

**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

Electronically Filed  
Feb 19 2021 02:02 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**APPENDIX TO APPELLANT'S OPENING BRIEF  
VOLUME III of XVI**

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HUTCHISON & STEFFEN, PLLC

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*Attorneys for Appellant*

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78	Transcript 2019-10-08	XIV	AA002753- AA002776
83	Transcript 2019-10-15	XIV	AA002840- AA002894

**CERTIFICATE OF SERVICE**

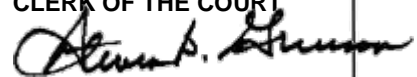
I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 18<sup>th</sup> day of February, 2021 the foregoing ***APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME III of XVI*** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made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

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An employee of Hutchison & Steffen, PLLC



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14 COMPANY OF PITTSBURGH, PA. & ROOF DECK ENTERTAINMENT, LLC  
15 d/b/a MARQUEE NIGHTCLUB

16 **DISTRICT COURT**  
17 **CLARK COUNTY, NEVADA**

18 ST. PAUL FIRE & MARINE INSURANCE  
19 COMPANY,

20 Plaintiffs,

21 vs.

22 ASPEN SPECIALTY INSURANCE  
23 COMPANY; NATIONAL UNION FIRE  
24 INSURANCE COMPANY OF  
25 PITTSBURGH PA.; ROOF DECK  
26 ENTERTAINMENT, LLC d/b/a MARQUEE  
27 NIGHTCLUB; and DOES 1 through 25,  
28 inclusive,

Defendants.

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

**DECLARATION OF RICHARD C.  
PERKINS 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, Richard C. Perkins, declare as follows:

1. I am the Global Operations Executive, Liability and Financial Lines, for Risk  
Specialists Companies Insurance Agency, Inc., a wholly-owned entity of AIG, Inc. I have

DECLARATION OF RICHARD C. PERKINS IN SUPPORT OF NATIONAL UNION'S MOTION TO DISMISS



1 personal knowledge of the facts stated herein and, if called as a witness, I could competently  
2 testify thereto.

3 2. I am the Manager of a group that is responsible for issuance and maintenance of  
4 insurance policies (including the fulfillment of post-binder servicing requests) for underwriting  
5 companies that are subsidiaries and/or affiliates of AIG, Inc., including but not limited to,  
6 National Union Fire Insurance Company of Pittsburgh, PA ("National Union").

7 3. Pursuant to a request from the underwriting department, National Union policy  
8 number 25414413 issued to The Restaurant Group, et al., with an effective date of October 6,  
9 2011, and all endorsements thereto, were retrieved from the electronic filing system, reviewed for  
10 completeness and certified by me on December 1, 2017 to be a true and correct copy of National  
11 Union policy number 25414413, including all endorsements thereto, as determined from the  
12 records of National Union.

13 4. Attached hereto as Exhibit A is a true and correct copy of National Union policy  
14 number 25414413, including all endorsements thereto, issued to The Restaurant Group, et al.,  
15 which I certified on December 1, 2017.

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

18 Dated this 6th day of February, 2018.

19  
20   
21 Richard C. Perkins  
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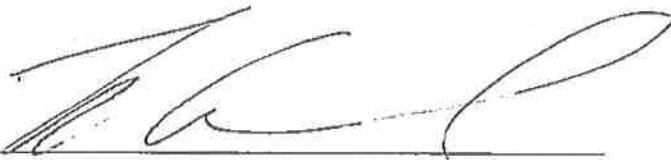
**EXHIBIT A**

**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 7<sup>th</sup> Ave, 34<sup>th</sup> Floor, New York, NY 10106 with an effective date of October 6, 2011.

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

A handwritten signature in dark ink, appearing to read 'RCP', is written over a horizontal line.

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](http://www.chartisinsurance.com/producercompensation) or by calling 1-800-706-3102.

**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.

91222 (12/09)

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## Product Profile

# Value-Added Policyholder Advantages

At Excess Casualty, our ongoing commitment is to deliver innovative and value-enriching solutions alongside our insurance coverages to help you further address your risk management challenges. As an Excess Casualty policyholder, don't forget to take advantage of the following enhancements and services available to you free of charge!

### Did you know that?...

Since the inception of the CrisisResponse program, we've responded to we over 325 reported incidents he ping po icyholders during their time of crisis.

Each day, more than 10,000 companies are utilizing the RiskToo System to better understand, manage and reduce health and safety risk in their workp ace.

The Claims Archive is evidence of our unmatched claims intelligence and the thousands of high-limit liability claims we see and manage on a yearly basis.

### CrisisResponse®

CrisisResponse® is a crisis management enhancement bui t-in to our commercial umbrella policies, providing professional support, including a 24-hour hotline with access to claims specialists, and immediate first dollar coverage outside of the umbrella limit in the event of a catastrophic casualty crisis.

- Up to \$250,000 of additional policy limits to cover urgent crisis management costs, such as temporary living, travel, counseling, medical and funeral expenses.
- An additional \$50,000 limit to retain the services of some of the nation's leading public relations and crisis management firms.
- An optional coverage enhancement that amends the definition of CrisisResponse costs to include expenses incurred by the recall, inspection or disposal of a product that results in a crisis event.

Call the 24-hour, toll-free hotline to trigger CrisisResponse coverage:  
1-877-244-3100.

### RiskTool System

The RiskTool System is a comprehensive loss prevention and risk management solution that allows users to identify, analyze and manage their operational exposures. Designed exclusively for Chartis, this web-based system provides a customizable platform to:

- Monitor and predict loss exposures with advanced analytics and reporting features;
- Build and manage risk management programs such as safety policies and audits;
- Standardize loss control practices across an organization;
- Access extensive training resources and global risk information;
- and much more.

Visit [www.risktool.com](http://www.risktool.com) to activate your account.

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Continued >

## Product Profile

## Value-Added Policyholder Advantages

Continued

### Claims Archive

The Claims Archive is a comprehensive online database including hundreds of real-world excess casualty claim scenarios. Searchable by liability or cause of loss, industry, or facility type, these examples help facilitate assessment and benchmarking of liability insurance limits.

Visit [www.chartisinsurance.com/claimsarchive](http://www.chartisinsurance.com/claimsarchive) to search the archive.

For more information about Excess Casualty or any of these services, please visit [www.chartisinsurance.com](http://www.chartisinsurance.com) or contact us at [excess.casualty@chartisinsurance.com](mailto:excess.casualty@chartisinsurance.com).

### Contact

Excess Casualty  
175 Water Street, 20<sup>th</sup> Floor  
New York, NY 10038  
[excess.casualty@chartisinsurance.com](mailto:excess.casualty@chartisinsurance.com)



**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 BE MAINTAINED IN THE OFFICE OF THE NEW YORK INSURANCE LAWYER. 2 - 13000

Chartis is a world-leading property casualty and general insurance organization serving more than 45 million clients in over 160 countries and jurisdictions. With a 90-year history, one of the most extensive ranges of products and services, deep claims expertise and excellent financial strength, Chartis enables its commercial and industrial policyholders to manage their risks effectively and efficiently. Chartis is a member of the Chartis Group, a leading provider of risk management solutions. Chartis is not a broker or agent and does not provide insurance coverage. Chartis is not responsible for the accuracy or completeness of the information provided in this document. Chartis assumes no responsibility for the discovery and elimination of hazards which could possibly cause accidents or damage to persons or property. Compliance with the recommendations contained in these materials in no way guarantees the elimination of your obligations as may be required by any local, state or federal laws.

062210 A 6/10

## FORMS SCHEDULE

**Named Insured:** THE RESTAURANT GROUP, ETAL

**Policy Number:** BE 25414413

**Effective 12:01 AM:** October 6, 2011

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	UMB PRIME JACKET	80517	(11/09)
	SCHEDULE OF UNDERLYING	UNDSCH	(05/99)
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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)

**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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**Umbrella Prime®  
Commercial Umbrella Liability Policy With CrisisResponse®**

**DECLARATIONS**

The company issuing this policy is indicated by an "X" in the box to the left of the company's name.

- |  |  |
|--|--|
| <input type="checkbox"/> Chartis Property Casualty Company     | <input type="checkbox"/> Illinois National Insurance Company                                 |
| <input type="checkbox"/> American Home Assurance Company       | <input checked="" type="checkbox"/> National Union Fire Insurance Company of Pittsburgh, Pa. |
| <input type="checkbox"/> Chartis Casualty Company              | <input type="checkbox"/> New Hampshire Insurance Company                                     |
| <input type="checkbox"/> Commerce & Industry Insurance Company | <input type="checkbox"/> The Insurance Company of the State of Pennsylvania                  |
| <input type="checkbox"/> Granite State Insurance Company       |  |

(each of the above being a capital 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 policy, 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



**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

**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)

Date

Issue Date: 10/26/11



**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 insurance 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.

**NOTICE:** THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE LAW AND REGULATIONS. HOWEVER, SUCH FORMS AND RATES MUST BE FILED WITH THE NEW YORK STATE INSURANCE COMMISSION BY THE DATE OF THE NEXT REGULAR MEETING OF THE COMMISSION. THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONS HAS ADOPTED A MODEL TERRORISM RISK INSURANCE ACT, WHICH IS BEING CONSIDERED BY THE NEW YORK STATE INSURANCE COMMISSION. THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONS HAS ADOPTED A MODEL TERRORISM RISK INSURANCE ACT, WHICH IS BEING CONSIDERED BY THE NEW YORK STATE INSURANCE COMMISSION.

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**Umbrella Prime®**  
**Commercial Umbrella Liability Policy With CrisisResponse®**

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**:

**NOTICE**  
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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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**.

NOTICE: 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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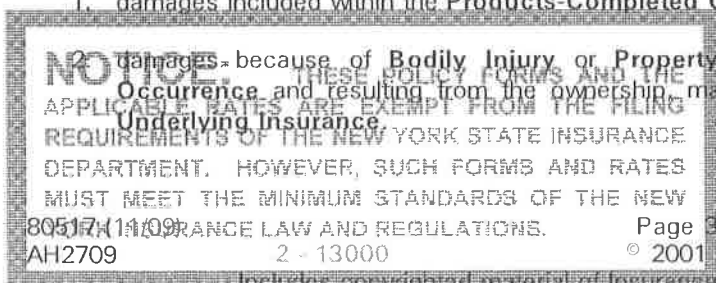
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- B. We will have no duty to defend the **Insured** against any **Suit** seeking damages for **Bodily Injury, Property Damage** or **Personal Injury and Advertising Injury** to which this insurance does not apply.
- C. When we assume the defense of 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**.

- 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**.

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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. An 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:

**NOTICE** to such party for or for the cost of, that party's defense has also been assumed in the same **Insured Contract** 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 State Insurance Law and Regulations.

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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.

**NOTICE:** THESE POLICY FORMS AND THE  
H. Electronic Chatrooms or Bulletin Boards and Electronic Data  
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  
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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.

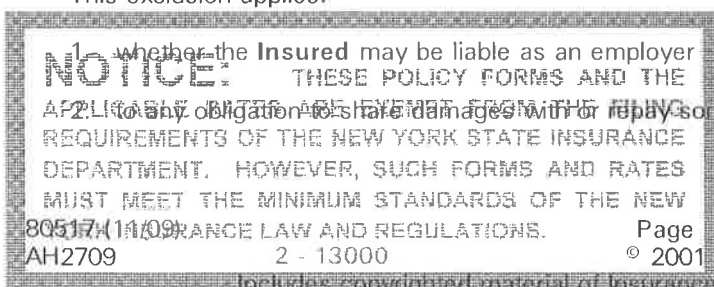
Paragraphs 1., 2. and 3. shall not apply to any liability arising out of **Bodily Injury or Personal Injury and Advertising Injury** if such coverage is provided by **Scheduled Underlying Insurance**. Coverage under this policy for **Bodily Injury or Personal Injury and Advertising Injury** will follow 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:





**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**

**NOTICE**

This insurance does not apply to any liability.

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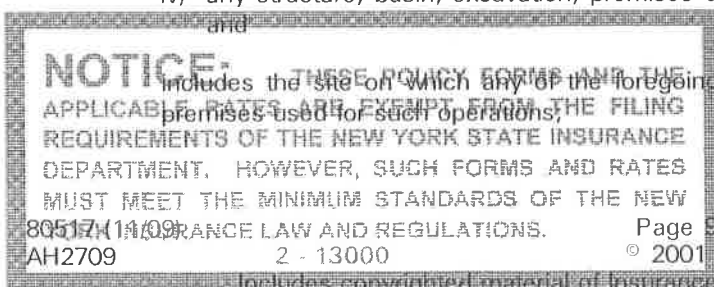
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- a. with respect to which the **Insured** is also an **Insured** under a nuclear energy liability policy issued by the Nuclear Energy Liability-Property Insurance Association, Mutual Atomic Energy Liability Underwriters or the Nuclear Insurance Association 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;



- 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**

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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 or 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.

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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**:

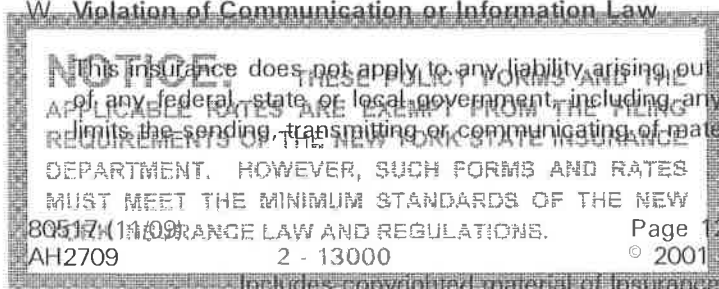
1. caused by or at the direction of the **Insured** with the knowledge that the act would violate the rights of another and would inflict **Personal Injury and Advertising Injury**;
2. arising out of oral, written or electronic publication, in any manner, of material if done by or at the direction of 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.

## 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.

#### NOTICE:

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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

<b>NOTICE:</b> Notice should be mailed, delivered, faxed or emailed to: 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 805174 (11/09) Page 14 of 24 AH2709 2 - 13000 © 2001 Chartis
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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 as 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;

**NOTICE:** The terms, definitions, conditions and exclusions of **Scheduled Underlying Insurance** will not materially

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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**.

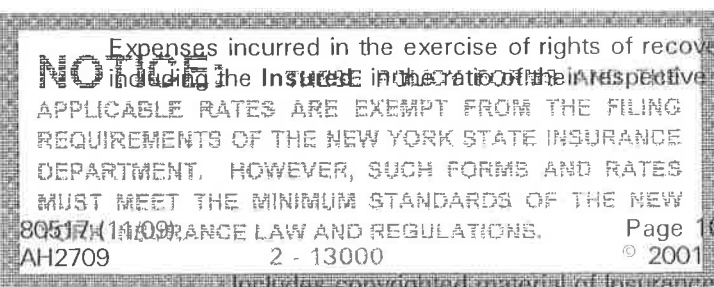
#### N. Separation of Insureds

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.



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.

**VI. 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

significant adverse regional or national media coverage.

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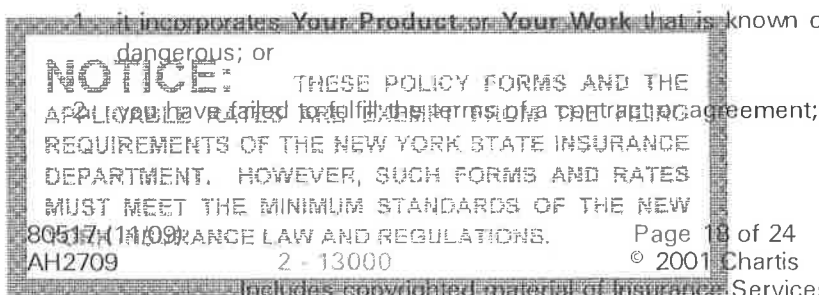
**Crisis Management Event** will include, without limitation, man-made disasters such as explosions, major crashes, multiple deaths, burns, dismemberment, traumatic brain injury, permanent paralysis, or contamination of food, drink or pharmaceuticals, provided that any damages arising out of any of the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



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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 legal liability of another party to pay for **Bodily Injury** or **Property Damage** to a third person or organization. **Joint liability** means availability that would be imposed by law in the absence of any contract or agreement.

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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AH2709 2 - 13000 © 2001 Chartis

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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**:

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

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AH2709

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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**.

**NOTICE:**

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 conditions will be deemed to arise out of one **Occurrence**.

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APPLICABLE RATES ARE EXEMPT FROM THE FINANCIAL 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:

**NOTICE:** THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE 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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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.

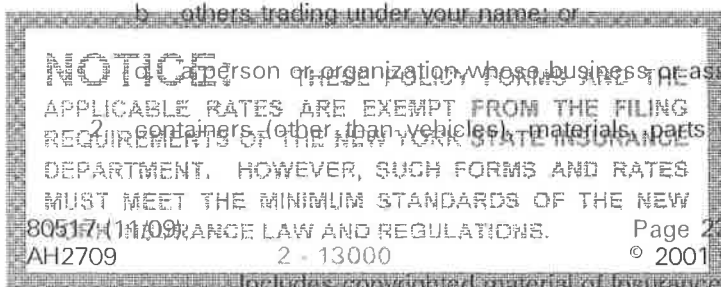
**BB. Self-Insured Retention** means the amount that is shown in Item 5. of the Declarations.

**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



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



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

**NOTICE:**

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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 limit

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 limit

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 limit



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.

UNDSCH (5/99) 2 - 13000  
AH0006

**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 in addition to the applicable Limit of Insurance.

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

<p><b>NOTICE:</b> 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.</p> <p>94621 (5/07) AH2035 2 - 13000</p>
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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").

**NOTICE:** THESE POLICY FORMS AND THE  
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DEPARTMENT. HOWEVER, SUCH FORMS AND RATES  
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YORK STATE INSURANCE LAW AND REGULATIONS.

