXCESS CARRIER AGAINST PRIMARY IS NOT RECOGNIZED IN NEVADA AND FAILS AS A MATTER OF LAW

Second, specific to St. Paul's putative "statutory" claim for Equitable Subrogation by an excess carrier against a primary carrier under NRS 686A.310, again, St. Paul lacks any standing to sue for subrogation under the express terms of this consumer protection statute and, this too, is not a

cognizable claim in the State of Nevada. Further, if this Court were inclined to rule, as a matter of first impression in Nevada, that an excess carrier may maintain a "statutory" cause of action for Equitable Subrogation against a primary carrier under 686A.310, as a matter of law, then St. Paul fails to plead any facts which would support its claim that primary carrier, Aspen, failed to fulfill any duties to the excess carrier or alleged insured, or that the insured suffered any damages which the excess carrier, St. Paul, has a right to pursue through a claim for Equitable Subrogation under the cited statute, NRS 686A.310.

St. Paul has no recognized legal basis upon which to pursue Aspen under either its first or second causes of action; Equitable Subrogation and "statutory" Equitable Subrogation under 686A.310 as between excess carrier and primary carrier as neither are recognized under Nevada law. Further, even if this Court were to decide to create new law for Nevada and recognize either cause of action in this case, both must fail as against Aspen as there are no facts to support that Aspen breached any duty nor that St. Paul has any cognizable damages under either legal or equitable claim, as a matter of law. Therefore, both causes of action fail and should be dismissed with prejudice immediately.

II.
LEGAL STANDARDS FOR RULE 12(B)(5) ANALYSIS

A motion brought under NRCP 12(b)(5) tests the legal sufficiency of a complaint. In reviewing a motion to dismiss under Rule 12(b)(5) of the Nevada Rules of Civil Procedure, the Court treats all factual allegations in the complaint as true and draws all *reasonable* inferences in favor of the plaintiff. See, Stubbs v. Strickland, 129 Nev., Adv. Op. 15, 297, P.3d 326, 329 (2013) (affirming dismissal). Those factual allegations, however, "*must be* legally sufficient to constitute the elements of the claim asserted." (emphasis added), Garcia v. Prudential Ins. Co. of Am., 129 Nev., Adv. Op. 3, 293 P.3d 869, 872 (2013) (affirming dismissal) (citation omitted); Sanchez v.

Wal-Mart Stores, Inc., 125 Nev. 818, 823, 221 P.2d 1276, 1280 (2009) (affirming dismissal of claims).

"Dismissal is appropriate when it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." Stubbs, 129 Nev., Adv. Op. 3, 297 P.3d at 329 (citations omitted). Dismissal is also appropriate where the complaint contains no factual allegation of an element of a claim. See Sproul Homes of Nevada v. State ex rel. Dep't of Highways, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (affirming dismissal of an inverse condemnation complaint for failure to make factual allegations of undue or unreasonable delay); Edgar v. Wagner, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985) (accord).

While courts are generally limited to considering the complaint and materials that are submitted with and attached to the complaint, "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim," the "defendant may offer such document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (for example, "when a plaintiff's claim about insurance coverage is based on the contents of a coverage plan"); see also United States v. Corinthian Colleges, 655 F.3d 984, 999 (9th Cir. 2011); Chambers v. Time Warner, Inc., 282 F.3d 147, 153, fn. 3 (2nd Cir. 2002); Martinez v. Victoria Partners, 2014 WL 1268705 at *1, fn. 3 (D. Nevada, Mar. 27, 2014); Parrino v. FHP, Inc., 146 F.3d 699, 705-706 (9th Cir. 1998) (superseded by statute on other grounds); Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010).

