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

APPENDIX TO APPELLANT'S OPENING BRIEF
VOLUME V of XVI

HUTCHISON & STEFFEN, PLLC

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

Attorneys for Appellant

Chronological Index

Doc No.	Description	Vol.	Bates Nos.
1	Redacted Complaint	I	AA000001-AA000014
2	National Union Motion Dismiss	I	AA000015-AA000031
3	Declaration National Union	I	AA000032-AA000095
4	Marquee Motion Dismiss	I	AA000096-AA0000113
5	Declaration Marque	I	AA0000114-AA000115
6	Exhibits Marquee Motion Dismiss	I	AA000116-AA0000118
7	Aspen Motion Dismiss	I	AA000119-AA000136
8	Declaration Aspen	II	AA000137-AA000256
9	Marquee Response re Objection	II	AA000257-AA000261
10	St. Paul Objection Evidence National Union	II	AA000262-AA000265
11	St. Paul Objection Evidence Marquee	II	AA000266-AA000268
12	St. Paul Opposition to Marquee Motion Dismiss	II	AA000269-AA000282
13	St. Paul Opposition to National Union Motion Dismiss	II	AA000283-AA000304
14	National Union Reply Motion Dismiss	II	AA000305-AA000312

15	Declaration Nation Union	III	AA000313-AA000378
16	Marquee Reply Motion Dismiss	III	AA000379-AA000390
17	National Union Response re Objection	III	AA000391-AA000394
18	Supplemental Declaration Marquee	III	AA000395-AA000397
19	Transcript [2018-02-13]	III	AA000398-AA000438
20	St. Paul Statement Re Aspen Motion	III	AA000439-AA000441
21	SAO Withdraw Aspen Motion Dismiss	III	AA000442-AA000445
22	Order Denying Marquee Motion Dismiss	III	AA000446-AA000448
23	Order Granting Denying National Union Motion Dismiss	III	AA000449-AA000451
24	Redacted First Amended Complaint	III	AA000452-AA000478
25	Aspen 2nd Motion Dismiss	IV	AA000479-AA000501
26	Aspens Declaration	IV	AA000502-AA000623
27	National Union 2nd Motion Dismiss	IV	AA000624-AA000649
28	National Unions Declaration	IV	AA000650-AA000714
29	Marquee 2nd Motion Dismiss	V	AA000715-AA000740
30	Marquee’s Declaration	V	AA000741-AA000766

31	Marquee Supp Declaration	V	AA000767-AA000769
32	National Union Request Judicial Notice	V	AA000770-AA000846
33	St. Paul Opposition Marquee 2nd Motion Dismiss	V	AA000847-AA000868
34	St. Paul Declaration 2	V	AA000869-AA000877
35	St. Paul Declaration 1	V	AA000878-AA000892
36	St. Paul Opposition Aspen 2nd Motion Dismiss	V	AA000893-AA000910
37	St. Paul Opposition National Union 2nd Motion Dismiss	V	AA000911-AA000948
38	St. Paul Errata	VI	AA000949-AA000951
39	Marquee Reply 2nd Motion Dismiss	VI	AA000952-AA000963
40	National Union Reply 2nd Motion Dismiss	VI	AA000964-AA000975
41	St. Paul Response to Reply to Motion Dismiss	VI	AA000976-AA001004
42	Aspen Reply 2nd Motion Dismiss	VI	AA001005-AA001018
43	National Union Request to Strike	VI	AA001019-AA001023
44	St. Paul Request to Strike	VI	AA001024-AA001036
45	Aspen Opposition Request to Strike	VI	AA001037-AA001043
46	Transcript [2018-10-30]	VI	AA001044-AA001098

47	Minute Order [2019-02-28]	VI	AA001099-AA001100
48	Order Denying Motions Dismiss	VI	AA001101-AA001105
49	National Union Answer	VI	AA001106-AA001129
50	Roof Deck Answer	VI	AA001130-AA001153
51	Aspen Answer	VI	AA001154-AA001184
52	St. Paul MPSJ against Aspen	VII	AA001185-AA001208
53	St. Paul Declaration MPSJ	VII	AA001209-AA001365
54	St. Paul Request Judicial Notice	VIII	AA001366-AA001442
55	Marquee MSJ	VIII	AA001443-AA001469
56	Marquee Declaration 1 MSJ	VIII	AA001470-AA001472
57	Marquee Declaration 2 MSJ	VIII	AA001473-AA001475
58	Marquee Exhibits MSJ	VIII	AA001476-AA001564
59	Marquee Request Judicial Notice	VIII	AA001565-AA001568
60	National Union MSJ	VIII	AA001569-AA001598
61	National Union Declaration 1 MSJ	VIII	AA001597-AA001599
62	National Union Declaration 2 MSJ	IX	AA001600-AA001664

63	National Union Exhibits MSJ	IX, X, XI	AA001665-AA002094
64	National Union Request Judicial Notice	XI	AA002095-AA002098
65	Aspen Opposition MPSJ	XI, XII	AA002099-AA002310
66	Order Stay Discovery	XII	AA002311-AA002313
67	St. Paul Opposition Marquee MSJ	XII	AA002314-AA002333
68	St. Paul Declaration 1 MSJ	XII	AA002334-AA002336
69	St. Paul Response Marquee Facts	XII	AA002337-AA002345
70	St. Paul Opposition National Union MSJ	XII	AA002346-AA002381
71	St. Paul Declaration 2 MSJ	XII	AA002382-AA002388
72	St. Paul Response National Union Facts	XII	AA002389-AA002394
73	St. Paul Exhibits MSJ	XII, XIII	AA002395-AA002650
74	St. Paul Reply MPSJ and Opp Countermotion	XIII	AA002651-AA002690
75	Marquee Opp Countermotion MSJ	XIII	AA002691-AA002709
76	Marquee Objection re Facts	XIII	AA002710-AA002737
77	Aspen Reply Countermotion MSJ	XIV	AA002738-AA002752
78	Transcript 2019-10-08	XIV	AA002753-AA002776