89644 (7/08)  
AH2421

2 - 13000



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.

<p><b>NOTICE:</b> 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 STATE INSURANCE LAW AND REGULATIONS.</p> <p>99497 (6/08) AH2423 2 - 13000</p>
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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<sup>SM</sup> AND EXCESS CASUALTY CRISIS FUND®**, the following conditions are added to Section VI. Conditions, Paragraph G. Duties in 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 or 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](mailto:excessfnol@chartisinsurance.com)

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

<p><b>NOTICE:</b> 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.</p> <p>83687 (1/10) AH2831</p>	<p>Page 1 of 7</p>
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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
<b>Abernathy MacGregor Group</b>			
501 Madison Avenue New York, NY 10022	<b>James T. MacGregor</b> (212) 371-5999 Office (646) 236-3271 Cell (212) 752-0723 Fax (212) 343-0818 Home jtm@abmac.com  <b>Rhonda Barnat</b> (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	<b>Ian D. Campbell</b> (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	
<b>Ann Barks Public Relations (Southeastern United States)</b>			
896 Cross Gates Boulevard Slidell, LA 70461	<b>Ann W. Barks</b> (985) 847-0750 Direct (985) 290-8304 Cell abarkspr@bellsouth.net	(985) 290-8304	Public Relations and Crisis Management
<b>Bright Light Marketing Group (Hawaii Only)</b>			
1001 Bishop Street, Suite 900 Honolulu, Hawaii 96813-3429	<b>Charlene Lo Chan</b> (808) 275-3007 Direct (808) 524-6441 Office (808) 781-7733 Cell (808) 524-8115 Fax charlene@brightlightmarketing.com		Public Relations and Crisis Management
<b>Dix &amp; Eaton</b>			
Dix & Eaton 200 Public Square Suite 1400 Cleveland, OH 44114-2316	<b>Matt Barkett</b> (216) 241-3073 Direct (216) 241-3073 Cell mbarkett@dix-eaton.com	(216) 241-3073	Public Relations. Crisis Management and Threat & Vulnerability Assessment

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.

FIRM ADDRESS	CONTACT INFORMATION	EMERGENCY TELEPHONE	SERVICES OFFERED
<b>Edelman</b>			
200 E. Randolph Drive Chicago, IL 60601	<b>William R. Keegan</b> (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
<b>Edward Howard and Company</b>			
1100 Superior Ave., Suite 1600 Cleveland, OH 44114	<b>Wayne Hill</b> (216) 298-4630 Direct (216) 781-2400 Office (216) 408-1211 Cell whill@edwardhoward.com  <b>Kathy Cupper Obert</b> (216) 298-4620 Direct (216) 781-2400 Office (330) 730-5500 Cell kobert@edwardhoward.com  <b>Chuck Vella</b> (937) 223-7386 Direct (937) 228-1141 Office (937) 603-5795 Cell cvella@edwardhoward.com  <b>Allen Pfenninger</b> (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
<b>Fleishman-Hilliard International Communications, Inc.</b>			
John Hancock Center 875 N. Michigan Avenue, Suite 3300 Chicago, IL 60611-1901	<b>David Saltz</b> (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	<b>Benjamin (Ben) Kincannon</b> (617) 69200501 Office (508) 314-4154 Cell (617) 267-5905 Fax ben.kincannon@fleishman.com		
<b>Levick Strategic Communications, LLC</b>			
1900 M Street NW Washington, D.C. 20036	<b>Gene Grabowski</b> (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



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

**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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FIRM ADDRESS	CONTACT INFORMATION	EMERGENCY TELEPHONE	SERVICES OFFERED
<b>Sard Verbinnen &amp; Co. (cont.)</b>			
190 S. LaSalle Street, Suite 1600 Chicago, IL 60603	<b>Brad Wilks</b> (312) 895-4740 Direct (312) 895-4700 Office (312) 895-4747 Fax bwilks@sardverb.com		
275 Battery Street, Suite 480 San Francisco, CA 94111	<b>Paul Kranhold</b> (415) 618-8750 Office (415) 568-9580 Fax pkranhold@sardverb.com		
<b>Sitrick and Company, Inc.</b>			
655 Third Avenue, 22 <sup>nd</sup> Floor New York, NY 10017	<b>Jeffrey S. Lloyd</b> (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	<b>Michael S. Sitrick</b> (310) 788-2850 Direct (310) 788-2855 Fax mike_sitrick@sitrick.com		
<b>The Rogers Group</b>			
1875 Century Park East, Suite 300 Los Angeles, CA 90067	<b>Lynne M. Doll</b> (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
<b>The Torrenzano Group</b>			
The Lincoln Building 60 East 42 <sup>nd</sup> Street, Suite 2112 New York, NY 10165-2112	<b>Richard Torrenzano</b> (212) 681-1700 Ext. 111 Direct (212) 681-6961 Fax richard@torrenzano.com		Public Relations. Crisis Management and Threat & Vulnerability Assessment
	<b>Edward A. Orgon</b> (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
<b>Coventry Health Care, Inc.</b>			
3200 Highland Ave. Downers Grove, IL 60515	<b>Michael Lacroix</b> (914) 223-4463 Cell (786) 513-7690 Fax jxlacroix@cvty.com	(888) 552-5378	Psychological Counseling, Medical Case Management, Medical Cost Projection and Containment.
<b>D.A.R., Inc.</b>			
4 Iris Drive Scarborough, Maine 04074	<b>David W. Hunt</b> (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.
<b>GAB Robbins North America, Inc.</b>			
560 Peoples Plaza, Suite 215 Newark, Delaware 19702	<b>Gail Oliver</b> (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.
<b>Lombardi Associates</b>			
277 Fairfield Road, Suite 305A Fairfield, NJ 07004	<b>Anthony Nastasi</b> (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.
<b>Meagher &amp; Geer, P.L.L.P.</b>			
33 S. Sixth Street, Suite 4400 Minneapolis, MN 55402	<b>Russell D. Melton</b> (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
<b>T. J. Russo Consultants (Nationwide)</b>			
99 Hillside Avenue, Suite X Williston Park, NY 11596	<b>Michael W. Russo</b> (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**

**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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AH1721

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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.

<p><b>NOTICE:</b> 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.</p> <p>83049 (3/06) AH1721</p>	<p>Page 2 of 2</p>
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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.

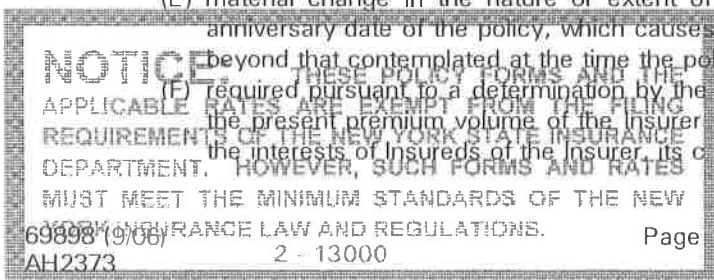
(b) CANCELLATION, NONRENEWAL AND CONDITIONAL RENEWAL BY THE INSURER

(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;



- (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)

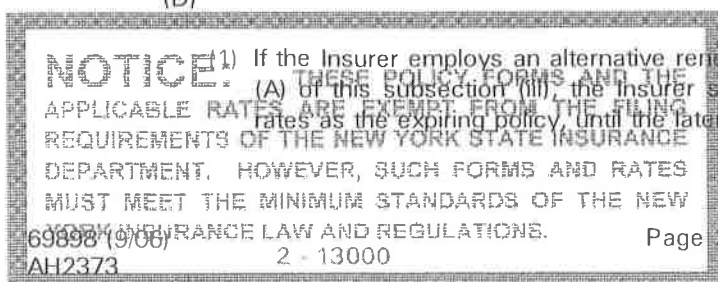
- (A) The Insurer shall mail to the Insured, and to his authorized insurance agent or broker, written notice indicating the Insurer's intention:

- (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)





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 to 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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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<sup>SM</sup>**

**Automobile Liability Exclusion**

This policy is amended as follows:

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

**Automobile Liability**

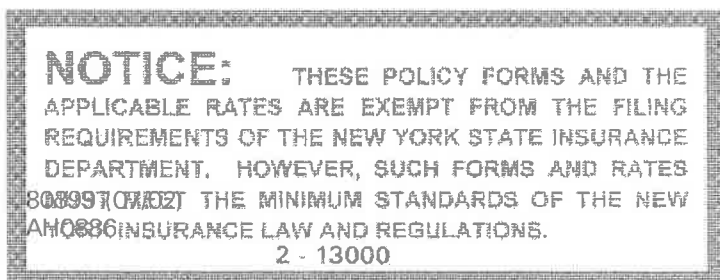
This insurance does not apply to any liability arising out of the ownership, maintenance, use or entrustment to others of any **Auto** owned or operated by or rented or loaned to any **Insured**. Use includes operation and loading and unloading.

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



Christopher G. Kopser

**Authorized Representative**  
or Countersignature (Where Applicable)



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**.

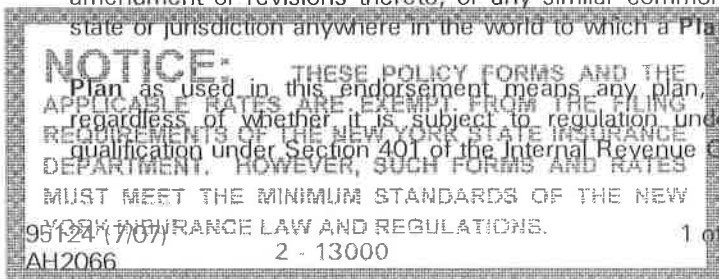
However, this exclusion will not apply only if and to the extent that coverage for such liability is provided by **Scheduled Underlying Insurance**.

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:



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.

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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)

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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:

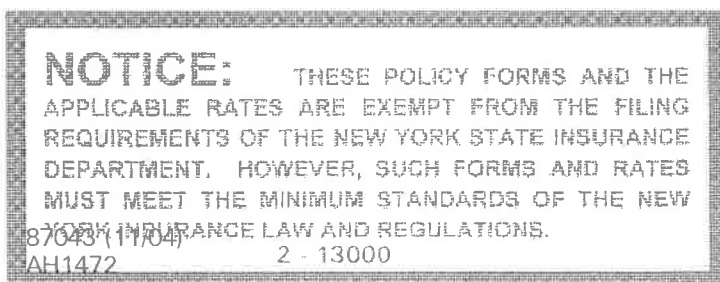
**Commercial General Liability**


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 no broader than the coverage provided by **Scheduled Underlying Insurance**.

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



  
\_\_\_\_\_  
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:

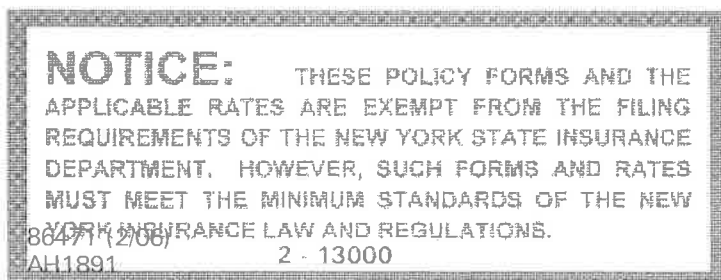
**Section V. EXCLUSIONS** is amended to include the following additional exclusion:

**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.



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.

<p><b>NOTICE:</b> 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.</p> <p>83093 (05/05) AH1668 2 - 13000</p>
--



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.

82449 (06/03)  
AH1257

2 - 13000

Page 1 of 1

  
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<sup>SM</sup>**

**Foreign Liability Exclusion**

This policy is amended as follows:

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

**Foreign Liability**

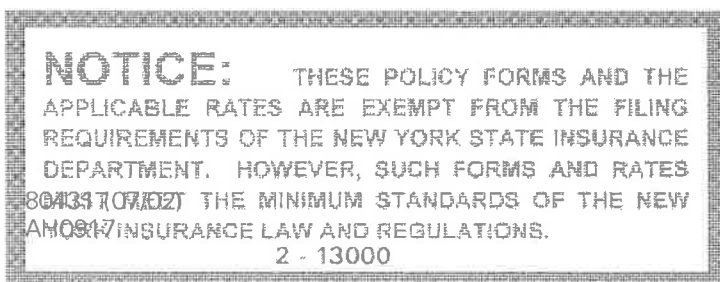
This insurance does not apply to **Bodily Injury, Property Damage or Personal Injury and Advertising Injury** caused by an **Occurrence** that takes place outside the United States of America, its territories or possessions, Puerto Rico or Canada.

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



Christopher G. Kopser

**Authorized Representative**  
or Countersignature (Where Applicable)



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:

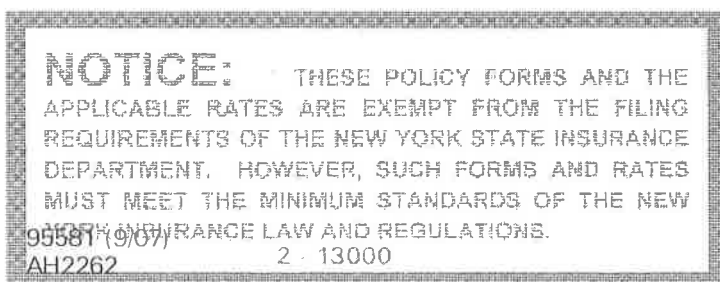
The person or organization first named as the **Named Insured** on the Declarations Page of this policy (the "First Named Insured"). **Named Insured** also includes:


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. of 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.



  
\_\_\_\_\_  
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.

83070 (09/09)  
AH1225

2 - 13000

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**

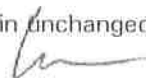
This insurance does not apply to **Bodily Injury** or **Property Damage** for which any **Insured** may be held liable by reason of:

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)

<p><b>NOTICE:</b> 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.</p> <p>83085 (09/09) AH1240</p> <p>2 - 13000</p>
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## FORMS SCHEDULE

Named Insured: THE RESTAURANT GROUP, ETAL

Policy Number: BE 25414413

Effective 12:01 AM: April 2, 2012

<u>End't. No.</u>	<u>Form Name</u>	<u>Form Number/ Edition Date</u>
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

2 - 13000

**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)

## CLAIM ELEMENTS

- Misrepresentation of Fact (§ 5:310)
- Without Grounds for Believing its Truth (§ 5:360)
- Duty to Plaintiff (§ 5:370)
- Intent to Induce Reliance (§ 5:380)
- Reliance (§ 5:390)
- Causation (§ 5:420)
- Harm (§ 5:425)

## PARTICULAR DEFENSES

- Internet Immunity—Communications Decency Act (§ 5:430)
- Public Policy (§ 5:435)

*Statute of Limitations:* 2 years (CCP § 339(1))

**Sources:**

Civ.C. §§ 1709, 1710(2), 1571-1574, 3343

5 Witkin, Summary of California Law (10th ed. 2005), Torts §§ 818-826

Rest.2d Torts §§ 310-311, 525, 528, 539, 552, 552B, 552C

Rest.3d Torts: Liability for Physical and Emotional Harm §§ 4-31, 34, 36

**Jury Instructions:**

CACI 1903: Negligent Misrepresentation

CACI 1904: Opinions as Statements of Fact

CACI 1905: Definition of Important Fact/Promise

CACI 1906: Misrepresentations Made to Persons Other Than the Plaintiff

CACI 1907: Reliance

CACI 1908: Reasonable Reliance

CACI 1920: Buyer's Damages for Purchase or Acquisition of Property

CACI 1921: Buyer's Damages for Purchase or Acquisition of Property—Lost Profits

CACI 1922: Seller's Damages for Sale or Exchange of Property

CACI 1923: Damages—"Out of Pocket" Rule

CACI 430: Causation—Substantial Factor

CACI 3903-3904: Economic Damages

CACI 3905-3905A: Noneconomic Damages

End of Document


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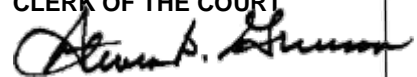


**CERTIFICATE OF SERVICE**

I certify that I am an employee of HEROLD & SAGER and that on **February 6, 2018**, I caused a true copy of the following document(s): **DECLARATION OF RICHARD C. PERKINS IN SUPPORT OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR 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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Eileen Monarez  
Employee of HEROLD & SAGER



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13 Attorneys for Defendants NATIONAL UNION FIRE

14 INSURANCE COMPANY OF PITTSBURGH, PA. and ROOF DECK

15 ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB

16 **DISTRICT COURT**

17 **CLARK COUNTY, NEVADA**

18 ST. PAUL FIRE & MARINE INSURANCE  
19 COMPANY,

20 Plaintiffs,

21 vs.

22 ASPEN SPECIALTY INSURANCE  
23 COMPANY; NATIONAL UNION FIRE  
24 INSURANCE COMPANY OF  
25 PITTSBURGH PA.; ROOF DECK  
26 ENTERTAINMENT, LLC d/b/a MARQUEE  
27 NIGHTCLUB; and DOES 1 through 25,  
28 inclusive,

Defendants.

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

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

1 Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") hereby  
2 submits the following reply in support of its Motion to Dismiss Plaintiff St. Paul Fire & Marine  
3 Insurance Company's ("St. Paul") Complaint (the "Motion").

4 I.

5 INTRODUCTION

6 St. Paul's opposition is replete with inaccurate statements and misplaced arguments that  
7 are insufficient to defeat Marquee's Motion. For many of its arguments, St. Paul either fails to  
8 provide any supporting authority or provides authority that is clearly distinguishable or does not  
9 stand for the proposition claimed by St. Paul. As discussed in Marquee's Motion and herein, St.  
10 Paul asserts that it may step into the shoes of its insured to pursue subrogation against Marquee.  
11 This assertion is contradicted by the express language of the Nightclub Management Agreement  
12 ("NMA") and the Uniform Contribution Act (the "Act"). In an attempt to keep its spurious claims  
13 alive, St. Paul makes a disingenuous authentication argument with regard to the NMA. St. Paul's  
14 argument is merely an attempt to distract the Court from the fact that St. Paul has no legal or  
15 equitable basis to pursue its subrogation claims against Marquee and its complaint should be  
16 dismissed with prejudice.