Further, given the Nevada Rules of Civil Procedure are "based in large part upon their federal counterparts, Nevada courts consider the federal courts' interpretation of the corresponding federal rule(s) as "strong persuasive authority" when interpreting the Nevada Rules of Civil

Procedure, as opposed to Nevada substantive law. See Executive Management, Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53 (2002) (citing Las Vegas Novelty v. Fernandez, 106 Nev. 113, 119 (1990); Nelson v. Heer, 121 Nev. 832, 834 (2005); Moseley v. Eighth Judicial Dist. Court ex rel County of Clark, 124 Nev. 654, 662-663 (2008). In its complaint, St. Paul expressly referred to Aspen's policy but failed to attach a copy of the policy to the complaint. Given the complaint's express reference to the policy, the Court may consider the Aspen primary commercial general liability policy attached hereto in ruling on Aspen's motion to dismiss without converting the motion into a motion for summary judgment. See Knievel v. ESPN, 393 F.3d 1068, 1076-1077 (9th Cir. 2005).

For the purposes of this motion Aspen does not accept nor admit, as true, any of the purported factual allegations pled by St. Paul in its complaint. In accordance the above cited standards, the Court will see that there are no set of facts under which Plaintiff can prove the necessary essential elements of the causes of action as required.

A. UNDERLYING ACTION

The relevant facts and allegations pled are similar, in great respect, as those identified in both National Union's Motion to Dismiss as well as the Motion to Dismiss filed by Roof Deck Entertainment in this matter. However, for purposes of a complete record, Aspen repeats and recites the operative allegations and history below.

The present action relates to a settlement agreed to by St. Paul, AIG, Zurich Insurance and Aspen following a jury trial in the personal injury case of *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"). (Redacted Complaint ("Comp.") ¶ 6.).

Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. (Comp.) ¶¶ 6-7.) 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. (Comp. ¶¶ 8-10). 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).

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 was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. (Id. ¶ 13.) The Court in the Underlying Action agreed with Moradi's position and imposed vicarious liability on Cosmopolitan for Marquee's actions. (Id.) The Court also ruled that Marquee and Cosmopolitan were jointly and severally liable for Moradi's damages claim. (Id. ¶ 14.)

The Underlying Action went to trial and, on April 28, 2017, the jury returned a verdict in Moradi's favor and awarded compensatory damages in the amount of $160,500,000. (Comp. ¶ 50.) During the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (Id.) National Union, St. Paul, Aspen and Zurich contributed redacted amounts towards the settlement demand. (Comp. ¶¶ 51-54.)

B. <u>INSURANCE POLICIES APPLICABLE TO THIS LITIGATION</u>

Marquee is an insured under National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al.

("National Union policy") (Comp. ¶ 23; Declaration of Michael F. Muscarella ("Muscarella Decl."), ¶ 2, Attached to National Union's Motion to Dismiss as Exhibit A.) The National Union umbrella policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. (Comp. ¶ 24; Muscarella Decl., ¶ 2). Cosmopolitan was an additional insured to the National Union umbrella policy with respect to the Underlying Action. (Comp. ¶ 25.) National Union acknowledged coverage for Cosmopolitan and Marquee under the National Union umbrella policy and provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a single defense firm. (Comp. ¶ 27.)

Marquee is also an insured under Aspen primary commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("Aspen Policy") (Comp. ¶ 15; Declaration of Michael Uzenski ("Uzenski Decl."), ¶ 2, Attached hereto as Exhibit A.) The Aspen primary commercial general liability policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (Comp. ¶ 16; Uzenski Decl., ¶ 2, Ex. A.) Cosmopolitan alleges that it was an additional insured to the Aspen primary commercial generally liability policy with respect to the Underlying Action. (Comp. ¶ 20.) Aspen acknowledged coverage for Cosmopolitan and Marquee under the Aspen primary commercial general liability policy and provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a single defense firm. (Comp. ¶ 21.)

Cosmopolitan is also an insured under St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 ("St. Paul policy") (Comp. ¶ 30.) The St. Paul umbrella policy provided for a limit of liability of $25,000,000 with respect to the Underlying Action. (Comp. ¶ 32.)

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C. ST. PAUL'S CLAIMS AGAINST ASPEN

In the First Cause of Action for Equitable Subrogation – Breach of the Duty to Settle, St. Paul alleges that Aspen breached its duty to settle by refusing to settle the Underlying Action in response to "pre-trial settlement demands within 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". (Comp. ¶¶ 60-61.) St. Paul further alleges that it is subrogated by law and principles of equity to the rights of Cosmopolitan for claims against Aspen 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 ¶¶ 64-66.)