79	National Union Reply re MSJ	XIV	AA002777-AA002793
80	National Union Objection re Facts	XIV	AA002794-AA002816
81	Marquee Reply re MSJ	XIV	AA002817-AA002827
82	St. Paul Reply re Marquee Countermotion	XIV	AA002828-AA002839
83	Transcript 2019-10-15	XIV	AA002840-AA002894
84	SAO stay discovery	XIV	AA002895-AA002900
85	Finding, Conclusion, Order Granting National Union MSJ	XIV	AA002901-AA002919
86	Finding, Conclusion, Order Granting Roof Deck MSJ	XIV	AA002920-AA002936
87	Order Denying St. Paul MPSJ, Granting Aspen Countermotion	XIV	AA002937-AA002945
88	NOE Findings, Conclusions, Order Denying St. Paul MPSJ	XIV	AA002946-AA002956
89	NOE Findings, Conclusions, Order Granting National Union MSJ	XV	AA002957-AA002977
90	NOE Findings, Conclusions, Order Granting Roof Deck MSJ	XV	AA002978-AA002996
91	Aspen Renewed Motion MSJ	XV	AA002997-AA003025
92	Aspen Appendix MSJ	XV, XVI	AA003026-AA003341
93	St Paul Notice of Appeal	XVI	AA003342-AA003344
94	St. Paul Opp Aspen Renewed MSJ	XVI	AA003345-AA003384

95	Aspen Reply Renewed MSJ	XVI	AA003385-AA003402
96	NOE Order Denying Aspen Renewed MSJ	XVI	AA003403-AA003416

Alphabetical Index

Doc No.	Description	Vol.	Bates Nos.
25	Aspen 2nd Motion Dismiss	IV	AA000479-AA000501
51	Aspen Answer	VI	AA001154-AA001184
92	Aspen Appendix MSJ	XV, XVI	AA003026-AA003341
7	Aspen Motion Dismiss	I	AA000119-AA000136
65	Aspen Opposition MPSJ	XI, XII	AA002099-AA002310
45	Aspen Opposition Request to Strike	VI	AA001037-AA001043
91	Aspen Renewed Motion MSJ	XV	AA002997-AA003025
42	Aspen Reply 2nd Motion Dismiss	VI	AA001005-AA001018
77	Aspen Reply Countermotion MSJ	XIV	AA002738-AA002752
95	Aspen Reply Renewed MSJ	XVI	AA003385-AA003402
26	Aspens Declaration	IV	AA000502-AA000623

8	Declaration Aspen	II	AA000137-AA000256
5	Declaration Marque	I	AA0000114-AA000115
15	Declaration Nation Union	III	AA000313-AA000378
3	Declaration National Union	I	AA000032-AA000095
6	Exhibits Marquee Motion Dismiss	I	AA000116-AA0000118
85	Finding, Conclusion, Order Granting National Union MSJ	XIV	AA002901-AA002919
86	Finding, Conclusion, Order Granting Roof Deck MSJ	XIV	AA002920-AA002936
29	Marquee 2nd Motion Dismiss	V	AA000715-AA000740
56	Marquee Declaration 1 MSJ	VIII	AA001470-AA001472
57	Marquee Declaration 2 MSJ	VIII	AA001473-AA001475
58	Marquee Exhibits MSJ	VIII	AA001476-AA001564
4	Marquee Motion Dismiss	I	AA000096-AA0000113
55	Marquee MSJ	VIII	AA001443-AA001469
76	Marquee Objection re Facts	XIII	AA002710-AA002737
75	Marquee Opp Countermotion MSJ	XIII	AA002691-AA002709
39	Marquee Reply 2nd Motion Dismiss	VI	AA000952-AA000963

16	Marquee Reply Motion Dismiss	III	AA000379-AA000390
81	Marquee Reply re MSJ	XIV	AA002817-AA002827
59	Marquee Request Judicial Notice	VIII	AA001565-AA001568
9	Marquee Response re Objection	II	AA000257-AA000261
31	Marquee Supp Declaration	V	AA000767-AA000769
30	Marquee's Declaration	V	AA000741-AA000766
47	Minute Order [2019-02-28]	VI	AA001099-AA001100
27	National Union 2nd Motion Dismiss	IV	AA000624-AA000649
49	National Union Answer	VI	AA001106-AA001129
61	National Union Declaration 1 MSJ	VIII	AA001597-AA001599
62	National Union Declaration 2 MSJ	IX	AA001600-AA001664
63	National Union Exhibits MSJ	IX, X, XI	AA001665-AA002094
2	National Union Motion Dismiss	I	AA000015-AA000031
60	National Union MSJ	VIII	AA001569-AA001598
80	National Union Objection re Facts	XIV	AA002794-AA002816

40	National Union Reply 2nd Motion Dismiss	VI	AA000964-AA000975
14	National Union Reply Motion Dismiss	II	AA000305-AA000312
79	National Union Reply re MSJ	XIV	AA002777-AA002793
32	National Union Request Judicial Notice	V	AA000770-AA000846
64	National Union Request Judicial Notice	XI	AA002095-AA002098
43	National Union Request to Strike	VI	AA001019-AA001023
17	National Union Response re Objection	III	AA000391-AA000394
28	National Unions Declaration	IV	AA000650-AA000714
88	NOE Findings, Conclusions, Order Denying St. Paul MPSJ	XIV	AA002946-AA002956
89	NOE Findings, Conclusions, Order Granting National Union MSJ	XV	AA002957-AA002977
90	NOE Findings, Conclusions, Order Granting Roof Deck MSJ	XV	AA002978-AA002996
96	NOE Order Denying Aspen Renewed MSJ	XVI	AA003403-AA003416
22	Order Denying Marquee Motion Dismiss	III	AA000446-AA000448
48	Order Denying Motions Dismiss	VI	AA001101-AA001105
87	Order Denying St. Paul MPSJ, Granting Aspen Countermotion	XIV	AA002937-AA002945
23	Order Granting Denying National Union Motion Dismiss	III	AA000449-AA000451

66	Order Stay Discovery	XII	AA002311-AA002313
1	Redacted Complaint	I	AA000001-AA000014
24	Redacted First Amended Complaint	III	AA000452-AA000478
50	Roof Deck Answer	VI	AA001130-AA001153
84	SAO stay discovery	XIV	AA002895-AA002900
21	SAO Withdraw Aspen Motion Dismiss	III	AA000442-AA000445
93	St Paul Notice of Appeal	XVI	AA003342-AA003344
35	St. Paul Declaration 1	V	AA000878-AA000892
68	St. Paul Declaration 1 MSJ	XII	AA002334-AA002336
34	St. Paul Declaration 2	V	AA000869-AA000877
71	St. Paul Declaration 2 MSJ	XII	AA002382-AA002388
53	St. Paul Declaration MPSJ	VII	AA001209-AA001365
38	St. Paul Errata	VI	AA000949-AA000951
73	St. Paul Exhibits MSJ	XII, XIII	AA002395-AA002650
52	St. Paul MPSJ against Aspen	VII	AA001185-AA001208
11	St. Paul Objection Evidence Marquee	II	AA000266-AA000268