17 Looking beyond St. Paul's specious objections to considering the NMA on this Motion, the  
18 NMA discloses two separate legal defenses for Marquee against St. Paul's claims. First, as a  
19 threshold matter, Section 12.2.6 of the NMA plainly shows that Cosmopolitan and Marquee  
20 agreed in advance, as business entities, to limit litigation between them by requiring all of their  
21 respective insurers to include subrogation waivers in their policies to prevent the insurers from  
22 ever bringing subrogation claims against either of them (or their affiliates). Such decision by  
23 Cosmopolitan and Marquee to negotiate and allocate their business risks between themselves is  
24 well within their rights and St. Paul cannot now in good faith argue that Cosmopolitan and  
25 Marquee were not allowed to limit or waive claims against each other.

26 Second, as a separate and independent defense, Section 13.1 of the NMA shows that  
27 Cosmopolitan and Marquee also agreed in advance to limit Cosmopolitan's indemnity rights  
28 against Marquee to situations in which Cosmopolitan (not its insurer) actually incurred out-of-

1 pocket costs that were not covered by insurance. Specifically, under Section 13.1, Marquee agreed  
2 to indemnify Cosmopolitan for losses “not otherwise covered by the insurance required to be  
3 maintained under the agreement.” Put differently, Cosmopolitan and Marquee agreed that  
4 Cosmopolitan would not be entitled to pursue Marquee in situations where Cosmopolitan had not  
5 actually paid money out of its own pocket because insurance money had covered the particular  
6 liability. This plain meaning of Section 13.1 is reinforced by the NMA’s definition of “Losses”  
7 themselves under Section 1 as “...any and all liabilities...not reimbursed by insurance....”. St.  
8 Paul’s allegations (or any possible amendment it may seek) cannot change the fact that  
9 Cosmopolitan suffered no actual Losses in the underlying litigation because it paid no money out-  
10 of-pocket. For these additional reasons, St. Paul has no shoes to step into to pursue Marquee and,  
11 therefore, its claims against Marquee fail as a matter of law.

## 12 II.

### 13 ARGUMENT

#### 14 A. The NMA Was Properly Authenticated Pursuant to Nevada Law and the Court May 15 Properly Consider It in Ruling on Marquee’s Motion.

16 Although St. Paul’s complaint asserts that it has subrogation rights arising from a  
17 management agreement entered into by parties in the underlying case, St. Paul attacks the very  
18 same agreement as improperly authenticated when Marquee attaches the agreement to its Motion.  
19 Tellingly, St. Paul does not dispute that the NMA is a true and correct copy of the agreement.  
20 Instead, St. Paul claims Marquee must do more to authenticate the agreement it so heavily relies  
21 upon to bring the instant action. The cases cited by St. Paul are inapplicable as they involve  
22 federal courts in California and Puerto Rico applying federal statutes in the context of motions for  
23 summary judgment. *See, Medina v. Multaler*, 547 F.Supp.2d 1099 (C.D. Cal. 2007); *Navedo v.*  
24 *Nalco Chemical, Inc.*, 848 F.Supp.2d 171 (D. Puerto Rico 2012). Whether the NMA is properly  
25 authenticated is a question that must be resolved under Nevada law. The applicable Nevada statute  
26 is NRS 52.025 which provides that “testimony of a witness is sufficient for authentication or  
27 identification if the witness has personal knowledge that a matter is what it claimed to be.” St.  
28 Paul improperly attempts to increase obligations under the statute to include that a witness must

1 also state and describe the “source” of his personal knowledge.

2 Bill Bonbrest, who authenticated the NMA, is the Chief Operating Officer of TAO Group,  
3 an entity related to Marquee. *See, Declaration of Bill Bonbrest*, ¶ 1. St. Paul complains that Mr.  
4 Bonbrest’s declaration does not explain, to their satisfaction, the relationship between TAO Group  
5 and Marquee. However, Nevada law does not require such an explanation or description in order  
6 to authenticate a document. Instead, all that is necessary for a document to be properly  
7 authenticated under NRS 52.025 is the witness’s testimony based on personal knowledge that the  
8 document is what it claims to be. In his declaration, Mr. Bonbrest states he has personal  
9 knowledge of the facts stated therein including that Marquee entered into the NMA with Nevada  
10 Restaurant Venture 1, LLC with regard to the Marquee Nightclub located within the Cosmopolitan  
11 Hotel & Casino and that a true and correct copy of the agreement was filed under temporary seal  
12 as an exhibit to Marquee’s Motion. *Bonbrest Decl.*, ¶¶ 2-3. Accordingly, Mr. Bonbrest’s  
13 declaration is more than sufficient to authenticate the NM A.

14 In addition to its disingenuous authentication argument, St. Paul improperly asserts that  
15 Marquee’s use of the NM is beyond the scope of materials that may be considered by the Court as  
16 part of a motion to dismiss. Contrary to St. Paul’s assertion, the Court may properly consider the  
17 NMA in ruling on Marquee’s Motion, given that St. Paul’s complaint references provisions in the  
18 agreement and St. Paul seeks to rely on the agreement in support of its claims. *U.S. v. Ritchie*, 342  
19 F.3d 903, 908 (9th Cir. 2003) (finding document that is not attached to the complaint may be  
20 incorporated by reference into the complaint if the plaintiff refers to the document or the document  
21 forms the basis of the plaintiff’s claim.)

22 Moreover, in submitting the NMA for the Court’s consideration, Marquee is not asking the  
23 Court to take judicial notice of facts that might be reasonably disputed as St. Paul erroneously  
24 contends<sup>1</sup>. Rather, Marquee is requesting the Court apply the doctrine of incorporation by  
25

---

26 <sup>1</sup> In support of its contention, St. Paul incorrectly cites *Ritchie*, 342 F.3d at 908 in its opposition. However, the  
27 paragraph quoted by St. Paul in its opposition was actually from *U.S. v. Corinthian Colleges*, 655 F.3d 984, 999 (9th  
28 Cir. 2011).

1 reference which allows the Court to treat the NMA as part of St. Paul's complaint and, as such,  
2 assume that its contents are true for purposes of the motion to dismiss. *Id.* It is disingenuous for St.  
3 Paul to rely on the NMA as part of its attempt to pursue alleged subrogation rights but yet, assert  
4 in the same breath that somehow the very same agreement cannot be relied on by Marquee in  
5 support of its Motion. As discussed in Marquee's Motion and herein, the NMA establishes that St.  
6 Paul has no viable claim for subrogation against Marquee and St. Paul's complaint should be  
7 dismissed with prejudice.

8 **B. Contrary to St. Paul's Assertions, The Waiver of Subrogation Clause In The NMA**  
9 **Bars Its Claims against Marquee.**

10 St. Paul complains that Marquee did not attach or quote the waiver of subrogation  
11 endorsement in St. Paul's policy. However, as St. Paul admits in its complaint, Marquee is not an  
12 insured under its policy. (Complaint, ¶31.) Given Marquee is not an insured, Marquee does not  
13 have a copy of St. Paul's policy. St. Paul obviously has its policy and certainly has knowledge of  
14 its policy provisions and endorsements. It could easily confirm the existence of a waiver of  
15 subrogation endorsement in its own policy and provide a copy to the Court for its review. That St.  
16 Paul did not deny the existence of the Waiver of Rights of Recovery Endorsement to its policy is  
17 indeed telling.

18 While refusing to confirm the existence of the Waiver of Rights of Recovery Endorsement  
19 to its policy (which it easily could have done), St. Paul nonetheless asserts that the endorsement  
20 does not apply because the NMA does not contain the "correct waiver" but cites no case law (or  
21 judicially noticeable evidence) to support its assertion. Again, while not confirming the existence  
22 of the endorsement, St. Paul asserts that the waiver of subrogation endorsement only applies if  
23 Cosmopolitan waived its rights of recovery against Marquee. While admitting that Section 12.2.6  
24 in the NMA requires the St. Paul policy to contain a waiver of subrogation endorsement, St. Paul  
25 argues (again without citing to any supporting authority) that this provision is not sufficient to bar  
26 its purported subrogation claim.

27 As discussed in Marquee's Motion, waiver of subrogation provisions have been  
28 universally enforced by numerous courts. *See, Davlar Corp. v. Superior Court*, 53 Cal.App.4th

1 1121, 1125 (1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 26 Cal.App.4th 1194 (1994)  
2 (waiver of rights for damages covered by insurance barred insurer's subrogation suit.); *Fireman's*  
3 *Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 169 Cal.App.4th 415 (2008) (holding tenant's  
4 failure to obtain the full amount of liability insurance required by lease did not preclude  
5 enforcement of subrogation waiver); *Commerce & Indus. Ins. Co. v. Orth*, 254 Or. 226 (1969)  
6 (holding insurer waived its subrogation rights against various contractors); *Touchet Valley Grain*  
7 *Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 119 Wn.2d 334, 342 (1992) (finding  
8 subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, 2016 WL 4425095, \*7  
9 (D.N.M. Feb. 29, 2016) (finding subrogation waivers serve important public policy goals, such as  
10 "encouraging parties to anticipate risks and to procure insurance covering those risks, thereby  
11 avoiding future litigation, and facilitating and preserving economic relations and activity.")  
12 (Citation omitted.) St. Paul cites no case law to the contrary.

13       Instead, St. Paul argues that the NMA must contain language in which Cosmopolitan  
14 waives its rights of recovery against Marquee. However, Cosmopolitan need not waive its own  
15 recovery rights against Marquee in order for the subrogation waiver in the NMA to be valid. *See*,  
16 *Davlar, supra*, 53 Cal.App.4th at 1124-1125 (finding there was "no inconsistency" between a  
17 waiver of subrogation clause and indemnity clause in a subcontract, which were "two distinct  
18 provisions".) Pursuant to Section 12.2.6 of the Nightclub Management Agreement, Cosmopolitan  
19 and Marquee mutually agreed that all insurance policies issued to them would contain a waiver of  
20 subrogation of the insurers' rights against Cosmopolitan and Marquee. St. Paul asserts that  
21 Marquee's interpretation of Section 12.2.6 is not reasonable. However, Section 12.2.6 clearly  
22 states "All Owner Policies and [Marquee] Policies shall contain a waiver of subrogation against  
23 the Owner Insured Parties and [Marquee] and its officers, directors, officials, manages, employees  
24 and agents and the [Marquee] principals." Section 12.2.5 of the NMA defines "Owner Policies" as  
25 "any insurance coverage maintained by any Owner Insured Parties". "Owner Insured Parties" is  
26 defined in Section 12.2.3 of the NMA and includes Cosmopolitan.

27       Accordingly, pursuant to the plain language of the NMA, Cosmopolitan and Marquee  
28 agreed that all of their respective insurance policies would contain waivers of subrogation against

each other. Further, St. Paul readily admits that this provision requires its policy to contain a waiver of subrogation endorsement. Under subrogation, the insurer has no greater rights than its insured. Given Cosmopolitan expressly agreed to waive its insurers' subrogation rights against Marquee, its insurer St. Paul has no shoes to step into to pursue Marquee. Any other reading of the NMA would be nonsensical and would not accurately reflect the clear intent of the parties, which this Court can interpret as a matter of law.

**C. The Indemnity Provision In The NMA Is Not Ambiguous and Also Bars St. Paul's Claims Against Marquee.**

Confronted with the actual language from the indemnity provision in the NMA that defeats its subrogation claim against Marquee, St. Paul attempts to create ambiguity where none exists by asserting that the reference to insurance in the indemnity provision somehow conflicts with the reference to insurance in the agreement's definition of Losses. Specifically, St. Paul asserts that, pursuant to Section 12.1.2 of the NMA, Cosmopolitan was only required to maintain insurance with limits of \$2 million per occurrence and \$4 million aggregate and that it paid more than the \$4,000,000 aggregate limit required by the NMA. Once again, St. Paul misinterprets and misquotes provisions in the NMA. Pursuant to Section 12.1.2, Cosmopolitan is required to provide "[c]ommercial general liability insurance, . . . 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". (Emphasis added.) Accordingly, pursuant to Section 12.1.2, the \$2,000,000 per occurrence and \$4,000,000 aggregate limits were the minimum, or the floor, of the insurance policy limits that Cosmopolitan agreed to provide, not the ceiling of the limits as St. Paul contends.

Courts in other jurisdictions that have considered similar contract language have rejected the same argument asserted by St. Paul. *See, e.g., Lirette v. Union Texas Petroleum Corp.*, 467 So.2d 29, 34 (La. Ct. App. 1985) (affirming trial court finding "the provision in the contract to be a minimal requirement and that U-Tex was entitled to indemnity up to the amount of insurance actually obtained."). Here, the fact that St. Paul's policy limit was higher than that required under Section 12.1.2 does not render the indemnity language in Section 13.1 ambiguous. Pursuant to



1 Section 13.1 of the NMA, Marquee agreed to indemnify Cosmopolitan for losses “not otherwise  
2 covered by the insurance required to be maintained under the agreement.” (Emphasis added.) For  
3 the reasons stated above, the St. Paul policy obtained by Cosmopolitan was “required” by the  
4 NMA. Given Marquee’s indemnity obligation to Cosmopolitan is limited to *uninsured* losses and,  
5 further, given Cosmopolitan does *not* have any uninsured losses (as its defense and settlement in  
6 the underlying action were paid for by insurance required by the NMA), the indemnity provision  
7 does not apply and St. Paul’s claim against Marquee fails as a matter of law.

8 **D. St. Paul Is Not Entitled to Seek Contribution Under NRS 17.225.**

9 St. Paul’s opposition takes issue with Marquee’s paraphrasing of NRS 17.265 asserting  
10 that there is a distinction between a “right” to indemnity and an “entitlement” to indemnity.  
11 However, the terms “right” and “entitlement” are synonymous. *See, Oxford Dictionaries,*  
12 <https://en.oxforddictionaries.com/thesaurus/entitlement>; *see also, Merriam-Webster Online*  
13 *Dictionary*, <https://www.merriam-webster.com/dictionary/entitlement> (defining “entitlement” as  
14 “the state or condition of being entitled: right” and “a right to benefits specified especially by law  
15 or contract”).

16 The Nevada Legislature also appears to have a similar understanding of the synonymous  
17 nature of the terms given the title of NRS 17.265 is “Certain rights of indemnity unimpaired.”  
18 (Emphasis added.) Pursuant to Section 13.1 of the NMA, Cosmopolitan has the right to seek  
19 indemnity from Marquee for uninsured losses paid by Cosmopolitan out of its own pocket.  
20 Obviously, St. Paul cannot dispute Cosmopolitan’s right to indemnity where, as here, it is  
21 *pursuing* this very right to indemnity with the Fourth Cause of Action for Express Indemnity in its  
22 complaint premised on an alleged right to subrogate to such claim. Given this right (or  
23 entitlement) to indemnity, Cosmopolitan has no statutory claim for contribution under NRS  
24 17.265 as a matter of law. *See also, Calloway v. City of Reno*, 113 Nev. 564, 578 (1997) (“implied  
25 indemnity theories are not viable in the face of express indemnity agreements.”) Given  
26 Cosmopolitan has no statutory contribution claim against Marquee, St. Paul has no shoes to step  
27 into to support its misguided subrogation claim for contribution.

28 As a separate point, St. Paul’s statutory contribution claim also fails based on the jury’s

1 finding in the underlying action that Cosmopolitan was jointly and severally liable with Marquee  
2 with regard to the underlying plaintiff's claims for assault, battery and false imprisonment. St.  
3 Paul tries to distract the Court by asserting that these are somehow "alternative facts", but the  
4 Court need only look to the special verdict form attached as an exhibit to St. Paul's complaint to  
5 confirm the accuracy of Marquee's assertion. St. Paul's assertions that the underlying plaintiff's  
6 injuries and damages were not caused by any affirmative actions or unreasonable conduct on the  
7 part of Cosmopolitan are merely a conclusory statement that the Court can and should disregard.  
8 *See, Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) citing *Papasan v. Allain*, 478 U.S.  
9 265, 286 (1986) ("on a motion to dismiss, courts are not bound to accept as true legal conclusions  
10 couched as factual allegations") (internal quotations omitted); *Jafbro's, Inc. v. GEICO Indem. Co.*,  
11 127 Nev. 1148 (Nev. 2011) (upholding dismissal of action where complaint relied upon  
12 conclusory allegations unsupported by factual allegations). Given the jury in the underlying action  
13 found Cosmopolitan jointly and severally liable for intentional tort claims, such findings preclude  
14 St. Paul from stepping into the shoes of its insured to pursue contribution from Marquee based on  
15 operation of NRS 17.255. Accordingly, St. Paul's statutory claim against Marquee fails as a matter  
16 of law.

17 **E. Marquee Is Entitled to Recover Its Attorneys' Fees from St. Paul.**

18 In its opposition, St. Paul asserts that, because it is not a party to the NMA, Marquee  
19 cannot recover its attorneys' fees should Marquee prevail on its Motion. However, conversely, St.  
20 Paul claims that, because it is stepping into the shoes of its insured, St. Paul will be entitled to  
21 recover its attorneys' fees from Marquee if it prevails on its claims against Marquee in the  
22 litigation. St. Paul cannot have it both ways. If the fact that St. Paul is not a "party" to the NMA  
23 precludes Marquee from recovering its attorneys' fees from St. Paul, then St. Paul also would not  
24 be entitled to recover attorneys' fees from Marquee, as stepping into the shoes of its insured would  
25 not make St. Paul a "party" to the agreement either.