However, dispositive of St. Paul's claims in Aspen's favor is the fact that St. Paul admits that Aspen never actually received a settlement demand at or within its policy limits (Comp. ¶¶ 39, 40, 41). Further, St. Paul's complaint never alleges that Aspen ever failed to notify St. Paul (or its insured) of any settlement demand at or within Aspen's policy limits. Therefore, taking the complaint allegations as true, St. Paul's complaint fails to allege the essential elements of this claim as against Aspen as Aspen never had the opportunity to settle with its policy limits and never failed to transmit such information to either St. Paul or its insured.

In the Second Cause of Action for Equitable Subrogation – Violations of NRS § 686A.310, St. Paul alleges that Aspen violated various portions of NRS § 686A.310(1), including: (1) misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue; (2) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; and (3) failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear. (Comp. ¶ 69.) St. Paul further alleges that, per NRS § 686A.310(2), Aspen is

liable for all damages caused by these violations and that St. Paul is subrogated by law and principles of equity to the rights of Cosmopolitan for claims against Aspen for violations of NRS § 686A.310(1). (Id. at ¶ 70, 73.) St. Paul asserts that, as a result of Aspen's alleged statutory violations, St. Paul was forced to, and without acting as a volunteer, to pay a redacted amount to satisfy the post-verdict settlement demand and consummate settlement of the Underlying Action to protect Cosmopolitan's interests as well as its own interests. (Id. at 74.)

However, once again, dispositive of St. Paul's claims in Aspen's favor is the fact that St. Paul admits that Aspen never actually received a settlement demand at or within its policy limits (Comp. ¶¶ 39, 40, 41). Further, St. Paul's complaint never alleges that Aspen ever failed to notify St. Paul (or its insured) of any settlement demand at or within Aspen's policy limits. Therefore, taking the complaint allegations as true, St. Paul's complaint fails to allege the essential elements of this claim as against Aspen as Aspen never had the opportunity to settle with its policy limits and never failed to transmit such information to either St. Paul or its insured.

As discussed in greater detail below, both of these putative causes of action fail as a matter of law as neither the Nevada Supreme Court nor any other Nevada state courts have recognized an excess insurer's right to pursue equitable subrogation against another primary insurer. Even if such a right were recognized, St. Paul's claims against Aspen fail as a matter of law given that Aspen never breached a duty to St. Paul or its insured, never had an opportunity to settle at or with its policy limits, never failed to notify St. Paul or its insured of an opportunity to settle within its policy limits and St. Paul's insured, Cosmopolitan, has never been forced to pay money for a claim that was not covered by its policies of insurance for which Cosmopolitan paid premiums to, and which were accepted by St. Paul.

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III.
POINTS AND AUTHORITIES

A. ST. PAUL LACKS ANY LEGAL BASIS TO ASSERT A CLAIM FOR EQUITABLE SUBROGATION FOR FAILURE TO SETTLE AGAINST ASPEN

St. Paul asserts two claims against Aspen; 1) Breach of the Duty to Settle, and 2) Violation of NRS 686A.310. Both causes of action are asserted under a theory Equitable Subrogation; arguing that St. Paul has the right to step into Cosmopolitan's shoes and assert Cosmopolitan's assignable claims. The first cause of action alleges Aspen breached its duty to settle. The second cause of action goes much further than the first, seeking to a create a form of "Statutory" Equitable Subrogation, allowing a third party insurer to perform an action for which the statute was never intended: to allow a third party claimant outside of direct contractual privity to assert a bad faith cause of action against another insurer.

St. Paul's claims against Aspen must fail. Although such claims have been referenced by Nevada federal court dicta addressing motions for summary judgment, the Nevada Supreme Court has not recognized Equitable Contribution as a cognizable claim among and between insurance carriers. See Colony Ins. Co. v. Colorado Cas. Ins. Co., 2016 WL 3360943 (D. Nev. June 9, 2016).