10	St. Paul Objection Evidence National Union	II	AA000262-AA000265
94	St. Paul Opp Aspen Renewed MSJ	XVI	AA003345-AA003384
36	St. Paul Opposition Aspen 2nd Motion Dismiss	V	AA000893-AA000910
33	St. Paul Opposition Marquee 2nd Motion Dismiss	V	AA000847-AA000868
67	St. Paul Opposition Marquee MSJ	XII	AA002314-AA002333
37	St. Paul Opposition National Union 2nd Motion Dismiss	V	AA000911-AA000948
70	St. Paul Opposition National Union MSJ	XII	AA002346-AA002381
12	St. Paul Opposition to Marquee Motion Dismiss	II	AA000269-AA000282
13	St. Paul Opposition to National Union Motion Dismiss	II	AA000283-AA000304
74	St. Paul Reply MPSJ and Opp Countermotion	XIII	AA002651-AA002690
82	St. Paul Reply re Marquee Countermotion	XIV	AA002828-AA002839
54	St. Paul Request Judicial Notice	VIII	AA001366-AA001442
44	St. Paul Request to Strike	VI	AA001024-AA001036
69	St. Paul Response Marquee Facts	XII	AA002337-AA002345
72	St. Paul Response National Union Facts	XII	AA002389-AA002394
41	St. Paul Response to Reply to Motion Dismiss	VI	AA000976-AA001004

20	St. Paul Statement Re Aspen Motion	III	AA000439-AA000441
18	Supplemental Declaration Marquee	III	AA000395-AA000397
19	Transcript [2018-02-13]	III	AA000398-AA000438
46	Transcript [2018-10-30]	VI	AA001044-AA001098
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 18th day of February, 2021 the foregoing ***APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME V 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:

Daniel F. Polsenberg (2376)
Abraham G. Smith (13250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway,
Ste. 600
Las Vegas, NV 89169
dpolsenberg@lrrc.com
asmith@lrrc.com
T: 702.474.2689
F: 702.949.8398
Attorneys for Respondent National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

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

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

/s/ Bobbie Benitez

An employee of Hutchison & Steffen, PLLC

CERTIFICATE OF SERVICE

I hereby certify that the **DECLARATION OF MICHAEL F. MUSCARELLA IN SUPPORT OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT** was submitted electronically for filing and/or service with the Eighth Judicial District Court's Odyssey E-File and Serve System on **June 25, 2018**. Electronic service of the foregoing document shall be made in accordance with the E-Service List[1] as follows:

COUNSEL OF RECORD	EMAIL ADDRESS(ES)	PARTY
Ramiro Morales, Esq. William C. Reeves, Esq. MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	rmorales@mfrlegal.com wreeves@mfrlegal.com mderewetzky@mfrlegal.com	PLAINTIFF
Michael M. Edwards, Esq. MESSNER REEVES LLP 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	medwards@messner.com nforsyth@messner.com lmaile@messner.com efile@messner.com	ASPEN SPECIALTY INSURANCE COMPANY

JuRee A. Bloedel
Employee of HEROLD & SAGER

[1] Pursuant to EDCR 8.05(a), each party who submits an E-filed document through the E-Filing System consents to electronic service pursuant to NRCP 5(b)(2)(D).

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

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT

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

DATED: June 25, 2018

HEROLD & SAGER

By: (11333) FVB

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Steven James Aaronoff, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub. will bring the foregoing Motion to Dismiss for hearing on the 31 day of July, 2018 at the hour of 9:30 a.m./~~p.m.~~ of said day, or as soon thereafter as counsel can be heard, in Department 26 of the District Court for Clark County, Nevada, located at the _____, Las Vegas, Nevada.

DATED: June 25, 2018

HEROLD & SAGER

By: _____ (11333) FOR

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Steven James Aaronoff, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — **Page(s)**

TABLE OF AUTHORITIES (continued)

Cases — **Page(s)**

TABLE OF AUTHORITIES (continued)

Cases — **Page(s)**

NEVADA RULES OF CIVIL PROCEDURE

///

///

///

///

TABLE OF AUTHORITIES (continued)

NEVADA REVISED STATUTES — **Page(s)**

I.

INTRODUCTION

Similar to its original complaint, in its first amended complaint ("FAC"), St. Paul Fire & Marine Insurance Company's ("St. Paul") seeks to step into shoes that are not available to pursue claims for subrogation and statutory subrogation against Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") as part of an attempt to recoup a settlement contribution, which it had an independent obligation to fund. While the Nightclub Management Agreement ("NMA") relied on by St. Paul to support its claims is again referenced in the FAC and was raised as a point of contention in Marquee's first motion to dismiss, St. Paul continues to refuse to attach a copy of the agreement to its FAC or set forth verbatim the provisions it relies upon in support of its claims despite Marquee's requests to do so. Instead, St. Paul paraphrases the provisions of the agreement in a misleading and incomplete manner, omitting the crucial portions of the agreement that are fatal to its claims. As discussed herein, the NMA contains a "waiver of subrogation" provision and an indemnity provision limited to uninsured losses. Pursuant to these provisions, St. Paul is precluded from bringing its subrogation and statutory subrogation claims against Marquee. Accordingly, St. Paul has no legal or equitable basis to pursue subrogation against Marquee and the causes of action against Marquee in the FAC should be dismissed with prejudice.

II.

FACTUAL ALLEGATIONS RELEVANT TO THIS MOTION

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

A. Underlying Action

This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). (FAC ¶ 6.) Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was attacked by Marquee employees resulting

in personal injuries. (FAC ¶¶ 6-7.) Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (*Id.* ¶¶ 8-10, Exhibit A.) Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit A.)

As noted above, Marquee Nightclub is a fictitious business name of Roof Deck Entertainment, LLC. The Cosmopolitan of Las Vegas is a fictitious business name of Nevada Property 1, LLC. (FAC ¶¶ 4, 10.) In their Motions for Summary Judgment filed in the Underlying Action, Cosmopolitan and Marquee confirmed both that Marquee and Roof Deck Entertainment, LLC are the same entity and that Nevada Property 1, LLC and Cosmopolitan are the same entity. (Request for Judicial Notice ("RJN"), Ex. 1-2.) Cosmopolitan is the owner of the subject property where the Marquee Nightclub is located and leases the nightclub location to its subsidiary, Nevada Restaurant Venture 1, LLC ("NRV1"). (FAC ¶ 10.) NRV1 entered into a written agreement with Marquee to manage the nightclub. (*Id.*) Marquee is a named insured under the National Union policy. (FAC ¶ 30.) Cosmopolitan is an insured under the St. Paul's policy. (FAC ¶ 40.)[1]

During the course of the Underlying Action, Moradi asserted that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breach of the non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.) The Court in the Underlying Action agreed with Moradi's position and imposed vicarious liability on Cosmopolitan for Marquee's actions. (*Id.*) The Court also found that Marquee and Cosmopolitan were jointly and severally liable for Moradi's damages claim. (FAC ¶ 14.)