26 Nevertheless, notwithstanding this obvious inconsistency, NRS 18.010(2)(b) provides  
27 further grounds for the Court to award Marquee its attorneys' fees as noted in Marquee's Motion.  
28 Pursuant to NRS 18.010(2)(b), the Court may make an allowance of attorneys' fees to a prevailing

1 party “when the court finds that a claim...of the opposing party was brought or maintained  
2 without reasonable ground or to harass the prevailing party.” See, *Bobby Berosini, Ltd. v. People*  
3 *for the Ethical Treatment of Animals*, 114 Nev. 1348 (1998) (holding that a claim is groundless if  
4 the allegations in the complaint are not supported by any credible evidence); *Semenza v. Caughlin*  
5 *Crafted Homes*, 111 Nev. 1089 (1995); *Bergmann v. Boyce*, 109 Nev. 670 (1993) (finding that  
6 sanctions are properly imposed when claim is baseless and made without reasonably competent  
7 inquiry). As discussed in Marquee’s motion and herein, St. Paul’s claims against Marquee are  
8 clearly baseless, made without competent inquiry, and not supported by any credible evidence.  
9 Despite Marquee’s prior notice to St. Paul that it had no viable claim against Marquee, St. Paul  
10 nonetheless went forward with the instant action without reasonable grounds. Accordingly, the  
11 Court may properly award Marquee its attorneys’ fees pursuant to NRS 18.010(2)(b). Notably, St.  
12 Paul did not discuss this statute in its opposition to Marquee’s Motion, likely hoping its silence  
13 would cause the Court to overlook its clear application.

14 **F. St. Paul’s Complaint Should Be Dismissed Without Leave to Amend**

15 Recognizing the insufficiency of its pleading, St. Paul, in the alternative, requests leave to  
16 amend its complaint to correct the deficiencies therein. However, as shown in Marquee’s motion  
17 to dismiss and herein, St. Paul has no viable claims against Marquee for equitable or statutory  
18 subrogation and no amendments to St. Paul’s complaint will change that fact. There is nothing that  
19 St. Paul can plead that would circumvent the clear language of the waiver of subrogation and  
20 indemnity provisions in the NMA or the clear language of the Act. Accordingly, St. Paul should  
21 not be granted leave to amend its complaint.

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III.

CONCLUSION

For all of the foregoing reasons, Marquee's Motion should be granted and St. Paul's complaint dismissed with prejudice.

DATED: February 6, 2018

HEROLD & SAGER

By: /s/ Nicholas B. Salerno

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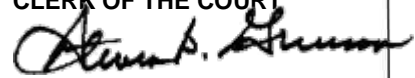
NIGHTCLUB

**CERTIFICATE OF SERVICE**

I certify that I am an employee of HEROLD & SAGER and that on **February 6, 2018**, I caused a true copy of the following document(s): **DEFENDANT ROOF DECK ENTERTAINMENT, LLD d/b/a MARQUEE NIGHTCLUB'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR 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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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

ST. PAUL FIRE & MARINE INSURANCE  
COMPANY,

Plaintiff,

vs.

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

Defendants.

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

**DEFENDANT NATIONAL  
UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH,  
PA'S RESPONSE TO ST. PAUL  
FIRE & MARINE INSURANCE  
COMPANY'S OBJECTIONS TO  
EVIDENCE**

1 Defendant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”)  
2 hereby submits the following response to Plaintiff St. Paul Fire & Marine Insurance Company’s  
3 (“St. Paul”) objections to evidence.

4 Evidence: National Union policy no. BE25414413, Exhibit A to Declaration of  
5 Declaration of Michael F. Muscarella in Support of National Union Fire Insurance Company of  
6 Pittsburgh, PA’s Motion to Dismiss.

7 St. Paul’s Objection: The document is not properly authenticated.

8 Only someone with “personal” knowledge of the genuineness of a document may  
9 authenticate the document for evidentiary purposes. See NRS 52.025.

10 In support of its Motion to Dismiss, National Union relies on the Declaration of Michael F.  
11 Muscarella to authenticate the document attached thereto as a true and correct copy of the subject  
12 National Union policy. Mr. Muscarella declares that he is the Vice President of Excess Specialty  
13 Claims at AIG Property Casualty, a “related entity” to National Union. While Mr. Muscarella  
14 states that he is authorized to make the declaration of behalf of National Union, he does not state  
15 that he has personal knowledge of the matters to which he avers. He also provides no facts from  
16 which one can infer personal knowledge; he fails to explain how AIG Property Casualty is  
17 “related to” National Union. In fact, the document attached to Mr. Muscarella’s declaration  
18 includes a page titled “Policy Certification” where the manager of Risk Specialist Companies  
19 Insurance Agency, Inc., Richard C. Perkins, “certifies” that the policy is true and correct. The fact  
20 that the Declaration and the Policy Certification come from two different individuals, employed by  
21 two different entities, neither of which is National Union, highlights the declarant’s failure to  
22 provide the necessary facts supporting his personal knowledge that the document being averred to  
23 is a true and correct copy of what it purports to be, National Union’s subject policy.

24 The National Union policy, therefore, has not been properly authenticated and is not  
25 evidence properly before the Court on National Union’s Motion to Dismiss.

26 National Union’s Response:

27 NRS 52.015 provides that authentication of a document may be satisfied by evidence or  
28 other showing sufficient to support a finding that the matter in question is what its proponent

1 claims. Further, the trial court has discretion to determine whether the requirement of  
2 authentication has been met. *Lopez v. State*, 105 Nev. 68, 75 (Nev. 1989). National Union has  
3 provided a declaration from Michael Muscarella, a Vice President of Excess Specialty Claims at  
4 AIG Property Casualty, an entity that is related to National Union. St. Paul complains that Mr.  
5 Muscarella's declaration does not explain the relationship between the two entities. However,  
6 Nevada law does not require an explanation of the relationship between the two entities in order to  
7 authenticate the document.

8 St. Paul also complains that Mr. Muscarella did not state he has "personal knowledge" of  
9 the matters to which he averred in his declaration. However, Mr. Muscarella states that he is  
10 authorized to make the declaration on behalf of National Union and that the policy attached to the  
11 motion is a true and correct copy of the National Union policy. *Declaration of Michael*  
12 *Muscarella*, ¶¶ 1-2. Such declaration could not be made without personal knowledge. In addition,  
13 St. Paul takes issue with the fact that the certification page of the National Union policy was  
14 signed by a person other than Mr. Muscarella, contending that this creates a conflict of some kind.  
15 However, no such conflict exists. Both Mr. Muscarella and Mr. Perkins (who certified the policy)  
16 have the requisite personal knowledge necessary to authenticate the National Union policy and  
17 National Union's choice to provide a declaration from Mr. Muscarella instead of Mr. Perkins in no  
18 way renders the authentication of the policy deficient. Nevertheless, while National Union  
19 disputes St. Paul's objection that the National Union policy has not been properly authenticated,  
20 National Union has provided a declaration from Richard Perkins certifying that the National  
21 Union policy is a true and correct copy of the policy issued to The Restaurant Group, et al.

22 DATED: February 6, 2018

HEROLD & SAGER

23 By: /s/ Nicholas B. Salerno  
24 ANDREW D. HEROLD, ESQ.  
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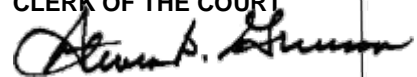


**CERTIFICATE OF SERVICE**

I certify that I am an employee of HEROLD & SAGER and that on **February 6, 2018**, I caused a true copy of the following document(s): **DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S RESPONSE TO ST. PAUL FIRE & MARINE INSURANCE COMPANY'S OBJECTIONS TO EVIDENCE**, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR 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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13 Attorneys for Defendants NATIONAL UNION FIRE INSURANCE  
14 COMPANY OF PITTSBURGH, PA & ROOF DECK  
15 ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB

16 **DISTRICT COURT**  
17 **CLARK COUNTY, NEVADA**

18 ST. PAUL FIRE & MARINE INSURANCE  
19 COMPANY,

20 Plaintiffs,

21 vs.

22 ASPEN SPECIALTY INSURANCE  
23 COMPANY; NATIONAL UNION FIRE  
24 INSURANCE COMPANY OF  
25 PITTSBURGH PA.; ROOF DECK  
26 ENTERTAINMENT, LLC d/b/a MARQUEE  
27 NIGHTCLUB; and DOES 1 through 25,  
28 inclusive,

Defendants.

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

**SUPPLEMENTAL 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 ("COO") for TAO Group, a related entity to  
Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"). I am involved in the

1 management of Marquee and am authorized to make this declaration on behalf of Marquee.

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

5 3. As set forth in my prior declaration in this action, Marquee entered into a Nightclub  
6 Management Agreement with Nevada Restaurant Venture 1, LLC with regard to the Marquee  
7 Nightclub located within The Cosmopolitan Hotel & Casino.

8 4. As part of my job responsibilities, I am required to be acquainted with the  
9 management agreements for the various nightclubs and other venues, including the Nightclub  
10 Management Agreement for the Marquee Nightclub.

11 5. I reviewed the Nightclub Management Agreement for the Marquee Nightclub on or  
12 about the time it was entered into and am familiar with its contents.

13 6. A true and correct copy of the Nightclub Management Agreement has been filed  
14 under temporary seal as Exhibit A to Marquee's Appendix of Exhibits in support of its Motion to  
15 Dismiss Plaintiff's Complaint.

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

18 Dated this 7th day of February, 2018.

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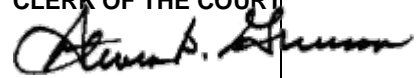
  
Bill Bonbrest

**CERTIFICATE OF SERVICE**

I certify that I am an employee of HEROLD & SAGER and that on **February 9, 2018**, I caused a true copy of the following document(s): **SUPPLEMENTAL DECLARATION OF BILL BONBREST IN SUPPORT OF ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR 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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Eileen Monarez  
Employee of HEROLD & SAGER



RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE  
INSURANCE COMPANY,

Plaintiff,

vs.

ASPEN SPECIALTY  
INSURANCE COMPANY,

Defendant.

CASE#: A-17-758902-C

DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

**TUESDAY, FEBRUARY 13, 2018**

**RECORDER'S TRANSCRIPT OF HEARING  
ALL PENDING MOTIONS**

**APPEARANCES:**

For the Plaintiff:

RAMIRO MORALES, ESQ.

For the Defendant:

NICHOLAS B. SALERNO, ESQ.  
STEVEN J. AARONOFF, ESQ.  
MICHAEL M. EDWARDS, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

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Las Vegas, Nevada, Tuesday, February 13, 2018

[Case called at 10:13 a.m.]

THE COURT: St. Paul Fire & marine v Aspen Specialty Insurance.

We'll take appearances and then we have a number --

MR. MORALES: Good morning, Your Honor. It's number 18 --

THE COURT: -- of motions.

MR. MORALES: Page 18. Rami Morales, counsel for St. Paul, 7141 -- excuse me. I have a little bit of a cold.

THE COURT: We all do.

MR. SALERNO: Good morning, Your Honor. Nick Salerno for Defendants.

THE COURT: Notify.

MR. SALERNO: I have with me counsel who has applied pro hac vice to associate, Steven Aaronoff, and --

THE COURT: That seems like probably the first place we want to start.

MR. SALERNO: That's what I was going to suggest. Thank you, Your Honor.

THE COURT: So you've got some additional counsel with you, so if you have anybody else to introduce as counsel.

Hi, Mr. Edwards.

MR. EDWARDS: Mike Edwards on behalf of Defendant Aspen --

THE COURT: Aspen.

1 MR. EDWARDS: -- Specialty Insurance Company.  
2 THE COURT: Okay. Thank you, Mr. Edwards.  
3 Okay. Mr. Edwards, do you take any position on any of these  
4 motions?  
5 MR. EDWARDS: Not today.  
6 THE COURT: Okay, great. Okay, so for today we just don't  
7 have to keep calling on you? Thank you, sir.  
8 All right. So it looks like the first thing obviously would be the  
9 motions to associate counsel.  
10 I saw no opposition. They appeared, Mr. Morales, to meet the  
11 statutory --  
12 MR. MORALES: No, no opposition.  
13 THE COURT: -- requirements for association of counsel. So  
14 we'll grant those.  
15 I would say, Mr. Salerno, that for court appearances and trial,  
16 we do request under the local rule that local counsel also be present.  
17 Whatever you guys do in the course of your discovery, anything, I don't  
18 care. I mean, whoever shows up shows up. They're admitted pro hac  
19 vice, it's perfectly fine. The only requirement is that we have local  
20 counsel in court.  
21 MR. SALERNO: Great to know. Thank you, Your Honor.  
22 THE COURT: And so you have orders for us to process?  
23 MR. SALERNO: I do.  
24 THE COURT: Okay.  
25 MR. SALERNO: And I have another housekeeping on the

1 motion to seal Exhibit A.

2 THE COURT: That's number two.

3 MR. SALERNO: That's unopposed as well.

4 THE COURT: That's our second issue.

5 What all were you looking to have sealed? Were we sealing the  
6 numbers of the settlement or the policy limits?

7 MR. SALERNO: This Exhibit A is the Nightclub Management  
8 Agreement and we sealed it as an abundance of precaution because the  
9 parties to the underlying action considered it propriety and they sealed it.  
10 So that was the only reason.

11 THE COURT: And so --

12 MR. SALERNO: So it's the filing of the Nightclub Management  
13 Agreement.

14 THE COURT: So then with respect to, though, to the actual  
15 policy limits that were in place and who paid what in the settlement  
16 agreement, because I thought the settlement agreement was also  
17 confidential.

18 MR. SALERNO: That part has been redacted from the  
19 Complaint --

20 MR. MORALES: Your Honor, the amount of the underlying  
21 settlement is confidential.

22 THE COURT: But not the amounts of the policy limits?

23 MR. MORALES: No.

24 THE COURT: Okay, understood. Thanks. All right, great.

25 So based on that then, sir, we'll submit an order indicating that



1 we are sealing the management agreement, that the terms of the  
2 settlement agreement should be sealed or redacted from any future  
3 pleadings but that the amounts of the insurance policies that are at issue  
4 in this coverage litigation, those can be -- they're public.

5 MR. SALERNO: There is no motion to seal the confidential  
6 settlement agreement amount.

7 THE COURT: I think we did that earlier.

8 MR. MORALES: We did that earlier.

9 MR. SALERNO: Did you? Okay. So --

10 THE COURT: Yeah. I think we did that, it was like the first  
11 thing.

12 MR. MORALES: Yes.

13 THE COURT: I think the Complaint was filed and then --

14 MR. MORALES: Yes.

15 THE COURT: -- there was a request to seal the --

16 MR. MORALES: That's correct, Your Honor. That's right.

17 THE COURT: -- settlement agreement.

18 So we won't talk about the number, but policy limits we can talk  
19 about. So I want to make it --

20 MR. SALERNO: Fair enough.

21 THE COURT: Okay. Is that -- is everybody agreed --

22 MR. MORALES: That's correct.

23 MR. SALERNO: Yes, Your Honor.

24 THE COURT: -- that that's the agreement? Okay.

25 MR. SALERNO: And Ms. Keller, I apologize, Your Honor, she's

1 in trial in California right now, --

2 THE COURT: Understood.

3 MR. SALERNO: -- who will take the lead as out-of-state  
4 counsel. She couldn't be here today.

5 THE COURT: Okay. We'll look forward to seeing her in the  
6 future.

7 MR. SALERNO: May I approach with the orders?

8 THE COURT: You may.

9 And then are you just going to write a different order on the -- or  
10 do you --

11 MR. SALERNO: So there's two. There's one for Mr. Aaronoff  
12 and one for Ms. Keller.

13 THE COURT: Okay. And then there's --

14 MR. SALERNO: And then there's one for the Exhibit A.

15 THE COURT: The Exhibit A, okay. Great. We'll get these  
16 processed and we'll notify your office.

17 MR. SALERNO: Thank you, Your Honor.

18 THE COURT: Thank you.

19 Okay. So we have a motion to dismiss and we have a  
20 countermotion so.

21 MR. SALERNO: What I'd ask, Your Honor, if we could as a  
22 housekeeping matter have Mr. Aaronoff address the motion to dismiss on  
23 behalf of Roof Deck, who we refer to as Marquee, and that I would argue  
24 the motion on behalf of National Union if Your Honor's okay with that.

25 THE COURT: Got it. It's okay.

1 MR. SALERNO: And we'll start, if Your Honor doesn't mind,  
2 then with the Marquee motion. Thank you.

3 MR. AARONOFF: Thank you, Your Honor.

4 Your Honor, do you prefer counsel to address the Court  
5 standing or sitting?

6 THE COURT: Whatever is comfortable for you works, I'm fine  
7 with it, or you can stand at the podium. Whatever you prefer.

8 MR. AARONOFF: I think I'll sit today. Thank you.

9 THE COURT: Okay, sit down. Thanks. Thanks for asking.

10 MR. AARONOFF: Thank you.

11 Your Honor, the first issue with respect to the motion by  
12 Marquee, also known as Roof Deck, pertains to the document known as  
13 the Nightclub Management Agreement, which I'll call the MNA if that's  
14 okay. We feel very strongly that the Court needs to consider this  
15 document with respect to the motion to dismiss.

16 For one thing, it's referred to expressly in Plaintiff's Complaint at  
17 paragraph 86. In fact, it's the factual basis for the express indemnity  
18 claim brought by the Plaintiff against Marquee.

19 THE COURT: Counsel, can I ask because there are lengthy  
20 quotes from the Nightclub Agreement in the body of the pleading, were  
21 those to be redacted or is that accepted okay? It's just that the entire  
22 document was what they consider private --

23 MR. SALERNO: There are other -- the attachments and things  
24 of that nature that are more proprietary to the runnings of the club.