1. Equitable Subrogation- Breach of Duty To Settle.

Even if this Court were to determine equitable subrogation is a cognizable cause of action under Nevada law, St. Paul's allegations are insufficient to satisfy the test for such claims utilized the by the United State District Court of Nevada in *Colony*. St. Paul cannot show that its insured suffered non-insured damages, nor can it satisfy the requirements of a claim for Breach of Duty to Settle.

In *Colony*, the United States District Court relied upon the California case of Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal. App. 4th 1279, 1292, 77 Cal. Rptr. 2d 296, 303 (1998) to identify eight (8) essential elements of an excess insurer's cause of action for Equitable Subrogation against a primary insurer:

(1) the insured (Cosmopolitan) suffered a loss for which the defendant (Aspen) insurer is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer;

(2) the claimed loss was one for which the insurer (Excess) was not primarily liable;

(3) the insurer (Excess) has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable;

(4) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer;

(5) the insured has an existing, assignable cause of action against the defendant that the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer;

(6) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends;

(7) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and

(8) the insurer's damages are in a liquidated sum, generally the amount paid to the insured.

See Colony at *5.

a. St. Paul has not pled, and in all likelihood cannot plead, that its insured suffered any losses in excess of policy limits.

The eight part test for Equitable Subrogation applied in *Colony* requires that the "the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends." See Colony at *5. The failure of St. Paul's Complaint to identify or even allege damages on the part of its insured is fatal to its claim.

Equitable subrogation does not create a right to recovery in and of itself, because a subrogee's rights are "equal to and limited by the right of action possessed by its insured; the subrogee simply stands in the stead of the original claimant and is subject to all defenses which could have been asserted against that party." Smith v. Parks Manor, 197 Cal. App. 3d 872, 881, 243 Cal. Rptr. 256, 261 (Ct. App. 1987).

In National Union v. Tokio Marine, the California court of appeal upheld dismissal of an equitable subrogation claim because there was no allegation that Costco (the insured) suffered

harm as a result of Tokio Marine's bad faith conduct for which National Union paid. The court explained:

> Specifically, the settlement payment made by National Union was not a loss suffered by Costco, and Costco's payments toward the settlement were not reimbursed by National Union. Thus, neither of the payments claimed in this cause of action meet the specific requirements for pleading a bad faith subrogation claim.

233 Cal. App.4th at 1362, 185 Cal. Rptr.3d at 308.

The judgment awarded Moradi was satisfied when Marquee and Cosmopolitan's insurers tendered their policy limits. The available insurance policy limits were sufficient to cover the entirety of the settlement, and Neither Marquee nor Cosmopolitan were required to pay any monies toward the satisfaction of an excess judgment.

Whereas neither Marquee nor Cosmopolitan suffered any losses from the underlying action that were not insured, neither entity suffered any losses that can be recovered by St. Paul through subrogation.

b. St. Paul's claim for Bad Faith Breach of Duty to Settle must fail, as it cannot allege that Aspen had the opportunity to settle within its policy limits.

"Bad faith claims typically arise when the insured alleges that his or her insurer unreasonably refused to settle within policy limits, resulting in a judgment against the insured in excess of the policy limits." Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Tokio Marine & Nichido Fire Ins. Co., 233 Cal. App. 4th 1348, 1362, 185 Cal. Rptr. 3d 296, 308 (2015), as modified on denial of reh'g (Mar. 5, 2015), review denied (Apr. 22, 2015). "Generally, '[a]n insurer who has no opportunity to settle within policy limits is not liable for an excess judgment for failing to settle the claim.'" Allstate Ins. Co. v. Miller, 125 Nev. 300, 315, 212 P.3d 318, 328 (2009), citing, 14 Couch on Insurance 3d § 203:18 (2005).

St. Paul has not, and most likely cannot, allege that the Aspen ever had the opportunity to settle Moradi's claims within the limits of its policy. The smallest settlement demand identified in St. Paul's complaint is the Offer of judgment, served on December 10, 2015, in the amount of

$1,500,000.[1] This amount was in excess of Aspen's undisputed policy limits of $1,000,000.[2] The only other settlement demand specified in the complaint was for $26,000,000, an amount that was also in excess of Aspen's policy, conveyed on November 2, 2016.[3] The Complaint does not assert that Aspen had failed to notify its insured of either of the foregoing settlement demands.