On April 28, 2017, the jury returned a verdict in Moradi's favor against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. (FAC ¶ 60.)

---

[1] Based on information and belief, Marquee asserts that NRV1 also qualifies as an insured under the St. Paul policy, however, this fact is not relevant to the Court's determination of this motion.

During the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66) National Union, St. Paul and other insurers accepted the settlement demand and resolved the Underlying Action with the confidential contributions set out in the non-public FAC filed under seal. (FAC ¶¶ 67-70.)

B. St. Paul's Claims Against Marquee

In its Fifth Cause of Action for Statutory Subrogation – Contribution Per NRS § 17.225, St. Paul asserts a subrogation right against Marquee under NRS § 17.225 for contribution to recoup a share of St. Paul's settlement payment. (FAC ¶ 113.) St. Paul alleges that Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct rather than any affirmative actions or unreasonable conduct on the part of Cosmopolitan. (FAC ¶¶ 117-118.) St. Paul further asserts that Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages. (FAC ¶ 118.) St. Paul alleges that its settlement payment on behalf of Cosmopolitan was in excess of Cosmopolitan's equitable share of this common liability such that St. Paul is entitled to subrogate to Cosmopolitan's contribution rights against Marquee pursuant to NRS §§ 17.225 and 17.275 for all sums paid by St. Paul as part of the settlement of the Underlying Action. (FAC ¶¶ 119-120.)

St. Paul's Sixth Cause of Action for Subrogation – Express Indemnity is nearly identical to the cause of action brought in the original complaint for which the Court requested clarification with regard to the relationship of the parties and their insurance coverages, which Marquee addresses further herein. In the FAC, St. Paul asserts that "[p]er written agreement," Marquee was obligated to "indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (*Id.* ¶ 122.) St. Paul further alleges that Marquee did not provide indemnification to Cosmopolitan for the claims asserted in the Underlying Action and that, as a result, St. Paul was forced to contribute to the settlement of the Underlying Action to protect Cosmopolitan's interests as well as its own. (*Id.* ¶¶ 125, 127.) St. Paul also alleges that "[p]er the terms of the written agreement", Marquee is liable to St. Paul for its attorneys' fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (*Id.* ¶ 129.)

///

As discussed below, both of these causes of action fail as a matter of law because the NMA includes subrogation waiver provisions that preclude its subrogation claims for express indemnity and contribution against Marquee. Accordingly, St. Paul has no legal basis to pursue subrogation for express indemnity or statutory subrogation against Marquee.

C. Nightclub Management Agreement

As noted above, St. Paul's FAC expressly references a written agreement as the basis for its subrogation claim for express indemnity, but tellingly St. Paul again fails to identify or attach the NMA beyond generalized references. (FAC ¶¶ 122, 124-125, 129.) St. Paul's complaint asserts that "[p]er written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (FAC ¶ 122.) St. Paul also alleges that "[p]er the terms of the written agreement, Marquee is also liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement." (FAC ¶ 129.)

St. Paul's refusal to attach the referenced written agreement as an exhibit to the FAC, or otherwise set forth the operative provisions of the alleged agreement, is telling, but is of no moment because the Court can take judicial notice of the NMA as set forth herein. The April 21, 2010 NMA was entered into between Marquee and NRV1 with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (FAC ¶ 10.) (Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Appendix of Exhibits in Support of its Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's Complaint ("Appendix"), Exhibit A (previously filed under seal in support of Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion to Dismiss Complaint)[2]; Declaration of Bill Bonbrest ("Bonbrest Decl."), ¶ 3; Supplemental Declaration of Bill Bonbrest ("Supp. Bonbrest Decl."), ¶6.) Despite counsel's attempts to separate Cosmopolitan from the NMA at the hearing on Marquee's first motion to dismiss, Cosmopolitan is identified as the Project Owner in the Recitals section of the NMA and is also a signatory to the agreement both on

[2] As the NMA was previously filed under seal in support of Marquee's Motion to Dismiss St. Paul's Complaint, Marquee will not file the NMA again for purposes of this motion, but will refer to the document already filed under seal. However, Marquee will deliver a courtesy copy of the NMA to the Court as part of its filing of this motion.

behalf of itself and NRV1, for which it is the Managing Member. (NMA, pg. 27, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.)

While Cosmopolitan and NRV1 are related entities, Cosmopolitan and Marquee are separate and unrelated entities. Further, Marquee and Cosmopolitan have separate towers of insurance. National Union and Aspen Specialty Insurance Company are the direct insurers of Marquee while Zurich American Insurance Company and St. Paul are the direct insurers of Cosmopolitan. (FAC ¶¶ 15, 30, 40, 69; RJN, Ex. 3.) As set forth in the Nightclub Management Agreement, Cosmopolitan is the Project Owner of the hotel casino and resort premises, including the Marquee Nightclub venue. (NMA, pg. 1, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.) Cosmopolitan leased the premises to its related entity, NRV1. (FAC ¶ 10.) In turn, NRV1 entered into the NMA in which Marquee agreed to manage and operate the Marquee nightclub in the Cosmopolitan hotel. (NMA, pgs. 1, 24-32, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.) Accordingly, the Court's consideration of the NMA and its terms is appropriate in ruling upon this motion.

The NMA contains the following pertinent provisions:

> **1. Definitions**
>
> ...
>
> **"Losses"** shall mean any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance, including, without limitation, all reasonable attorneys' fees and all other reasonable professional or consultants' expenses incurred in investigating, preparing for, serving as a witness in, or defending against any action or proceeding, whether actually commenced or threatened.
>
> ...
>
> **12. Insurance**
>
> 12.1 [NRV1's] Insurance. During the Term of this Agreement, [NRV1] shall provide and maintain the following insurance coverage, at its sole cost and expense . . .:
>
> . . .
>
> 12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage, with a combined single limit of not less than Two Million Dollars ($2,000,000) for each occurrence, and at

least Four Million Dollars ($4,000,000) in the aggregate, including excess coverage; and

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

12.2 [Marquee's] Insurance.

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

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

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

. . .

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

. . .

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

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

13. Indemnity

13.1 By [Marquee]. [Marquee] shall indemnify, hold harmless and defend [NRV1] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members,

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

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

. . .

20. Third Party Beneficiary

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

...