25 THE COURT: Okay. So the indemnity and insurance portions

1 that are quoted here, paragraphs 12, they're okay to be cited?

2 MR. MORALES: That's fine, Your Honor.

3 MR. SALERNO: Yes, Your Honor.

4 THE COURT: Okay. Because we don't want to offend the  
5 party whose actual agreement it is, so thanks. Okay, I appreciate that.

6 MR. SALERNO: We appreciate that, Your Honor. Thank you.

7 THE COURT: Okay.

8 MR. AARONOFF: Thanks very much for that, for noting that,  
9 Your Honor.

10 Why this is critical, because we believe that the NMA  
11 establishes two distinct legal defenses in favor of Marquee as a  
12 Defendant on these particular claims and if I can note for the record and  
13 for the Court's attention certain crucial language at page 63 of the NMA.  
14 This is -- let me start first with what has been referred to in the briefing as  
15 the Waiver of Subrogation Provision, and that's, just for reference,  
16 paragraph 12.2.6. It's our position that this portion of the agreement  
17 between Marquee and Cosmopolitan demonstrates --

18 MR. MORALES: Your Honor, I'm going to object. The  
19 agreement is not between Marquee and Cosmopolitan. If you look at the  
20 first page, it is between Marquee and Nevada Restaurant Group.

21 THE COURT: Understood.

22 MR. AARONOFF: Point taken.

23 But for all intents and purposes, Your Honor, I think they're  
24 synonymous in terms of the functioning of --

25 MR. MORALES: Your Honor, --

1 THE COURT: Yeah, well, you'll get an opportunity, so let's just  
2 hear his argument. Thanks.

3 MR. SALERNO: At any rate, it's the operative agreement, but  
4 let me move on from there.

5 The clause that we're talking about demonstrates that the two  
6 insureds here decided to forego subrogation claims and made a decision  
7 to require each other to have certain provisions in their respective  
8 policies. We've cited copious case law to the Court that this sort of a  
9 provision is enforced all the time and it has a preclusive effect on the  
10 Plaintiff's claim, their primary claim, and, in fact, their secondary claim for  
11 contribution against Marquee. So that's number one.

12 Number two is a different legal defense rising from the operative  
13 agreement. And that is in a neighboring paragraph which is also on page  
14 63 but washes over onto 64, that is 13.1. The key here is language that  
15 is in the middle of the paragraph, which discusses under what  
16 circumstances the operator should indemnify, hold harmless, and defend  
17 the owner. And the language I'm talking about is: And not otherwise  
18 covered by the insurance required to be maintained hereunder.

19 Why this is significant, Your Honor, there can be no dispute that  
20 in this matter the owner, which is the hotel entities, did not pay money out  
21 of its own pocket. So in our view this forecloses the ability to bring the  
22 express indemnity claim, which is, I believe, the third cause of action in  
23 the Operative Complaint here. And also we believe would similarly  
24 disable the other purported cause of action against Marquee, which  
25 sounds in contribution. And the Court may recall from our briefing that

1 there are other arguments that we have made regarding the contrast  
2 between indemnity and contribution, which I can go into if the Court  
3 would like amplification on that. But, fairly simply, the statute itself  
4 indicates that you don't get to have it both ways. In other words, there is  
5 an effect by bringing -- by attempting to bring an indemnity claim and you  
6 don't get to go with the other type of claim.

7 The second major problem. The -- Marquee and Cosmopolitan,  
8 as you know, this went to a judgment. There was a finding of liability  
9 against the Cosmopolitan. That, in and of itself, under Nevada law would  
10 prevent that party from asserting --

11 THE COURT: Did the Court rule that as a matter of law or was  
12 that a finding on on a special verdict form by the jury? Who made that  
13 determination? I'm assuming it was the Court.

14 MR. AARONOFF: The verdict was determined -- the jury  
15 determined that, Your Honor.

16 THE COURT: Okay. So it wasn't the Court determining it as a  
17 matter of law?

18 MR. AARONOFF: To the best of my knowledge, no.

19 THE COURT: Okay.

20 MR. AARONOFF: This went the distance, as it were.

21 THE COURT: This was jury verdict, okay, got it. All right.

22 MR. AARONOFF: So that in a nutshell is what we're arguing  
23 here today, Your Honor. There is an extra issue, which if we get there,  
24 involves attorney's fees.

25 THE COURT: Yeah.

1 MR. AARONOFF: And, at any rate, we've asserted that in the  
2 briefing and if things go well, we'll assert it again.

3 THE COURT: I had a question about all these corporate  
4 names, who's on first, who's who. As I understand it, your client's policy  
5 was to Nightclub Management Group, something like that, which is the, I  
6 think, the parent company of all these Tao, all those different entities.  
7 And it indicated that any 50-percent owned subsidiary or after-acquired  
8 subsidiary, anything that they owned 50 percent of would be considered  
9 to be an insured. So we don't have any issues there regarding who the  
10 insureds were meant to be under the policy and that those were, in fact,  
11 parties to the settlement and the subsequent coverage litigation. I mean,  
12 you could trace that from the parent through -- because, as it was pointed  
13 out, there are all these initials and names. I think this -- we had Roof  
14 Deck and then there was -- I think the NVPD 1, because Cosmo has a  
15 very odd corporate name. Deutsche Bank came up with some weird  
16 corporate name, like Nevada 1, or something. It's a very unusual --

17 MR. SALERNO: Similar to that.

18 MR. MORALES: Nevada Properties 1, Your Honor.

19 THE COURT: Nevada Properties 1, yeah.

20 MR. SALERNO: Yeah, Nevada Properties 1 holds the property.

21 THE COURT: So I was trying to make -- figure out to make  
22 sure that we -- all -- we talk about parties --

23 MR. SALERNO: And then they leased it to Nevada Residential,  
24 the leasing -- the company that's in the Agreement.

25 THE COURT: Okay. But we don't have any -- that's not part of

1 our coverage dispute. We're not --

2 MR. SALERNO: It is not, Your Honor.

3 THE COURT: -- disputing who the parties are and whether they  
4 were in fact insureds?

5 MR. SALERNO: This isn't even a coverage action, Your Honor.

6 THE COURT: Okay, got it. Well, a contribution, yeah.

7 MR. SALERNO: There is some overlap, certainly.

8 THE COURT: Okay. All right, great. I just wanted to make  
9 sure that we didn't have to worry about whether anybody was actually an  
10 insured.

11 MR. SALERNO: Fair enough.

12 THE COURT: Okay. Thanks. All right. Thank you.

13 So Counsel, anything further on this particular issue? Keeping  
14 in mind our lower pleading standard, I understand that in federal court  
15 every fact giving rise to a cause of action needs to be specifically pled in  
16 your Complaint. They sort of -- on these kinds of motions, I guess, really  
17 pick apart the Complaint to so see if in fact the elements are pled. We,  
18 under Nevada law, have a less stringent standard, just that there is a  
19 cause of action that may be proven is what we need.

20 So in this matter your view is that as a matter of law, we don't  
21 have to get into all that about what's pled in the Complaint so much with  
22 respect to all these facts, but it's just that as a matter of law this cause of  
23 action cannot exist because of the background of the management  
24 agreement, which was referenced in the underlying Complaint. So,  
25 therefore, even though not attached, it's relevant and the Court can



1 consider it on this motion to dismiss.

2 MR. AARONOFF: That is our position, Your Honor.

3 THE COURT: Okay.

4 MR. AARONOFF: And the other thing I would add, Your Honor,  
5 judicial economy.

6 THE COURT: Okay, great. Thank you.

7 All right. Anything else?

8 MR. AARONOFF: Not at the moment.

9 THE COURT: Okay. Okay, so, Mr. Morales. Yeah.

10 MR. MORALES: Your Honor, following up on the Court's  
11 comment, the initial question of what was decided, it was decided as a  
12 matter of law that there was a nondelegable duty from Cosmopolitan. So  
13 the suggestion that this was part of a verdict, et cetera, they were  
14 basically treated as one.

15 THE COURT: Okay.

16 MR. MORALES: Okay. That's what happened.

17 Now with regard to the pre-answer litigation we have here, we  
18 have a dispute about what Marquee relies on as the operative document  
19 and its interpretation. And I want to start with stepping through the  
20 document that they rely so heavily on that is not properly authenticated  
21 because Mr. Bonesteel, et cetera, if you look at his declaration, he  
22 actually says in his declaration this is an agreement between Nevada  
23 Restaurant Ventures and Roof Deck Entertainment. Neither of those  
24 parties is Cosmopolitan, so to the extent they are saying: Well, look at  
25 this document. And their papers do this throughout. They conflate

1     Cosmopolitan and they just treat them as if they are the tenant. That's  
2     not true.

3             If you look at page 1 of the agreement, it refers to the two  
4     entities. If you look at page 2 of the agreement, it specifically defines  
5     owner as Nevada Restaurant Group. The provision that counsel relies  
6     on, he refers to owner. Well, that is Nevada Restaurant Group.

7             We have a dispute about how this document applies. We've  
8     laid out several of them in our papers. But certainly for the pleading  
9     standard, this nowhere is near the mark to submit a 153-page document  
10    that Cosmopolitan is not the operative entity. Nevada Restaurant is the  
11    operative entity. And to suddenly say we're just going to overlay  
12    everything and say this document controls all actions and it's over, it just  
13    doesn't support Nevada's pleading standards.

14            And if you like, I could run through the various provisions that  
15    they raise that are problematic, if the Court has time, I can do that.  
16    Whatever you like.

17            The first section, they refer to --

18            THE COURT: I guess you did raise a point, and there was a  
19    separate motion with respect to your objection to the evidence. And I  
20    think it was somewhat addressed in the second. There was a second  
21    affidavit, but I think those just went to --

22            MR. SALERNO: Policy, Your Honor.

23            THE COURT: -- policies.

24            MR. SALERNO: Yes.

25            THE COURT: We didn't have anybody authenticating the

1 agreement, which the parties apparently consider proprietary, operational  
2 information, should not be made public, so we've sealed it.

3 So with respect to the clarification that they actually -- that  
4 somebody who actually has access to the policy had it downloaded.  
5 And, oddly, there's all sorts of mis -- the letter I seems to be missing  
6 throughout that policy. I don't know why, they just printed oddly. So I  
7 guess that's the first thing that we need to discuss, with respect to the  
8 policy.

9 Are we over our objections to the policy and are we just really  
10 now -- the only thing we really have to deal with is the management  
11 agreement.

12 MR. MORALES: Yes, you're right.

13 THE COURT: Okay. Oh, thank you.

14 With respect to the -- you did have a motion on for your  
15 objection to the evidence, which was this issue as to whether we had  
16 properly declared -- proper foundation for the insurance policy. I think  
17 that was answered when the second affidavit was submitted again with  
18 the policy. It had more detail in it.

19 MR. MORALES: Yes.

20 THE COURT: And it explained a little bit better how the person  
21 who's authenticating it was related to --

22 MR. MORALES: And it was a different person.

23 THE COURT: Yeah, yeah.

24 He gave more information. He was higher up and I think  
25 specifically had the job that would --

1 MR. MORALES: Yeah, it was more than two sentences.

2 THE COURT: Yeah. So is that one moot?

3 MR. AARONOFF: The policy's fine.

4 THE COURT: Okay. So we're going to moot that particular  
5 motion because there was a subsequent affidavit provided that satisfied  
6 the requirements, so we don't have to deal with that any further. We can  
7 get back to our original topic. I'm sorry, I forgot we had to deal with that.

8 MR. MORALES: Yeah, we do have an objection pending  
9 regarding the management agreement in that --

10 THE COURT: Management agreement, which is, yeah,  
11 separate, and for some reason didn't make the calendar today, so I don't  
12 know.

13 MR. MORALES: Mr. Bonbrest, all he testifies to is that this is a  
14 document between Nightclub management and Marquee, there's nothing  
15 to establish that this has --

16 THE COURT: We as --

17 MR. MORALES: -- binding impact or connection to --

18 THE COURT: And that was my question about do we know  
19 who these corporate entities are and --

20 MR. MORALES: We do know who they are. They are -- if  
21 you -- the Cosmopolitan/Nevada Properties 1 is the owner of the entire  
22 property. Cosmopolitan/Nevada Properties 1 leases the property, the  
23 particular nightclub, to Nevada Restaurant Group. Nevada Restaurant  
24 Group then enters into a contract with Marquee. Nevada Restaurant  
25 Group was not a party to the underlying litigation and they're not a party

1 to this litigation.

2 THE COURT: Okay. And so what's the significance of that?

3 MR. MORALES: Well, because what Marquee is suggesting is  
4 that the contract entered into between Nevada Restaurant Group and  
5 Marquee, the terms here, they're trying to bind Cosmopolitan to those  
6 terms. Some of them may apply to them, some of them may not. But  
7 this broad brush, if you read their papers, their papers state: The  
8 agreement between Marquee and Cosmopolitan. That's the foundation  
9 of their papers.

10 THE COURT: Who owns Marquee?

11 MR. MORALES: Excuse me?

12 THE COURT: Who owns Marquee? I mean, that's kind of what  
13 was missing from me, is this --

14 MR. MORALES: I don't know who owns Marquee.

15 THE COURT: -- is it like the family tree?

16 MR. MORALES: No, no.

17 MR. SALERNO: Roof Deck. It's a separate entity, Your Honor.

18 MR. MORALES: It's a separate company.

19 MR. SALERNO: It's a Tao company.

20 MR. AARONOFF: Doing business as Marquee at the time of  
21 these -- I apologize. I didn't mean to interrupt counsel.

22 MR. MORALES: There were motions filed in the underlying  
23 case, just by way of anecdote, where Marquee's counsel filed motions to  
24 tell the Court, Cosmopolitan and Marquee do not have a contract  
25 together. So to suggest that this document, and I could run you through

1 their papers where they say this is an agreement between -- page 7,  
2 line 22: The management agreement between Marquee and  
3 Cosmopolitan. That's wrong. They say it throughout.

4 The intent of Marquee and Cosmopolitan was how these  
5 policies would apply. The Cosmopolitan is not the party to this  
6 agreement.

7 THE COURT: Okay. Because this is my question, when I was  
8 reading all of this, is: Don't we need somewhere to -- because the  
9 question is do we have any discovery we have left to do. All my  
10 questions have been who is the insured, who are the parties to the  
11 contract, because it's a complex structure, --

12 MR. MORALES: We have a lot of discovery to do.

13 THE COURT: -- to say the least. And who's who, who controls  
14 who, who made these agreements, was somehow this agreement a  
15 requisite of Cosmopolitan to either lease to Marquee? I mean, that was  
16 what was kind of missing for me, is that it seems like we have to first -- I  
17 appreciate it's not a coverage dispute. It's -- it's a collection --

18 MR. MORALES: It is in part. I want to correct that. It is in part  
19 a coverage dispute.

20 THE COURT: Well, coverage matters, but the issue is just can  
21 you collect under these terms. I didn't -- I thought it was -- on the surface  
22 I understood that these are all legal issues, but what I -- seriously, I was  
23 trying to make little charts of who owned who, and I got lost because it's  
24 very unclear.

25 I mean, I think I understand who the actual insured is, and they

1 have a bunch of subsidiaries, but I didn't understand where Roof Deck  
2 came into all of that structure or who they were, or Marquee --

3 MR. MORALES: We'd submit that there was a lot of discovery  
4 to do, and this motion is to be denied.

5 THE COURT: Yeah.

6 MR. MORALES: I mean, there is a lot of work to do.  
7 Admittedly, I'm new to the case. I think the only ones who have been  
8 involved since the underlining litigation was Mr. Salerno's firm.

9 THE COURT: Yeah.

10 MR. MORALES: But I'm -- we're getting up to speed. But just  
11 reading the document on its face and reading their papers, their papers  
12 misstate the relationships.

13 MR. AARONOFF: May I respond, Your Honor?

14 THE COURT: Maybe. Yeah. Yes, I wish you would.

15 MR. AARONOFF: Thank you, Your Honor.

16 Your Honor, I'm going to read paragraph 86 of Plaintiff's  
17 Complaint. 86, this is on page 13 of the Complaint, for reference: Per  
18 written agreement, comma, Marquee was obligated to indemnify, comma,  
19 hold harmless and defend Cosmopolitan for Marati's claims in the  
20 underlying action, period. End of sentence.

21 This is counsel's own writing here. Now if he can't tell us  
22 whether the Nightclub Management Agreement what I'm holding in my  
23 hand here, if that's the not the written agreement he was talking about,  
24 then what agreement was he talking about?

25 Second, Your Honor, if we look back at page 63, which is the

1 section regarding indemnity, it says --

2 THE COURT: Are we back in the management agreement or  
3 are we on the contract still -- I mean, the Complaint still?

4 MR. AARONOFF: We're in the Nightclub Management  
5 Agreement. I'm sorry, Your Honor.

6 THE COURT: The management agreement, okay.

7 MR. AARONOFF: If you look at the specific language of the  
8 key provision, it says that the operator shall indemnify, hold harmless,  
9 and defend owner, and he points out, it said earlier, the owner is Nevada  
10 Restaurant. Okay, but it says: Owner, and its respective parents,  
11 subsidiaries, and affiliates. And affiliates is a defined term in the  
12 Nightclub Management Agreement, and all of each of their respective  
13 officers, directors, shareholders, employees, agents, members,  
14 managers, representatives, successors, and assigns. And this entire  
15 block of individuals and/or entities is called the owner indemnities.

16 I don't see what more needs to be said here, Your Honor.

17 THE COURT: But, again, that was my question because I  
18 started with the policy --

19 MR. AARONOFF: Right.

20 THE COURT: -- to see who are we talking about, who's our  
21 actual insured, and how do they relate to the entities here in Nevada.  
22 And, again, that's where I kind of ran aground because I don't find that all  
23 of the entities are actually defined as to -- because, as I said, the one  
24 thing I found that defined what ownership was was in the policy. It said  
25 50 percent. If you own 50 percent of anything you own, then that's part



1 of our insured.