Aspen cannot, as a matter of law, be found to have breached its duty to settle when it was never presented with an opportunity to settle.

2. Equitable Subrogation – Violations of NRS 686A.310

As state above, Nevada has not recognized the validity of a cause of action for equitable contribution among and between an excess and primary insurance carrier. In the event such a claim is ever allowed by the Court, St. Paul's claim for Equitable Subrogation stemming from alleged violations of Nevada's Unfair Claims Practices Act (NRS 686A et seq.) suffers from the same legal infirmity as the foregoing claim. St. Paul is unable establish that the its insured suffered any damages, as the entirety of the judgment in favor of Moradi was resolved within the available policy limits. Therefore, the elements necessary to allow equitable contribution, notwithstanding the viability of the underlying cause of action, are unmet.

a. St. Paul's lacks standing to assert a claims under NRS 686A.310.

Nevada Revised Statute 686A.310 does not create a statutory basis for claims of third party bad faith. Talbot v. Sentinel Ins. Co., No. 2:11-CV-01766-MMD, 2012 WL 3995562, at *3 (D. Nev. Sept. 10, 2012); citing Wilson v. Bristol W. Ins. Grp., No. 209-CV-00006-KJD-GWF, 2009 WL 3105602, at *2 (D. Nev. Sept. 21, 2009) see also, Gunny v. Allstate Ins. Co., 108 Nev. 344, 346 830 P.2d 1335 (1992). The Act designates certain acts by insurers taken against their insured to be unfair claims practices. This statute proscribes specific actions taken by an insurer which Nevada has deemed to be unfair whether or not they are related to a denial of insurance benefits. Hart v. Prudential Property & Cas. Ins. Co., 848 F. Supp. 900, 904 (D. Nev. 1994). Moreover, the

[1] Para 39
[2] Para 8
[3] Para 41

statute does not authorize an insurer to step into to the shoes of its insured to assert wrongdoing on the part of another insurer.

b. St. Paul's complaint fails to state a claim for violations of NRS 686A.310 as their insured suffered no non-insured losses.

As stated above, St. Paul can only assert the claims of its insured, and its insured suffered absolutely no damages. Even if the Court were to take every word of the Plaintiff's complaint as true, St. Paul's insured was never required to pay any monies out of its own resources. All of the losses arising from Moradi's claims were resolved within policy limits. There is, quite simply, nothing for St. Paul to recover on behalf of their insured.

c. St. Paul's rote, conclusory recitations of statute are insufficient to state a claim under NRS 686A.310.

St. Pauls' complaint alleges that the Aspen violated the following subsections of NRS 686A.310:

(1) Misrepresenting to Insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue.

There is no factual allegation set forth in the complaint that relates to this bare recitation of the statute. There is no overt allegation that there was any confusion as to the nature of Aspen's policy or that Aspen worked to conceal the existence of St. Paul's policy. There is no identification of "pertinent facts" that were "misrepresented to the insureds."

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under the insurance policies.

As discussed above, there is no allegation that Aspen ever had an opportunity to settle within its policy limits, nor does the complaint allege that Aspen failed to advise its insured of settlement opportunities.

(3) Failure to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

Again, there is no allegation that Aspen ever had an opportunity to settle within its policy limits. St. Paul's entire complaint is predicated upon two settlement demands made by Moradi, both

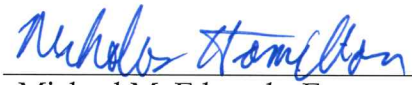
of which were in excess of Aspen's policy. The Complaint is otherwise devoid of any factual assertions that Aspen refused to negotiate or pass along information. Given, St. Paul's direct contractual relationship to Cosmopolitan, if such facts existed they would likely have bene included in the complaint.

IV.
CONCLUSION

Based on the foregoing, St. Paul has no legal basis to pursue its claims against Aspen Specialty Insurance Company and its Complaint should be dismissed with prejudice.

DATED this 13 day of December, 2017.

MESSNER REEVES LLP



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CERTIFICATE OF SERVICE

On this 15th day of December, 2017, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused the foregoing DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

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