28. Attorneys' Fees

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

> the representation of its rights hereunder in or in connection with the bankruptcy of another party, such party, if successful therein, shall be reimbursed immediately by the party in bankruptcy for reasonably incurred attorneys' fees and other costs and expenses.

(Emphasis added.)

III.

LEGAL STANDARDS

A complaint may be dismissed under NRCP 12(b)(5) where it appears beyond a doubt that the complaint could prove no set of facts, which, if true, would entitle the plaintiff to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008). While courts must accept as true all material factual allegations in a complaint for purposes of a motion to dismiss, the factual grounds for plaintiff's entitlement to relief "require more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("on a motion to dismiss, courts are not bound to accept as true legal conclusions couched as factual allegations") (internal quotations omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth"); *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) ("if allegations are indeed more conclusory than factual, then the court does not have to assume their truth.") Further, a Plaintiff may not disguise insufficient claims with vague allegations so as to avoid dismissal as St. Paul attempts to do here with its refusal to identify the NMA. *See Clarendon American Ins. Co. v. Nev. Yellow Cab Corp.*, 2012 WL 786270, *3 (D. Nev. 2012) (dismissing breach of contract claim because Plaintiff neglected to cite the pertinent policy provisions which allegedly imposed a duty on the insurer).

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

F.3d 903, 908 (9th Cir. 2003) (for example, "when a plaintiff's claim about insurance coverage is based on the contents of a coverage plan"); *see also United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153, fn. 3 (2nd Cir. 2002); *Martinez v. Victoria Partners*, 2014 WL 1268705 at *1, fn. 3 (D. Nev., Mar. 27, 2014); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998) (superseded by statute on other grounds); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

The court may also properly consider judicially noticeable documents in context of a motion to dismiss. *Intri-Plex Technologies, Inc. v. Crest Group*, 499 F.3d 1048, 1052 (9th Cir. 2007); *Van Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010); *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847 (1993). For example, courts may take judicial notice of the contents of court files in other lawsuits, including transcripts of proceedings. *See Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Gila River Indian Community,* 626 F.3d 1059, 1075 (9th Cir. 2010); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Sheriff, Clark Cnty. v. Kravetz*, 96 Nev. 919, 920 (1980) (relying upon a preliminary hearing transcript as basis for judicial notice).

Further, given the Nevada Rules of Civil Procedure are "based in large part upon their federal counterparts," Nevada courts consider the federal courts' interpretation of the corresponding federal rule(s) as "strong persuasive authority" when interpreting the Nevada Rules of Civil Procedure. *See Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002) (citing *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119 (1990); *Nelson v. Heer*, 121 Nev. 832, 834 (2005); *Moseley v. Eight Judicial Dist. Court ex rel County of Clark*, 124 Nev. 654, 662-663 (2008). As discussed herein, the NMA is integral to St. Paul's claims against Marquee and, based on St. Paul's failure to attach the agreement to its complaint, Marquee is permitted to attach the agreement to the instant motion to show that St. Paul has failed to state a claim against Marquee for which relief can be granted pursuant to NRCP 12(b)(5). This "incorporation by reference" doctrine allows the Court to consider the NMA without converting the motion into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076-1077 (9th Cir. 2005). Similarly, Marquee may attach various portions of the court file from the Underlying Action, which may similarly be

considered for purposes of the instant motion. *Intri-Plex Technologies, Inc.*, 499 F.3d at 1052; *Van Saher,* 592 F.3d at 960.

IV.

POINTS AND AUTHORITIES

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

St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated by its policy, law and principles of equity to the rights of Cosmopolitan for claims for express indemnity against Marquee. (FAC ¶ 126.) However, pursuant to Section 12.2.6 of the NMA, all policies issued to NRV1, Marquee, and Cosmopolitan are required to contain a waiver of subrogation against Cosmopolitan, Marquee and NRV1. Specifically, Section 12.2.6 states that the waiver of subrogation requirements applies to both "Operator Policies" and "Owner Policies." "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance coverage maintained by any "Owner Insured Party." Section 12.2.3 defines "Owner Insured Parties" as including NRV1, Cosmopolitan, their respective parents, subsidiaries, affiliates, and other related persons and entities. Accordingly, despite St. Paul's contentions otherwise, the waiver of subrogation clause in the NMA expressly applies to Cosmopolitan's insurance policies, including the policy issued by St. Paul.

Upon information and belief, although not necessary to support this motion to dismiss, the St. Paul policy contains an endorsement in which St. Paul agrees to waive its right to recovery for any payment it makes if Cosmopolitan agreed to waive its rights of recovery in a written contract. Marquee anticipates that St. Paul will take issue with Marquee's inability to quote the exact language from the St. Paul policy. However, as noted in Marquee's first motion to dismiss, Marquee is not an insured under the St. Paul policy and accordingly does not have a copy of the policy. Rather, St. Paul has a copy of the policy and can easily admit or refute Marquee's description of the waiver of subrogation language in the policy. St. Paul's failure to also attach the policy to its FAC and its failure to reference the waiver of subrogation language in its policy is again telling, especially where the issue of the policy language was raised in Marquee's prior

motion to dismiss and the Court requested clarification of these details. St. Paul's ongoing strategy to submit vague pleadings in this regard is not sufficient to avoid dismissal of the claims against Marquee. *See Clarendon American Ins. Co.*, 2012 WL 786270 at *3 (D. Nev. 2012).

Waiver of subrogation provisions have been universally enforced. *See Davlar Corp. v. Superior Court*, 53 Cal.App.4th 1121, 1125 (1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 26 Cal.App.4th 1194 (1994) (waiver of rights for damages covered by insurance barred insurer's subrogation suit.); *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 169 Cal.App.4th 415 (2008) (holding tenant's failure to obtain the full amount of liability insurance required by lease did not preclude enforcement of subrogation waiver); *Commerce & Indus. Ins. Co. v. Orth*, 254 Or. 226 (1969) (holding insurer waived its subrogation rights against various contractors); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 119 Wn.2d 334, 342 (1992) (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, 2016 WL 4425095, *7 (D.N.M. Feb. 29, 2016) (finding subrogation waivers serve important public policy goals, such as "encouraging parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity.") (Citation omitted.) Pursuant to the waiver of subrogation provision in the NMA, the parties agreed that Marquee, NRV1 and Cosmopolitan would waive any claims against each other that were paid with insurance.