2 But I didn't find anything that defined, you know, because they  
3 just named that entity in the policy. They didn't talk about other insureds,  
4 other named insureds, who they were supposed to be indemnifying, and  
5 how does that policy, when read with this management agreement, how  
6 we do we determine if we're talking about the same thing, because it  
7 seems like there's a little bit different language and definitions in the  
8 policy than there is in this management agreement. And that's where I  
9 couldn't figure out where we could define them the same way, because  
10 we didn't have enough background information about who owed who.  
11 And that's I think what we need. I mean, we need to know who actually  
12 owns these people --

13 MR. SALERNO: Your Honor --

14 THE COURT: -- because, you know, I'm not allowed to go to  
15 the Secretary of State's page and figure it out myself, so.

16 MR. SALERNO: I think all you really need to know is whether  
17 this is the agreement that they're basing the claim on. Because if it is,  
18 this is what it says. And if they're standing here saying this isn't the  
19 agreement, then they have a pleading obligation to come forward and  
20 identify what is, otherwise the pleadings are deficient. You're not hearing  
21 that this isn't the agreement.

22 MR. MORALES: We're all going to argue now?

23 MR. SALERNO: You're not hearing this is not the agreement.  
24 You're hearing some kind of technical argument, based on an evidentiary  
25 objection, that if that's the case, then they haven't met their burden

1 pleading. And Mr. Morales is not sitting here saying this isn't the  
2 agreement.

3 THE COURT: Right. But that -- and I understand that, but  
4 because we have the actual document, it has been sealed, and we do  
5 need to figure out how we're going to deal with that.

6 The problem that I ran into was there doesn't seem to be a  
7 direct, on-its-face, this is the name. We have this finding by the other  
8 court. I thought it was like a legal direction to the jury. Like I said, I  
9 wasn't involved, don't really know, so I guess I need to look that up.

10 But I'm still trying to figure out how we figured out who the  
11 parties were, how did we get -- because I don't know, I don't really think  
12 about Mr. Marati's Complaint, what he alleged, who he said was  
13 responsible, and how we got there? Like I said, I can't do my own  
14 research on corporate entities, so that's what I was just -- to me it  
15 seemed like this largely is an issue of law, I understand that. But the  
16 relationships of these parties are a little obscure, and I'm trying to figure  
17 out how we got from Roof Deck, how was Cosmopolitan named, and  
18 that's -- you know sort of what I'm missing here is we need to  
19 understand --

20 MR. SALERNO: That's really a pleading issue, Your Honor, if I  
21 may --

22 THE COURT: Thank you.

23 MR. MORALES: Marati filed extensive litigation. If I could,  
24 Your Honor --

25 THE COURT: Mr. Salerno --

1 MR. MORALES: If I could respond to Mr. Salerno's comment?

2 THE COURT: Mr. Salerno, I think, had another comment to  
3 make, sir --

4 MR. MORALES: Okay.

5 THE COURT: -- and then we'll respond, yeah.

6 MR. MORALES: Okay.

7 MR. SALERNO: I mean, Your Honor's illustrated a point with  
8 the pleadings. I don't think there is a dispute whether the insureds  
9 properly flow and whether St. Paul insured Cosmo, which also insured  
10 Nevada Residential Properties. I don't think there is a dispute in that  
11 regard. But they chose to plead it this way.

12 And I would respectfully submit all Your Honor really needs to  
13 know is whether this is the written agreement that they're basing the  
14 express indemnity claim on that they claim is owed to Cosmo or Nevada  
15 Residential Properties. What are they claiming? And if they're saying it's  
16 not clear, and they're sitting here denying this is it, then that's a real  
17 deficiency in their pleading that must be corrected, and then we can  
18 come back and deal with this issue. But I'm here to tell you they won't tell  
19 you that because this is the agreement, and everybody knows and  
20 understands that.

21 And so what I would respectfully submit is that this written  
22 agreement with this express indemnity provision is all the Court really  
23 needs to know to decide this aspect of the motion.

24 Thank you, Your Honor.

25 THE COURT: Okay. Well, because the -- you know paragraph

1 6, and I don't think anybody disputes this, the dispute arises out of the  
2 160,500,000 compensatory damage jury verdict award in Marati versus  
3 Roof Deck, LLC, dba Marquee, and then et al. So who are the et al. and  
4 where did the court come up with this agreement that as a matter of law  
5 they're vicariously liable? Cosmo had a nondelegable duty.

6 Marati also named Nevada Property, LLC, dba the  
7 Cosmopolitan. Okay. So that's just my concern, is how can we  
8 immediately get to who owes who what kind of duties until we know what  
9 the different corporate structures are and how they are related, if they  
10 are.

11 I mean, I don't know how Mr. Marati got Cosmo in here. I am  
12 assuming because they're ultimately the landlord and as a licensee they  
13 are obligated to be responsible. They can't wash themselves of all  
14 responsibility even if it's a four-wall like this one was. They can't divest  
15 themselves with all obligations. So what was that based on? Did the  
16 judge handling -- who was the judge at the trial? I don't --

17 MR. MORALES: Judge Johnson, Your Honor.

18 THE COURT: Judge -- okay, I didn't remember, yeah. -- make  
19 that determination, that Cosmo --

20 MR. SALERNO: He did, Your Honor, and I don't know what  
21 specific arguments were made.

22 THE COURT: No.

23 MR. SALERNO: But clearly St. Paul insured one of the  
24 entities --

25 THE COURT: Right. Yeah, okay.

1 MR. SALERNO: -- and paid that money on behalf of one of  
2 those entities, and that's not really in dispute in this action. Now  
3 something like that could come up through the course of discovery.

4 THE COURT: I understand.

5 MR. SALERNO: Yeah.

6 THE COURT: But why did they do it? Like I said, I can figure  
7 out St. Paul. That policy says if you own 50 percent, okay. So how then  
8 did that relate to who they -- who were the parties in this litigation and  
9 what they paid on.

10 I mean to me, I appreciate you think this should all be in the  
11 Complaint, but we're not in federal court, so --

12 MR. SALERNO: Yeah, but those are essential facts to evaluate  
13 their standing and threshold legal issues that should be addressed at this  
14 stage of the pleading. So I realize it's notice pleading, and Your Honor  
15 had been practicing in this state a long time, but when there's essential  
16 facts that are necessary to show capacity and standing to sue, and, you  
17 know, the legal ability to pursue a claim, they should be pled if counsel is  
18 going to get up today and then dispute them or claim it's ambiguous or  
19 claim they haven't been established. You can't have it both ways.

20 THE COURT: You know originally you had talked about that  
21 you were going to split the -- your discussion on the various motions.

22 MR. SALERNO: Yes.

23 THE COURT: So we -- before Mr. Morales gets back up and  
24 responds, have we discussed both of them? Because we --

25 MR. SALERNO: I haven't done my -- the motion to dismiss on

1       behalf of National Union yet, Your Honor.

2               THE COURT: Okay. So we're -- so far we have just discussed  
3       the original motion, which was the Marquee motion, correct?

4               MR. SALERNO: Yes, Your Honor.

5               MR. AARONOFF: Correct.

6               THE COURT: Anything more to say on Marquee before we get  
7       into National Union?

8               MR. MORALES: Your Honor, just to clarify what Marquee is  
9       doing repeatedly, and he just did it again, he said: Well, this is that  
10      agreement. What he doesn't discuss is how the agreement applies to the  
11      separate entities. That's what's missing, that's what needs discovery,  
12      okay. It's very -- it's a basic issue. We're going to do discovery on how it  
13      applies to different entities. There are ownership entities, there are  
14      project ownership entities, there are operator entities. They just want to  
15      conflate everything and say, oh, look, nothing to see here. That's not the  
16      case. There's work to do.

17              THE COURT: So, Mr. Salerno, then we have the next motion  
18      that we have is the National Union. And, again, your firm and your  
19      associated counsel represent both?

20              MR. SALERNO: Yes, Your Honor. Thank you. And both firms,  
21      including out of state.

22              Your Honor, so the motion to dismiss on behalf of National  
23      Union has a couple tiered arguments similar to the other motion. And the  
24      first tier that the Court must address really as a matter of Nevada law is  
25      an issue of first impression in the district courts here, in the state district

1 courts. And that is whether Nevada recognizes an equitable subrogation  
2 right among carriers. Nevada has not squarely addressed that. It's been  
3 addressed in other states, like California certainly, and even federal  
4 district courts sitting in Nevada have allowed it. But so that's a threshold  
5 question that Your Honor must address as part of this motion. And then  
6 with regard -- and that's with regard to the first cause of action for failure  
7 to settle.

8 The second cause of action for equitable subrogation based on  
9 Nevada's Unclaimed Fair Practices Act is similar. There is no court  
10 anywhere that's allowed an insurance company to step into their shoes to  
11 pursue that, a cause of action based upon that act.

12 And so Your Honor will by necessity need to address whether  
13 that's going to be allowed. But even so there's problem with those  
14 causes of action as a matter of law that should be addressed at this  
15 stage of the proceedings. On the first cause of action for failure to settle,  
16 you have a pleading here that says that both carriers, St. Paul and  
17 National Union, are excess-level carriers.

18 St. Paul tries to say, no, we're a high-level excess, whatever  
19 that means. But none of the case law talks about that. They talk about  
20 the ability of an excess carrier in the states that allow equitable  
21 subrogation for failure to settle. They talk about the ability of an excess  
22 carrier to pursue a primary carrier for their failure to settle. Not excess to  
23 excess. And so that's another issue that needs to be addressed by Your  
24 Honor.

25 If you're going to allow equitable subrogation, what are the

1 factors? Are they the similar factors that have been adopted in  
2 California, where it's excess against primary and other equities are  
3 considered, which can get into fact questions, but not whether you're  
4 excess versus primary. Those are legal questions that should be  
5 addressed at this stage of the proceeding. Because if St. Paul's truly not  
6 an excess carrier to National Union, they have no cause of action even if  
7 Your Honor would allow equitable subrogation, such as an estate based  
8 on the factors that would have been developed in California.

9 Now similar to this nightclub agreement thing, St. Paul wants to  
10 hide behind the fact that they haven't pled the operative provisions to  
11 show that it is an excess carrier to National Union. Right now the  
12 Complaint just says excess to excess. And so based on the Complaint,  
13 that cause of action fails as a matter of law, if Your Honor would allow  
14 equitable subrogation for failure to settle.

15 They have their own policy. Rather than come forward and  
16 show you the language that they claim needs to be looked at, they try to  
17 say, oh, we don't have the information, we need to conduct discovery.  
18 You don't need to conduct discovery on basic threshold legal matters.  
19 They should be pled. And that's really the point of this.

20 So if Your Honor is going to allow equitable subrogation to be  
21 pursued between carriers, we should at least evaluate this issue upfront  
22 in the name of judicial economy, because either they are stuck with the  
23 facts they've pled, excess to excess, or they need to plead more so we  
24 can evaluate that priority of coverage issue as a threshold question.

25 They've had their chance, so we respectfully submit they



1 shouldn't be allowed now to conduct discovery on issues that should  
2 have been pled, that they should have come forward with as part of this  
3 motion work and demonstrated, and instead have tried to hide behind the  
4 alleged evidentiary issues, which are legal issues.

5           So Your Honor should decide it on the pleadings. But to the  
6 extent Your Honor's not inclined to do that, they should have to amend  
7 their Complaint to set out the provisions, the legally operative provisions  
8 that Your Honor can decide as a matter of law to, in fact, show they have  
9 standing to pursue this claim as an excess carrier, and we can address  
10 that properly as a threshold question.

11           On the Unfair Claims Practices Act, it's the same thing, Your  
12 Honor. Yeah, there's an absence of law, so St. Paul thinks they should  
13 be allowed to do it, but it's a statutory scheme meant to protect  
14 consumers. In the times that third-party claimants have tried to step in,  
15 the Supreme Court has provided guidance that said, no, you can't do  
16 that.

17           Think about what St. Paul is trying to say here, that they can  
18 pursue their failure-to-settle claim but without all those equitable factors  
19 that have to be considered, by stepping into the shoes of their insured  
20 under the Unfair Claims Practices Act. That's not what that act is meant  
21 to be, because if it was, every carrier in this case could do the same  
22 thing. National Union can file a counterclaim against St. Paul. We paid  
23 money, we step into the insured's shoes. You should have settled,  
24 because that's what this fight's about, whether both should have settled  
25 or both have equal opportunity, when the right elements exist, which they

1 don't. But that's not what the Unfair Claims Practices Act is about. Some  
2 form for carriers to come in and point fingers at each other to try to  
3 resolve who should have done what. It's a consumer-protection statute.  
4 It has no application to these claims.

5 Thank you, Your Honor.

6 THE COURT: Thanks.

7 MR. MORALES: Your Honor, a couple of things. First,  
8 Mr. Salerno opens by saying these are both undecided issues of law in  
9 Nevada. Accepting that at face value, which I do not, but I believe where  
10 the action raises an issue of law that is a first impression, motions to  
11 dismiss are disfavored. Okay, so --

12 MR. SALERNO: Citation, please?

13 MR. MORALES: It's in our papers. *Chestnut v AVX Corp.* 413  
14 S.C. 224.

15 Okay. So on its face, to say, well, these are novel legal issues,  
16 so they should be decided at the pre-answered motion stage is incorrect.  
17 But let's move to whether or not these are novel issues. They are not.

18 What National Union is saying is subrogation doesn't exist.  
19 Well, the Supreme Court in *AT&T Technologies v Reed*, 109 Nevada  
20 592, says: Subrogation is a basic accomplish to accomplish fairness and  
21 justice between the parties. It's a very basic concept. What National  
22 Union is suggesting and what they're doing is they're saying: well, we've  
23 never seen a case with these two parties. It's as if you were to say  
24 there's never been a negligence case between two flight attendants, so it  
25 must not be allowed.

1 Subrogation is a basic concept. There are legions of cases  
2 recognizing it. What is clearly absent from National Union's papers is a  
3 case disallowing it. They just say, it's never been there.

4 Now let me comment on another point in National Union's  
5 papers. National Union takes the liberty of saying, in fact, there has  
6 never been a subrogation case in a Nevada state court between carriers.  
7 I will submit to you that I litigated a case with Mr. Salerno as my co-  
8 counsel in subrogation before Judge Earl, Case Number A5-13374. So  
9 to say to the Court there has never been a subrogation case in the state  
10 of Nevada? That's ridiculous. Subrogation exists because it is a basic  
11 concept. It is simply trying to do justice between the parties. If they want  
12 to sue us because they think we did wrong, they're free to. But  
13 subrogation is an old, basic concept. We cite to a number of cases that  
14 recognize it in this context. We cite to the *Colony* decision which is,  
15 frankly, on all fours. And what National Union says is they predict we'll  
16 cite the law. Yes, we do. That is their prediction. They're correct on  
17 that. We do cite the law, because the law is in our favor. The law  
18 recognizes this cause of action. The law recognizes it on all counts. It's  
19 not limited to some accounts and others. Subrogation is a basic concept  
20 of due justice. That's what we're doing.

21 Their suggestion that because they are not -- these particular  
22 parties, it can never be allowed, not only is improper at the pre-answer  
23 stage, but it's improper legally.

24 THE COURT: What about the Unfair Claims Practices Act? I  
25 mean, that's a statutory scheme --

1 MR. MORALES: It's a recycle. It's the same issue because  
2 what --

3 THE COURT: No, because it's statutory. And the statutory  
4 language talks about the insured versus their insurance career. So how  
5 can that be extended to this third-party concept of indemnity? It doesn't  
6 make any sense --

7 MR. MORALES: It is not a third-party concept. We are  
8 stepping into the shoes of the insured. Their insured, Cosmopolitan.  
9 They admit that in their papers. We're stepping into the shoes of  
10 Cosmopolitan because National Union had obligations to them. They  
11 had obligations to notify --

12 THE COURT: You can step into the shoes of your insured, but  
13 you can't step into the shoes of a third party. I mean, Cosmopolitan isn't  
14 a party --

15 MR. MORALES: Your Honor, Cosmopolitan is National Union's  
16 insured.

17 THE COURT: I understand, --

18 MR. MORALES: Okay.

19 THE COURT: -- but how far do you have to step into the shoes  
20 of their -- subrogation is they pay a claim on behalf of their insured and  
21 they go sue the third party.

22 MR. MORALES: No, sub- --

23 THE COURT: Where is there any right for a third-party carrier  
24 to step into the shoes of somebody else's insurance company to sue that  
25 insurance company for --

1 MR. MORALES: We're not stepping into the shoes of National  
2 Union.

3 THE COURT: No, no. You're stepping into the shoes of  
4 Cosmopolitan. We already had -- they're not your insured.

5 MR. MORALES: Cosmopolitan has a claim for Unfair Claims  
6 Practices against National Union.

7 THE COURT: Did they assign it to you? Do you have a  
8 contract assigning it?

9 MR. MORALES: No, it's equitably assigned in subrogation.

10 THE COURT: No.

11 MR. MORALES: That's what subrogation is.

12 THE COURT: This is a statutory remedy that an insured has  
13 against their carrier. So if you weren't assigned this statutory cause of  
14 action by the party who holds it, what right do you have equitably to  
15 statutory remedy, specifically limited to the insured?

16 MR. MORALES: Subrogation is an equitable assignment.

17 THE COURT: But there is a difference between subrogation  
18 and Unfair Claims Practices, and Unfair Claims Practices is absolutely,  
19 statutorily the right of the insured. They're not your insured.