Marquee anticipates that St. Paul will again argue that the NMA does not have sufficient subrogation waiver language and that Marquee cannot show that the subrogation waiver provision contained in the St. Paul Policy applies to the settlement payments made in the Underlying Action (essentially due to St. Paul's refusal to provide the court with its policy.). However, the intent to waive subrogation rights for losses covered by insurance is clear as a matter of law. Pursuant to Section 12.2.6 of the NMA, Cosmopolitan and Marquee mutually agreed that all insurance policies issued to them would contain a waiver of subrogation of the insurers' rights against Cosmopolitan and Marquee. The NMA further provides that express indemnity only applies to claims that are not paid by insurance proceeds. So, the intent of Cosmopolitan and Marquee waive subrogation rights is clear. To find otherwise would be inconsistent with the terms of the NMA. Accordingly, St.

Paul's subrogation claim for express indemnity fails as a matter of law given it steps into Cosmopolitan's shoes, who waived any subrogation rights where, as here, the Underlying Action was resolved with insurance proceeds.

B. St. Paul's New Allegations Against Marquee Based On The Alleged Acceptance of Cosmopolitan's Defense Is Not Sufficient To Avoid Dismissal Because It Does Not Alter That Marquee's Indemnity Obligation, If Any, Only Applies to Losses Not Covered By Insurance

As noted above, St. Paul's subrogation claim for express indemnity in the FAC is substantially similar to the original complaint except St. Paul has added allegations in the FAC that Marquee accepted Cosmopolitan's contractual indemnity tender, which has no known legal support. (FAC ¶ 25.) Nonetheless, even if this allegation is accepted as true, it does not save St. Paul's deficient pleading because Marquee's acceptance of Cosmopolitan's tender does not change the fact that, pursuant to the terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan only applies to losses not covered by insurance. It is undisputed that the settlement in the Underlying Action was paid by Marquee and Cosmopolitan's insurers. As Cosmopolitan did not sustain any uninsured losses, Marquee owes no indemnity to Cosmopolitan and by extension, St. Paul, whose rights are no greater than Cosmopolitan.

St. Paul alleges that, per written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action. (FAC ¶ 122.) However, St. Paul's limited paraphrasing of the indemnity provision in the NMA is inaccurate and misleading. Specifically, pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify, hold harmless and defend NRV1 and its parents, subsidiaries and affiliates (including Cosmopolitan), from and against losses to the extent incurred as a result of the breach or default by Marquee of any term or condition of the Agreement, or the negligence or willful misconduct of Marquee that is not otherwise covered by the insurance required to be maintained under the Agreement. (Emphasis added.) The NMA further defines "losses", in pertinent part, as "liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance." (Emphasis added.) St. Paul's failure to accurately cite the indemnity

///

provision in the NMA, including the underlined portion of the provision, is crucial as it clearly defeats St. Paul's claim.

As noted above, in considering Marquee's motion to dismiss, the Court is not bound by St. Paul's self-serving and limited paraphrasing of the agreement set forth in the FAC. *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). Rather, the actual language of the indemnity provision in the NMA may be properly considered by the Court for purposes of ruling on the instant motion, as this provision is the foundation for St. Paul's cause of action for subrogation based upon express indemnity.

Nevada courts strictly construe indemnity obligations and will enforce them in accordance with the terms of the contracting parties' agreement. *See United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. Adv. Op. 59 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331 (2011); *Contreras v. American Family Mut. Ins. Co.*, 135 F.Supp.3d 1208, 1231 (D.Nev. 2015); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F.Supp.2d 1262, 1268 (D.Nev. 2008) ("It is well settled that a court should enforce a contract as it is written, should not create a new contract by rewriting unambiguous terms, and has no power to create a new contract.") As explained by the Nevada Supreme Court in *United Rentals*:

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

Id. at 229.

The exclusion of insurance payments from the definition of "losses" in Section 1 of the NMA and the inclusion of the phrase "and not otherwise covered by the insurance required to be maintained hereunder" in the indemnity provision set out in Section 13.1 expressly limit any purported indemnity obligation by Marquee to uninsured losses. Further, construing the waiver of subrogation provision in Section 12.2.6 with the mutual indemnity provisions in Section 13 of the NMA, it is clear that it was the intent of the parties to the agreement to limit their respective indemnity obligations to losses paid out-of-pocket by the respective indemnitees and not losses paid

by their insurers. Cosmopolitan's defense in the underlying action and its joint and several liability for the verdict and resulting settlement were paid for by insurance. (FAC ¶¶ 13-14, 27, 32, 35-36, 68-70.) In short, the indemnity provision only applies to uninsured losses. Here, insurance provided by National Union and St. Paul, among others, paid for the entire settlement of the Underlying Action. Thus, there is no uninsured loss for which Marquee could indemnify Cosmopolitan. Stated another way, as Cosmopolitan has no losses that were not reimbursed by insurance, Cosmopolitan has no right to indemnity from Marquee. Given Cosmopolitan has no right to indemnity from Marquee, St. Paul has no shoes to step into to pursue Marquee. Accordingly, given the expressed intent of the indemnity provision, the waiver of subrogation provision and the fact Cosmopolitan's insurers paid the settlement in the Underlying Action, not Cosmopolitan, St. Paul has no valid claim for express indemnity and, therefore, its claim against Marquee fails on this basis as well.

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

As with St. Paul's subrogation claim based on express indemnity, its subrogation claim for contribution under the Uniform Contribution Act is similarly barred by the waiver of subrogation provision in the NMA as well as the waiver of subrogation endorsement to the St. Paul policy, which St. Paul apparently refuses to provide to the Court.[3] In addition, St. Paul's statutory subrogation claim for contribution fails as there is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death. NRS 17.255. In the Underlying Action, Cosmopolitan was found jointly and severally liable with Marquee on all of Moradi's asserted claims, including the intentional tort claims for assault, battery, and false imprisonment. (FAC ¶¶ 13-14, Ex. B.) Given Cosmopolitan was found by the jury to be jointly liable with Marquee for the intentional tort claims that allegedly contributed to Moradi's injury, such findings preclude Cosmopolitan (and St. Paul) from pursuing contribution from Marquee.

///

[3] Worth noting is that any claim for contribution would also be barred by a determination of good faith settlement pursuant to NRS 17.245.

In addition, pursuant to NRS 17.265, when a tortfeasor has a right to indemnity from another tortfeasor, his claim is for indemnity and he has no right to contribution under the Uniform Contribution Act. As set forth above, the NMA contains an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was covered by insurance. Given the existence of Cosmopolitan's contractually defined right to indemnity from Marquee, it has no right to contribution under the Uniform Contribution Act pursuant to NRS 17.265. Further, although St. Paul asserts a claim against Marquee under NRS 17.275, that statute is of no benefit to St. Paul as it only allows the insurer to be subrogated to the tortfeasor's right of contribution. If the tortfeasor has no right of contribution, then neither does its insurer. As discussed above, Cosmopolitan has no right to contribution from Marquee as it has a contractual right to indemnity from Marquee pursuant to the NMA. Given this right (or entitlement) to indemnity, Cosmopolitan has no statutory claim for contribution under NRS 17.265 as a matter of law. *See also, Calloway v. City of Reno*, 113 Nev. 564, 578 (1997) ("implied indemnity theories are not viable in the face of express indemnity agreements.") Where, as here, Cosmopolitan has no statutory right of contribution against Marquee, St. Paul also has no statutory right of contribution against Marquee.

D. Marquee Is Entitled to Recover Attorneys' Fees from St. Paul

St. Paul claims that, pursuant to the written agreement, Marquee is liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (FAC ¶ 129.) St. Paul is likely referring to Section 28 of the NMA which provides that, in the event of a dispute regarding the enforcement or interpretation of the agreement, the prevailing party shall be reimbursed for reasonably incurred attorneys' fees and other costs and expenses. However, for the reasons discussed above, St. Paul's claims against Marquee fail as a matter of law. Marquee previously advised St. Paul of its position and the baseless nature of its claims, but St. Paul decided to file its frivolous complaint anyway. Given St. Paul's complaint fails to state a claim against Marquee upon which relief can be granted pursuant to NRCP 12(b)(5), this motion to dismiss should be granted and the Court should award Marquee its attorneys' fees and costs as the prevailing party under the terms of the NMA.

Notwithstanding the prevailing party provision in the NMA, NRS 18.010(2)(b) also provides grounds for the Court to award Marquee its attorneys' fees. Pursuant to NRS 18.010(2)(b), the Court may make an allowance of attorneys' fees to a prevailing party "when the court finds that a claim…of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." *See, Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348 (1998) (holding that a claim is groundless if the allegations in the complaint are not supported by any credible evidence); *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089 (1995); *Bergmann v. Boyce*, 109 Nev. 670 (1993) (finding that sanctions are properly imposed when claim is baseless and made without reasonably competent inquiry). St. Paul's claims against Marquee are clearly baseless, made without (or despite) competent inquiry, and not supported by any credible evidence. Despite Marquee's prior notice to St. Paul that it had no viable claim against Marquee, St. Paul nonetheless went forward with the instant action without reasonable grounds. Accordingly, the Court may properly award Marquee its attorneys' fees pursuant to NRS 18.010(2)(b).

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

V.

CONCLUSION

For foregoing reasons, St. Paul's FAC against Marquee should be dismissed with prejudice without leave to amend and Marquee should be awarded its attorneys' fees and costs.

DATED: June 25, 2018

HEROLD & SAGER

By: (11333) FUR

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Steven James Aaronoff, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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

CERTIFICATE OF SERVICE

I hereby certify that the **DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT** was submitted electronically for filing and/or service with the Eighth Judicial District Court's Odyssey E-File and Serve System on **June 25, 2018**. Electronic service of the foregoing document shall be made in accordance with the E-Service List[1] as follows:

COUNSEL OF RECORD	EMAIL ADDRESS(ES)	PARTY
Ramiro Morales, Esq. William C. Reeves, Esq. MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	rmorales@mfrlegal.com wreeves@mfrlegal.com mderewetzky@mfrlegal.com	PLAINTIFF
Michael M. Edwards, Esq. MESSNER REEVES LLP 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	medwards@messner.com nforsyth@messner.com lmaile@messner.com efile@messner.com	ASPEN SPECIALTY INSURANCE COMPANY

JuRee A. Bloedel
Employee of HEROLD & SAGER

[1] Pursuant to EDCR 8.05(a), each party who submits an E-filed document through the E-Filing System consents to electronic service pursuant to NRCP 5(b)(2)(D).

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

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT

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

DATED: June 25, 2018

HEROLD & SAGER

By: (11333) FVB

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Steven James Aaronoff, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub. will bring the foregoing Motion to Dismiss for hearing on the 31 day of July, 2018 at the hour of 9:30 a.m./~~p.m.~~ of said day, or as soon thereafter as counsel can be heard, in Department 26 of the District Court for Clark County, Nevada, located at the _____, Las Vegas, Nevada.

DATED: June 25, 2018

HEROLD & SAGER

By: [signature] (11333) FOR

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Steven James Aaronoff, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — **Page(s)**

TABLE OF AUTHORITIES (continued)

Cases — **Page(s)**

TABLE OF AUTHORITIES (continued)

Cases — **Page(s)**

NEVADA RULES OF CIVIL PROCEDURE

///

///

///

///

TABLE OF AUTHORITIES (continued)

NEVADA REVISED STATUTES — **Page(s)**

I.

INTRODUCTION

Similar to its original complaint, in its first amended complaint ("FAC"), St. Paul Fire & Marine Insurance Company's ("St. Paul") seeks to step into shoes that are not available to pursue claims for subrogation and statutory subrogation against Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") as part of an attempt to recoup a settlement contribution, which it had an independent obligation to fund. While the Nightclub Management Agreement ("NMA") relied on by St. Paul to support its claims is again referenced in the FAC and was raised as a point of contention in Marquee's first motion to dismiss, St. Paul continues to refuse to attach a copy of the agreement to its FAC or set forth verbatim the provisions it relies upon in support of its claims despite Marquee's requests to do so. Instead, St. Paul paraphrases the provisions of the agreement in a misleading and incomplete manner, omitting the crucial portions of the agreement that are fatal to its claims. As discussed herein, the NMA contains a "waiver of subrogation" provision and an indemnity provision limited to uninsured losses. Pursuant to these provisions, St. Paul is precluded from bringing its subrogation and statutory subrogation claims against Marquee. Accordingly, St. Paul has no legal or equitable basis to pursue subrogation against Marquee and the causes of action against Marquee in the FAC should be dismissed with prejudice.

II.

FACTUAL ALLEGATIONS RELEVANT TO THIS MOTION

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

A. Underlying Action

This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). (FAC ¶ 6.) Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was attacked by Marquee employees resulting

in personal injuries. (FAC ¶¶ 6-7.) Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (*Id.* ¶¶ 8-10, Exhibit A.) Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit A.)