20 MR. MORALES: Cosmopolitan --

21 THE COURT: I mean, I would understand this if -- as counsel  
22 as insurance company for Cosmopolitan, they chose to step into their  
23 insured's shoes --

24 MR. MORALES: We are.

25 THE COURT: -- because there is a statutory agreement for

1 subrogation there. And their actual insured would have the right to  
2 assign their cause of action, because this is a statutory cause of action.  
3 It's not common law. You can't say under a common law right of  
4 subrogation we're going to take over the statutory claim that's not of our  
5 own insured but against some third party, forcing them to sue their carrier  
6 for coverage --

7 MR. MORALES: So is --

8 THE COURT: -- for the Unfair Claims Practices Act.

9 MR. MORALES: So would the Court --

10 THE COURT: That's Cosmopolitan's right to say that.

11 MR. MORALES: Are you saying we would need an express  
12 assignment from Cosmopolitan in order to pursue that count?

13 THE COURT: I'm saying I don't understand how you can claim  
14 it because it's statutory.

15 MR. MORALES: We view it as a straight subrogation claim and  
16 we step into the shoes --

17 THE COURT: But you can't impose a common law remedy --

18 MR. MORALES: I understand. I understand the Court's point.

19 THE COURT: -- on a statutory right. The statutory right is  
20 defined, who is the party who may sue for an Unfair Claims Practices Act.  
21 And I see nothing that would -- under the statute give you a right to claim  
22 that. It's the right of an insured and if the insured -- it's an excess  
23 judgment against him and wants to assign all their rights to the person  
24 who holds the judgment, that's their right. They can assign their rights,  
25 but it's not a statutory -- or it's not a common law remedy of subrogation,

1 it's a statutory claim. And I don't understand how under this statute you  
2 could claim that.

3 MR. MORALES: We insure Cosmopolitan. We paid a  
4 significant amount on their behalf.

5 THE COURT: Right.

6 MR. MORALES: It's our view that in subrogation we step into  
7 their shoes to pursue whatever claims they have against National Union.

8 THE COURT: Okay. So thanks.

9 Mr. Salerno.

10 MR. SALERNO: Briefly, Your Honor. Counsel made the point  
11 about equitable subrogation being, you know, a known right and applied  
12 it in the insurance setting. I did not say that no case has ever been  
13 pursued at the state court level, because I don't know if that's true. I said  
14 Nevada has not addressed whether it's allowed. That means the  
15 Supreme Court.

16 THE COURT: Right.

17 MR. SOLERNO: And that's all I meant by that. I did not mean  
18 to mislead Your Honor as insinuated by counsel.

19 What counsel doesn't address, though, is, okay, if Your Honor is  
20 inclined to recognize that as a viable cause of action, what are the  
21 factors? One of the factors is has to be excess to primary. Counsel  
22 didn't address that point whatsoever, so I take that as an admission that  
23 it's not excess to primary, because that's not what's alleged in their  
24 Complaint. What's alleged in their Complaint is two umbrella policies with  
25 the same limits for two different insureds, two different towers of

1 coverage, one in which -- one tower in which Cosmo is also an additional  
2 insured, and that's the National Union tower.

3 It's also never been allowed in Nevada with two different towers.  
4 So those are just threshold legal issues Your Honor has to address. But  
5 as a matter of law to allow this claim to proceed, St. Paul has to  
6 demonstrate and be able to plead if they're saying something different  
7 now than what's in their pleadings, the operative provisions that makes  
8 their policy somehow high-level excess to the excess level of the National  
9 Union policy. If, in fact, that's true, they have their policy, they have that  
10 language, that is a legal question that should be addressed at this stage,  
11 because we don't need to engage in costly discovery about a bunch of  
12 facts that are irrelevant. It's a threshold legal question.

13 So I would say base it on the pleading, Your Honor. But if  
14 you're not inclined to, you think there is an issue there, they should be  
15 required to amend their pleadings to set out their operative provisions --

16 THE COURT: Okay.

17 MR. SALERNO: -- or discovery should be very limited just to  
18 that issue, and then we'll address it with Your Honor with all the  
19 information.

20 THE COURT: Well, with respect to the first motion, which is the  
21 Roof Deck motion, I am going to deny that without prejudice to be  
22 renewed at an appropriate time because I think we are lacking just a  
23 basic understanding of who the players are, who the insureds are, who  
24 the contract parties were, was there some word from above from Cosmo  
25 that you needed -- that there is an agreement there that is why the



1 coverage passed through. I don't know any of those answers. So for  
2 that one I think that's premature.

3 With respect to the second motion, which is the National Union  
4 motion, that to me is a disparate issue because it raised these two very  
5 specific issues, the standing concept. I am very troubled by the concept  
6 that a statutory remedy that is specific to an insured against their  
7 insurance carrier can be somehow assumed by another carrier that may  
8 have paid a claim, that they may have benefitted from the payment of  
9 that claim. I don't understand that cause of action at all.

10 So I don't know if it's possible to plead in more terms anything  
11 that would show that, but I'll certainly give them leave to amend this  
12 pleading because I do think what we have to have amended are what  
13 the -- specifically, I think we have to have this. I don't think this is a  
14 problem with just notice of pleading, but I think we have to know the base  
15 upon which they're claiming -- against which St. Paul is claiming this right  
16 to indemnity, whether equitable or contractual, seems like it's mostly  
17 equitable. I'm not sure subrogation is ever equitable, but contribution is.

18 So I think we have to have this pleading amended on those two  
19 issues, because I do not, I cannot comprehend how this statutory remedy  
20 of an insured against their own insurance company -- there's a  
21 relationship between the insured and their insurance company that is  
22 contractual, that gives you a statutory remedy. I don't see how that could  
23 ever be equitable or assumed by somebody else. It's a statutory remedy.  
24 It's very specific. They owe you a contractual duty as your insurance  
25 company because you've paid the premiums. It's personal to the

1 insured. But, anyway, I still think we need -- I would grant the alternative  
2 relief requested of amending the pleading.

3 MR. AARONOFF: So we're --

4 MR. SALERNO: Your Honor, may I clarify? I understood what  
5 you said about the two issues that should be addressed on an amended  
6 pleading, which is the ability to pursue an Unfair Claims Practices Act.  
7 Was the other one relating to the management agreement and the  
8 capacity of the parties?

9 THE COURT: No. We were talking here, as I thought was your  
10 argument, is that this --

11 MR. SALERNO: The operative provisions.

12 THE COURT: -- as in the universe of all this coverage, who  
13 owed the obligations to pay what first, because that was what I  
14 understood your problem was with --

15 MR. SALERNO: That --

16 THE COURT: -- them saying that they have the right to sue  
17 you, is that how do they have standing to sue you, what is it in their --  
18 either in common law or if that's what it is, that's fine, or if there is some  
19 contractual --

20 MR. SALERNO: To show priority essentially of --

21 THE COURT: Agreements, yeah.

22 MR. SALERNO: -- who is excess, who is primary.

23 THE COURT: Yeah. Because that was your point, was --

24 MR. SALERNO: That -- that's right.

25 THE COURT: -- is there even standing to sue National Union --

1 MR. SALERNO: Thank you, Your Honor.

2 MR. MORALES: So, Your Honor, so I'm clear, --

3 THE COURT: -- on just those two issues.

4 MR. MORALES: You want amendment on both counts or just

5 on the --

6 THE COURT: Yes. Yes.

7 MR. MORALES: Okay.

8 THE COURT: On both of them, yeah.

9 So one is granted in part as to the alternative relief that was

10 requested, that's the National Union motion. I just am going to deny as

11 premature the motion to dismiss just on the bigger issue of how are these

12 parties related, what are the contracts that relate them --

13 MR. SALERNO: Who's on first, who's on third.

14 THE COURT: Right.

15 MR. AARONOFF: Third base.

16 THE COURT: And the corporate structures --

17 MR. SALERNO: Your Honor, could we limit discovery to those

18 issues before we go too far down the road in this case?

19 THE COURT: Well, I think first we have to see the amended --

20 proposed amended pleading, because we don't have. And so we would

21 need to see their proposed amended pleading, you know, before we

22 could even go any further.

23 MR. SALERNO: Thank you.

24 THE COURT: And then we'll -- then we can see where --

25 MR. MORALES: Thank you, Your Honor.

1 THE COURT: -- we're going with it.

2 MR. SALERNO: Fair enough.

3 THE COURT: All right. You all have a good week.

4 MR. SALERNO: Your Honor, should we submit orders and

5 exchange them between counsel then?

6 THE COURT: Yes.

7 MR. SALERNO: All right. Thank you, Your Honor.

8 THE COURT: I mean because there are the two different

9 motions.

10 MR. SALERNO: Yes.

11 THE COURT: And then we also need the other motions on the

12 other orders on the sealing and --

13 MR. SALERNO: I gave you those. I don't know if --

14 THE COURT: So you've got all those?

15 MR. SALERNO: -- Your Honor wants to sign those and provide

16 them back or --

17 THE COURT: I have another motion to hear so, yeah, we'll

18 process --

19 MR. SALERNO: Pick them up later.

20 THE COURT: -- them and get them back to you.

21 MR. SALERNO: Very well. Thank you, Your Honor.

22 . . .

23 . . .

24 . . .

25 . . .

1 THE COURT: Okay. So as long as I've got all of our orders, we're good.

2 Thank you, all.

3 MR. SALERNO: Thank you, Your Honor.

4 [Hearing concluded at 11:06 a.m.]

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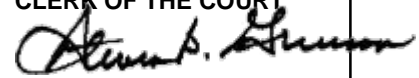
21 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
22 audio/video proceedings in the above-entitled case to the best of my ability.

23 

24

Susan Palmer  
Court Recorder/Transcriber

25



1 **STAT**  
2 RAMIRO MORALES [Bar No.: 007101]  
3 E-mail: rmorales@mfrlegal.com  
4 MARC J. DEREWETKY [Bar No.: 006619]  
5 E-mail: mderewetzky@mfrlegal.com  
6 MORALES, FIERRO & REEVES  
7 600 South Tonopah Drive, Suite 300  
8 Las Vegas, Nevada 89106  
9 Telephone: (702) 699-7822  
10 Facsimile: (702) 699-9455

11 Attorneys for Plaintiff ST. PAUL FIRE &  
12 MARINE INSURANCE COMPANY

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 ST. PAUL FIRE & MARINE INSURANCE )  
16 COMPANY, )

17 Plaintiff, )

18 vs. )

19 ASPEN SPECIALTY INSURANCE )  
20 COMPANY; NATIONAL UNION FIRE )  
21 INSURANCE COMPANY OF )  
22 PITTSBURGH, PA.; ROOF DECK )  
23 ENTERTAINMENT, LLC, d/b/a MARQUEE )  
24 NIGHTCLUB; and DOES 1 through 25, )  
25 inclusive, )

26 Defendants. )

CASE NO.: A-17-758902-C

ST. PAUL'S STATEMENT THAT NO  
OPPOSITION TO ASPEN'S MOTION TO  
DISMISS THE ORIGINAL COMPLAINT  
IS DUE BASED ON A PENDING  
WITHDRAWAL OF MOTION AND A  
FORTHCOMING AMENDED PLEADING

Date: March 13, 2018

Time: 9:30 AM

Dept.: XXVI

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1  
NO OPPOSITION DUE TO ASPEN'S MOTION TO DISMISS  
BASED ON PENDING WITHDRAWAL OF MOTION

CASE NO. A-17-758902-C

1 Pursuant to the Parties' Stipulation and the Court's February 5, 2018 Order, Aspen's  
2 Motion to Dismiss St. Paul's original Complaint was set to be heard March 13, 2018, and any  
3 opposition to the Motion was due today, February 26, 2018. However, the Parties are in the  
4 process of submitting a Stipulation to the Court for its Order withdrawing Aspen's Motion to  
5 Dismiss without prejudice and vacating the March 13, 2018 hearing date, pending St. Paul's filing  
6 of an Amended Complaint. Accordingly, as Aspen's Motion to Dismiss the original Complaint is  
7 being withdrawn and the hearing date vacated, no opposition is required from St. Paul, or any  
8 other party, to that motion today or in the future. In withdrawing its Motion to Dismiss the  
9 original complaint without prejudice, Aspen reserves its right to file a new Motion to Dismiss the  
10 Amended Complaint based upon the same or similar arguments, or new arguments as Aspen may  
11 deem appropriate to respond to the Amended Complaint.

12 Dated: February 26, 2018

Respectfully submitted,

MORALES FIERRO & REEVES

13  
14  
15 By: /s/ Ramiro Morales

Ramiro Morales [Bar No. 007101]

Marc J. Derewetzky [Bar No. 006619]

600 So. Tonopah Dr., Suite 300

Las Vegas, NV 89106

Attorney for Plaintiff ST. PAUL FIRE

& MARINE INSURANCE COMPANY

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

**ST. PAUL'S STATEMENT THAT NO OPPOSITION TO ASPEN'S MOTION TO DISMISS THE  
ORIGINAL COMPLAINT IS DUE BASED ON A PENDING WITHDRAWAL OF MOTION  
AND A FORTHCOMING AMENDED PLEADING**

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

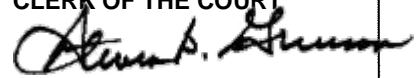
Eileen Monarez ([emonarez@heroldsagerlaw.com](mailto:emonarez@heroldsagerlaw.com)), *Attorney for Roof Deck Entertainment, LLC*

Michael M. Edwards, Esq.  
Messner Reeves LLP  
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Tel: (702) 363-5100  
medwards@messner.com  
*Attorney for*  
*Aspen Specialty Insurance Company*

Dated: February 26, 2018

  
Matthew T. Matejcek





1 **SAO**  
2 Michael M. Edwards, Esq.  
3 Nevada Bar No. 6281  
4 Nicholas L. Hamilton, Esq.  
5 Nevada Bar No. 10893  
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12 nhamilton@messner.com  
13 *Attorneys for Aspen Specialty Insurance*

14  
15 DISTRICT COURT  
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17 CLARK COUNTY, NEVADA  
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13 ST. PAUL FIRE & MARINE INSURANCE )  
14 COMPANY, )  
15 Plaintiff, )  
16 vs. )  
17 ASPEN SPECIALTY INSURANCE )  
18 COMPANY; NATIONAL UNION FIRE )  
19 INSURANCE COMPANY OF )  
20 PITTSBURGH, PA.; ROOF DECK )  
21 ENTERTAINMENT, LLC, d/b/a MARQUEE )  
22 NIGHTCLUB; and DOES 1 through 25, )  
23 inclusive, )  
24 Defendants. )

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

**STIPULATION AND  
ORDER TO WITHDRAW ASPEN'S  
MOTION TO DISMISS ST. PAUL'S  
INITIAL COMPLAINT AND VACATE  
HEARING DATE**

Hearing Date: March 13, 2018  
Hearing Time: 9:30 AM

STIPULATION

This stipulation is entered into by and between the following parties pursuant to E.D.C.R. 2.22: 1) Plaintiff St. Paul Fire and Marine Insurance Company ("St. Paul"); 2) Defendant Aspen Specialty Insurance Company ("Aspen"); 3) Defendant National Union Fire Insurance Company of Pittsburgh, PA. ("National Union"); and 4) Defendant Roof Deck Entertainment, LLC, d/b/a Marquee Nightclub ("Marquee") (St. Paul, Aspen, National Union, and Marquee are collectively referred to as the "Parties").

Whereas, National Union and Marquee brought Motions to Dismiss St. Paul's complaint, which motions were heard by the Court on February 13, 2018;

Whereas, at the February 13, 2018 hearing, the Court granted National Union's Motion to Dismiss with leave to amend, and denied Marquee's Motion to Dismiss as premature (proposed orders for these rulings have been submitted and are pending with the Court for approval and signature);

Whereas, Aspen also filed a Motion to Dismiss St. Paul's complaint, which was originally set for hearing on February 13, 2018, but was continued by stipulation and order to March 13, 2018;

Whereas, in light of the Court's February 13, 2018 order on National Union's Motion to Dismiss directing St. Paul to file an amended complaint, Aspen's pending Motion to Dismiss St. Paul's original complaint has been rendered moot pending the amended complaint;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for St. Paul, Aspen, National Union and Marquee, that Aspen's Motion to Dismiss set to be heard on March 13, 2018, is hereby withdrawn without prejudice, and the March 13, 2018 hearing date vacated. The Parties stipulate and agree that in withdrawing its present Motion to Dismiss, Aspen reserves all legal rights and arguments in connection therewith, including the right to file a new motion to dismiss the amended complaint based upon the same, similar or new arguments as Aspen may deem appropriate to address the amended complaint.

///

///

1 Prepare and respectfully submitted by:

2 Dated: February 27, 2018

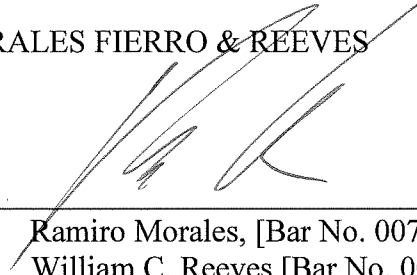
MESSNER REEVES LLP

3  
4 By: 

5 Michael M. Edwards, [Bar No. 006281]  
6 Nicholas L. Hamilton, [Bar No. 010893]  
7 Attorneys for Defendant ASPEN  
8 SPECIALTY INSURANCE COMPANY  
9 8945 W. Russell Road, Suite 300  
10 Las Vegas, NV 89148

11  
12 Dated: February \_\_, 2018

MORALES FIERRO & REEVES

13 By: 

14 Ramiro Morales, [Bar No. 007101]  
15 William C. Reeves [Bar No. 008235]  
16 Attorneys for Plaintiff ST. PAUL FIRE &  
17 MARINE INSURANCE COMPANY  
18 600 So. Tonopah Dr., Suite 300  
19 Las Vegas, NV 89106

20 (Signatures continued next page)

21 ///

22 ///

23 ///

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1 Dated: February 27, 2018

HEROLD & SAGER


2  
3 By: 

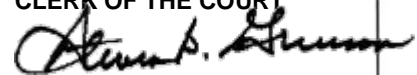
4 Andrew Herold [Bar No. 007378]  
5 Nicholas Salerno [Bar No. 006118]  
6 Attorneys for Defendants NATIONAL  
7 UNION FIRE INSURANCE COMPANY OF  
8 PITTSBURGH PA. and ROOF DECK  
9 ENTERTAINMENT, LLC d/b/a MARQUEE  
10 NIGHTCLUB  
11 3960 Howard Hughes Parkway, Suite 500  
12 Las Vegas, NV 89169

13 **ORDER**

14 IT IS SO ORDERED, Aspen's Motion to Dismiss St. Paul's original complaint currently  
15 set for hearing on March 13, 2018 is hereby withdrawn without prejudice, and the March 13, 2018  
16 hearing date vacated.

17 Dated: March 1<sup>st</sup>, 2018

18   
19 Honorable Gloria J. Sturman  
20 District Judge, Department XXVI  
21  
22  
23  
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28



**ORDR**

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Nevada Bar No. 7378

NICHOLAS B. SALERNO, ESQ.

Nevada Bar No. 6118

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Attorneys for Defendants ROOF DECK ENTERTAINMENT LLC

d/b/a/ MARQUEE NIGHTCLUB & NATIONAL UNION FIRE

INSURANCE COMPANY OF PITTSBURGH, PA

**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.: XXVI

**ORDER DENYING  
ROOF DECK ENTERTAINMENT  
LLC dba MARQUEE  
NIGHTCLUB'S MOTION TO  
DISMISS PLAINTIFF'S  
COMPLAINT**

1 On February 13, 2018 at 9:30 a.m. in Department 26 of the above-entitled Court,  
2 Defendant Roof Deck Entertainment LLC dba Marquee Nightclub's ("Marquee") Motion to  
3 Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Complaint  
4 ("Complaint") came on for hearing, the Honorable Gloria J. Sturman presiding. Nicholas Salerno  
5 of Herold & Sager, and associated counsel, Steven J. Aaronoff of Keller/Anderle LLP appeared  
6 on behalf of Marquee and co-defendant National Union Fire Insurance Company of Pittsburgh,  
7 PA ("National Union"). Ramiro Morales of Morales Fierro & Reeves appeared on behalf of  
8 Plaintiff St. Paul.

9 The Court, having considered the motion, the related filings and the argument presented at  
10 the hearing, and good cause appearing, orders as follows:

11 The motion is DENIED without prejudice as premature until the capacity and relationship  
12 of the parties to the Nightclub Management Agreement is further clarified for the Court.  
13 Marquee's responsive pleading to the amended complaint to be filed by St. Paul in response to  
14 the Court's order granting National Union's Motion to Dismiss will be due on the same date as  
15 National Union's responsive pleading.

16 IT IS SO ORDERED.

17 Dated: March 14, 2018

18   
19 Hon. Gloria J. Sturman  
EIGHTH JUDICIAL DISTRICT COURT JUDGE

20 SUBMITTED BY:

21  
22 By 


23 NICHOLAS B. SALERNO, ESQ.  
24 Nevada Bar No. 6118  
25 HEROLD & SAGER  
3960 Howard Hughes Parkway, Suite 500  
26 Las Vegas, NV 89169  
27 [nsalerno@heroldsagerlaw.com](mailto:nsalerno@heroldsagerlaw.com)  
28 Attorneys for Defendant ROOF DECK  
ENTERTAINMENT LLC dba MARQUEE  
NIGHTCLUB & NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH PA.

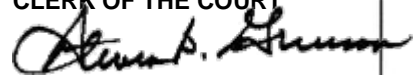


**CERTIFICATE OF SERVICE**

I certify that I am an employee of HEROLD & SAGER and that on **February 20, 2018**, I caused a true copy of the following document(s): **[PROPOSED] ORDER DENYING ROOF DECK ENTERTAINMENT LLC dba MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR 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.

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: <a href="mailto:rmorales@mfrlegal.com">rmorales@mfrlegal.com</a> William C. Reeves, Esq. Email: <a href="mailto:wreeves@mfrlegal.com">wreeves@mfrlegal.com</a> MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	PLAINTIFF
Michael M. Edwards, Esq. Email: <a href="mailto:medwards@messner.com">medwards@messner.com</a> Nicholas L. Hamilton, Esq. <a href="mailto:nhamilton@messner.com">nhamilton@messner.com</a> MESSNER REEVES LLP <a href="mailto:efile@messner.com">efile@messner.com</a> 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	ASPEN SPECIALTY INSURANCE COMPANY

  
Eileen Monarez  
Employee of HEROLD & SAGER



**ORDR**

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Attorneys for Defendants ROOF DECK ENTERTAINMENT LLC

d/b/a/ MARQUEE NIGHTCLUB & NATIONAL UNION FIRE

INSURANCE COMPANY OF PITTSBURGH, PA

**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.: XXVI

**ORDER**

**GRANTING NATIONAL UNION  
FIRE INSURANCE COMPANY  
OF PITTSBURGH, PA.'S  
MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT**



1 On February 13, 2018 at 9:30 a.m. in Department 26 of the above-entitled Court,  
2 Defendant National Union Fire Insurance Company of Pittsburgh, PA.'s ("National Union")  
3 Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Complaint  
4 ("Complaint") came on for hearing, the Honorable Gloria J. Sturman presiding. Nicholas Salerno  
5 of Herold & Sager, and associated counsel, Steven J. Aaronoff of Keller/Anderle LLP appeared  
6 on behalf of National Union and co-defendant Roof Deck Entertainment LLC dba Marquee  
7 Nightclub. Ramiro Morales of Morales Fierro & Reeves appeared on behalf of Plaintiff St. Paul.

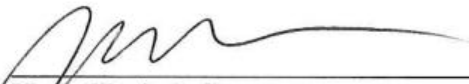
8 The Court, having considered the motion, the related filings and the argument presented at  
9 the hearing, and good cause appearing, orders as follows:

10 St. Paul's evidentiary objections to National Union commercial umbrella liability policy  
11 number BE 25414413 offered by National Union in support of the motion is overruled.

12 The motion is GRANTED in part and DENIED in part to allow leave to amend. St. Paul  
13 is granted leave to amend its Complaint and shall file and serve its amended Complaint twenty-  
14 one (21) days from entry of the Order and responses shall be due thirty (30) days after service of  
15 the amended Complaint.

16 IT IS SO ORDERED.

17 Dated: March 16, 2018



Hon. Gloria J. Sturman  
EIGHTH JUDICIAL DISTRICT COURT JUDGE

20 SUBMITTED BY:

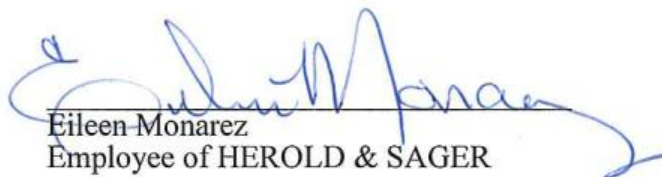
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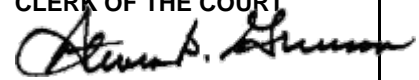
NICHOLAS B. SALERNO, ESQ.  
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Las Vegas, NV 89169  
[nsalerno@heroldsagerlaw.com](mailto:nsalerno@heroldsagerlaw.com)  
Attorneys for Defendant ROOF DECK  
ENTERTAINMENT LLC dba MARQUEE  
NIGHTCLUB & NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH PA.

**CERTIFICATE OF SERVICE**

I certify that I am an employee of HEROLD & SAGER and that on **February 20, 2018**, I caused a true copy of the following document(s): **[PROPOSED] ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR 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.

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: <a href="mailto:rmorales@mfrlegal.com">rmorales@mfrlegal.com</a> William C. Reeves, Esq. Email: <a href="mailto:wreeves@mfrlegal.com">wreeves@mfrlegal.com</a> MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	PLAINTIFF
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Eileen Monarez  
Employee of HEROLD & SAGER



**ACOMP**  
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WILLIAM C. REEVES [Bar No. 008235]  
E-mail: wreeves@mfrlegal.com  
MARC J. DEREWETZKY [Bar No.: 006619]  
E-mail: mderewetzky@mfrlegal.com  
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Telephone: (702) 699-7822  
Facsimile: (702) 699-9455

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,	)	CASE NO.: A-17-758902-C
	)	
Plaintiff,	)	DEPT.: 26
	)	
vs.	)	REDACTED FIRST AMENDED COMPLAINT
	)	
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,	)	JURY TRIAL DEMANDED
	)	
Defendants.	)	Exempt from Arbitration: Amount in Controversy Exceeds \$50,000.00

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

THE PARTIES

1. St. Paul is a Connecticut corporation, is duly authorized to do business in Nevada and is engaged in the business of insurance.
2. Defendant ASPEN SPECIALTY INSURANCE COMPANY ("Aspen") is a foreign corporation doing business in Nevada, and is engaged in the business of insurance. Aspen's

1 principal place of business is in Connecticut.

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

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

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

13 FACTUAL ALLEGATIONS

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

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

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

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

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

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

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

18 12. Moradi asserted a lost income claim specifically for past lost wages in the range of  
19 approximately \$29,000,000 to \$44,000,000, and future lost wages in the range of approximately  
20 \$87,000,000 to \$264,000,000.

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

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

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

1 number CRA8XYD11, effective October 6, 2011, to October 6, 2012 (“Aspen Policy”).

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

6 17. Aspen’s \$1,000,000 each occurrence limit generally provides coverage for damages  
7 because of “bodily injury” caused by an “occurrence.”

8 18. Aspen’s \$1,000,000 personal and advertising injury limit generally provides  
9 coverage for damages because of “personal and advertising injury,” sustained by any one person  
10 or organization.

11 19. Aspen’s \$1,000,000 Liquor Liability coverage generally provides coverage for  
12 damages because of “injury” in connection with the selling, serving or furnishing of alcohol.

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

15 21. Aspen later paid its Coverage A, \$1,000,000 “bodily injury” occurrence limit solely  
16 on behalf of Marquee and has paid no indemnity policy benefits on Cosmopolitan’s behalf.

17 22. Aspen did not offer, and has not paid, the “personal injury” \$1,000,000 per offense  
18 limit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 39. Based on the respective positions taken by Aspen and AIG (unless otherwise  
20 differentiated, collectively referred to hereinafter as "Carrier Defendants") regarding their limits,  
21 Carrier Defendants took the position throughout the Underlying Action that the total combined  
22 limit of liability to pay for a judgment or settlement on behalf of Cosmopolitan and Marquee was  
23 \$26,000,000.

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

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

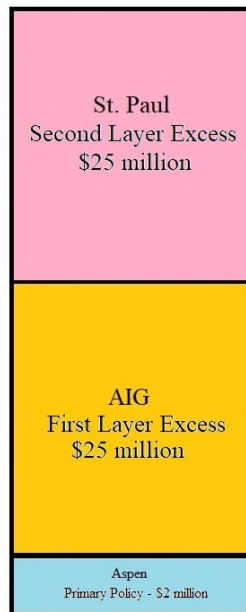
28 42. The St. Paul Policy contains a subrogation provision which transfers all of



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

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

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



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

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

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

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

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

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

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

1 a lower level insurer first offered its policy limit.

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

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

15 53. On March 9, 2017, Moradi made another settlement demand for \$26,000,000 – the  
16 claimed limit of the Carrier Defendants' policies. Per the terms of the settlement demand,  
17 acceptance by the Carrier Defendants would have resulted in global resolution of all claims against  
18 both Marquee and Cosmopolitan. A copy of Moradi's pre-trial settlement demand dated March 9,  
19 2017, is attached hereto as **Exhibit B**. Based on information and belief, in response to Moradi's  
20 March 9, 2017 settlement demand, Marquee wrote to Aspen's and AIG's appointed defense  
21 counsel for Cosmopolitan demanding that the Underlying Action be settled within the Carrier  
22 Defendants' policy limits. Carrier Defendants rejected the March 9, 2017 settlement demand, and  
23 made no counter offer to Moradi.

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

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

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

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

7           58.     Based on information and belief, coverage counsel for Cosmopolitan responded to  
8 AIG's March 21, 2017 reservation of rights letter as improper. In rejecting AIG's late reservation,  
9 coverage counsel for Cosmopolitan pointed out that all pre-trial reports indicated that  
10 Cosmopolitan's exposure was well in excess of the Aspen Policy limits, Moradi submitted  
11 evidence at trial well in excess of Aspen's policy limit, Aspen tendered its policy limits on March  
12 8, 2017, and in response to the March 9, 2017 demand by Moradi, Cosmopolitan demanded AIG  
13 settle the action within its limits, which demand AIG completely ignored without response to  
14 Cosmopolitan. Coverage counsel for Cosmopolitan complained that AIG was not communicating  
15 with Cosmopolitan and instructed AIG that due to its improper conduct, AIG would be liable for  
16 all of Cosmopolitan's liability, if any, regardless of policy limits.

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

1 its right to independent counsel.

2 60. On April 26, 2017, the jury in the Underlying Action rendered a compensatory  
3 damages verdict against Marquee and Cosmopolitan for \$160,500,000. A copy of the special jury  
4 verdict form filed in the Underlying Action is attached hereto as **Exhibit C**. Per the verdict, the  
5 jury found in favor of Moradi on his claims for assault, battery, false imprisonment, and  
6 negligence. Per the verdict, the jury awarded Moradi \$23,000,000 in past loss of earnings/earning  
7 capacity, \$79,500,000 in future loss of earnings/earning capacity, \$20,000,000 in past pain,  
8 suffering, anguish and disability, and \$38,000,000 in future pain, suffering, anguish and disability.  
9 Per court order, Marquee and Cosmopolitan were each jointly and severally liable for the  
10 \$160,500,000 verdict.

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

17 62. Soon after St. Paul first received notice of the Underlying Action on February 13,  
18 2017, St. Paul sent correspondence on multiple occasions to AIG requesting information  
19 pertaining to the Underlying Action and settlement negotiations in the Underlying Action. AIG  
20 ignored and/or delayed responding to St. Paul's reasonable requests for information.

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

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

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

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

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

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

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

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

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

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

1 FIRST CAUSE OF ACTION

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

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

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

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

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

18 76. Aspen breached the duty to settle by refusing to settle the Underlying Action  
19 despite a reasonable \$1,500,000 pre-trial Offer of Judgement by Moradi, which was within  
20 Aspen's available policy limits. Aspen further breached its duty to settle by failing to tender its  
21 limits to AIG in response to Moradi's numerous settlement demands. The defense counsels'  
22 compensatory damages liability assessment of \$310,000,000 was over 200 times Moradi's  
23 \$1,500,000 Offer of Judgement, and twelve times Moradi's settlement demand of \$26,000,000.  
24 The ultimate compensatory damages jury verdict of \$160,500,000 was more than 100 times the  
25 amount of Moradi's \$1,500,000 Offer of Judgement, and six times Moradi's settlement demand of  
26 \$26,000,000.

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

1 two years after the commencement of the Underlying Action.

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

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

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

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

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



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

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

## SECOND CAUSE OF ACTION

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

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

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

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

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

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

1 representing to this Court that it had an independent duty to settle regardless of whether a lower  
2 level insurer such as Aspen tendered its policy limit. Further, based on information and belief,  
3 AIG breached its duty to settle by failing to request Aspen tender its policy limits and accept  
4 Moradi's various settlement demands. The defense counsels' compensatory damages liability  
5 assessment of \$310,000,000 was almost twelve times the amount of the settlement demands for  
6 \$26,000,000. The ultimate compensatory damages jury verdict was more than six times the  
7 amount of the settlement demands for \$26,000,000.

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

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

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

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

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

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

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

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

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

15 THIRD CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

#### FOURTH CAUSE OF ACTION

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

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

1 set forth.

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

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

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

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

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

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

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

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

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

6  
7 FIFTH CAUSE OF ACTION

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

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

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

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

17 115. Per court order, Cosmopolitan and Marquee were jointly and severally liable for the  
18 \$160,500,000 jury verdict in the Underlying Action.

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

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

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

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

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

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

SIXTH CAUSE OF ACTION

Subrogation – Express Indemnity  
(Against Marquee Only)

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

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

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

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

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

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

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

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

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

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

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

9 SEVENTH CAUSE OF ACTION

10 Equitable Estoppel  
11 (Against Carrier Defendants Only)

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

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

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

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



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

6           b. Throughout the Underlying Action Carrier Defendants controlled the  
7 defense and all settlement negotiations on behalf of Marquee and Cosmopolitan. Based on  
8 information and belief, none of Cosmopolitan's direct insurers were given notice of the loss until  
9 late in February 2017, even though the case had been pending since 2014, trial was set for March  
10 2017, and had been previously set for June 27, 2016. St. Paul was not notified of the Underlying  
11 Action until on or about February 13, 2017. Trial began on March 20, 2017, but St. Paul was not  
12 advised of the trial date and did not learn of the trial until three days after trial started, on March  
13 23, 2017.

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

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

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

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

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

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

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1 EIGHTH CAUSE OF ACTION

2 Equitable Contribution  
3 (Against AIG Only)

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

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

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

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

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

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

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

28 ///

1 PRAYER FOR RELIEF

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

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

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

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

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

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

16 7. For attorney's fees.

17 8. For costs of suit.

18 9. For pre-judgment interest.

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

20 Dated: April 23, 2018

MORALES FIERRO & REEVES

21  
22 By: /s/ Ramiro Morales  
23 Ramiro Morales [Bar No. 007101]  
24 William Reeves [Bar No. 008235]  
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