As noted above, Marquee Nightclub is a fictitious business name of Roof Deck Entertainment, LLC. The Cosmopolitan of Las Vegas is a fictitious business name of Nevada Property 1, LLC. (FAC ¶¶ 4, 10.) In their Motions for Summary Judgment filed in the Underlying Action, Cosmopolitan and Marquee confirmed both that Marquee and Roof Deck Entertainment, LLC are the same entity and that Nevada Property 1, LLC and Cosmopolitan are the same entity. (Request for Judicial Notice ("RJN"), Ex. 1-2.) Cosmopolitan is the owner of the subject property where the Marquee Nightclub is located and leases the nightclub location to its subsidiary, Nevada Restaurant Venture 1, LLC ("NRV1"). (FAC ¶ 10.) NRV1 entered into a written agreement with Marquee to manage the nightclub. (*Id.*) Marquee is a named insured under the National Union policy. (FAC ¶ 30.) Cosmopolitan is an insured under the St. Paul's policy. (FAC ¶ 40.)[1]

During the course of the Underlying Action, Moradi asserted that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breach of the non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.) The Court in the Underlying Action agreed with Moradi's position and imposed vicarious liability on Cosmopolitan for Marquee's actions. (*Id.*) The Court also found that Marquee and Cosmopolitan were jointly and severally liable for Moradi's damages claim. (FAC ¶ 14.)

On April 28, 2017, the jury returned a verdict in Moradi's favor against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. (FAC ¶ 60.)

---

[1] Based on information and belief, Marquee asserts that NRV1 also qualifies as an insured under the St. Paul policy, however, this fact is not relevant to the Court's determination of this motion.

During the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66) National Union, St. Paul and other insurers accepted the settlement demand and resolved the Underlying Action with the confidential contributions set out in the non-public FAC filed under seal. (FAC ¶¶ 67-70.)

B. St. Paul's Claims Against Marquee

In its Fifth Cause of Action for Statutory Subrogation – Contribution Per NRS § 17.225, St. Paul asserts a subrogation right against Marquee under NRS § 17.225 for contribution to recoup a share of St. Paul's settlement payment. (FAC ¶ 113.) St. Paul alleges that Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct rather than any affirmative actions or unreasonable conduct on the part of Cosmopolitan. (FAC ¶¶ 117-118.) St. Paul further asserts that Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages. (FAC ¶ 118.) St. Paul alleges that its settlement payment on behalf of Cosmopolitan was in excess of Cosmopolitan's equitable share of this common liability such that St. Paul is entitled to subrogate to Cosmopolitan's contribution rights against Marquee pursuant to NRS §§ 17.225 and 17.275 for all sums paid by St. Paul as part of the settlement of the Underlying Action. (FAC ¶¶ 119-120.)

St. Paul's Sixth Cause of Action for Subrogation – Express Indemnity is nearly identical to the cause of action brought in the original complaint for which the Court requested clarification with regard to the relationship of the parties and their insurance coverages, which Marquee addresses further herein. In the FAC, St. Paul asserts that "[p]er written agreement," Marquee was obligated to "indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (*Id.* ¶ 122.) St. Paul further alleges that Marquee did not provide indemnification to Cosmopolitan for the claims asserted in the Underlying Action and that, as a result, St. Paul was forced to contribute to the settlement of the Underlying Action to protect Cosmopolitan's interests as well as its own. (*Id.* ¶¶ 125, 127.) St. Paul also alleges that "[p]er the terms of the written agreement", Marquee is liable to St. Paul for its attorneys' fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (*Id.* ¶ 129.)

///

As discussed below, both of these causes of action fail as a matter of law because the NMA includes subrogation waiver provisions that preclude its subrogation claims for express indemnity and contribution against Marquee. Accordingly, St. Paul has no legal basis to pursue subrogation for express indemnity or statutory subrogation against Marquee.

C. Nightclub Management Agreement

As noted above, St. Paul's FAC expressly references a written agreement as the basis for its subrogation claim for express indemnity, but tellingly St. Paul again fails to identify or attach the NMA beyond generalized references. (FAC ¶¶ 122, 124-125, 129.) St. Paul's complaint asserts that "[p]er written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (FAC ¶ 122.) St. Paul also alleges that "[p]er the terms of the written agreement, Marquee is also liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement." (FAC ¶ 129.)

St. Paul's refusal to attach the referenced written agreement as an exhibit to the FAC, or otherwise set forth the operative provisions of the alleged agreement, is telling, but is of no moment because the Court can take judicial notice of the NMA as set forth herein. The April 21, 2010 NMA was entered into between Marquee and NRV1 with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (FAC ¶ 10.) (Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Appendix of Exhibits in Support of its Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's Complaint ("Appendix"), Exhibit A (previously filed under seal in support of Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion to Dismiss Complaint)[2]; Declaration of Bill Bonbrest ("Bonbrest Decl."), ¶ 3; Supplemental Declaration of Bill Bonbrest ("Supp. Bonbrest Decl."), ¶6.) Despite counsel's attempts to separate Cosmopolitan from the NMA at the hearing on Marquee's first motion to dismiss, Cosmopolitan is identified as the Project Owner in the Recitals section of the NMA and is also a signatory to the agreement both on

[2] As the NMA was previously filed under seal in support of Marquee's Motion to Dismiss St. Paul's Complaint, Marquee will not file the NMA again for purposes of this motion, but will refer to the document already filed under seal. However, Marquee will deliver a courtesy copy of the NMA to the Court as part of its filing of this motion.

behalf of itself and NRV1, for which it is the Managing Member. (NMA, pg. 27, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.)

While Cosmopolitan and NRV1 are related entities, Cosmopolitan and Marquee are separate and unrelated entities. Further, Marquee and Cosmopolitan have separate towers of insurance. National Union and Aspen Specialty Insurance Company are the direct insurers of Marquee while Zurich American Insurance Company and St. Paul are the direct insurers of Cosmopolitan. (FAC ¶¶ 15, 30, 40, 69; RJN, Ex. 3.) As set forth in the Nightclub Management Agreement, Cosmopolitan is the Project Owner of the hotel casino and resort premises, including the Marquee Nightclub venue. (NMA, pg. 1, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.) Cosmopolitan leased the premises to its related entity, NRV1. (FAC ¶ 10.) In turn, NRV1 entered into the NMA in which Marquee agreed to manage and operate the Marquee nightclub in the Cosmopolitan hotel. (NMA, pgs. 1, 24-32, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.) Accordingly, the Court's consideration of the NMA and its terms is appropriate in ruling upon this motion.

The NMA contains the following pertinent provisions:

> **1. Definitions**
>
> ...
>
> **"Losses"** shall mean any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance, including, without limitation, all reasonable attorneys' fees and all other reasonable professional or consultants' expenses incurred in investigating, preparing for, serving as a witness in, or defending against any action or proceeding, whether actually commenced or threatened.
>
> ...
>
> **12. Insurance**
>
> 12.1 [NRV1's] Insurance. During the Term of this Agreement, [NRV1] shall provide and maintain the following insurance coverage, at its sole cost and expense . . .:
>
> . . .
>
> 12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage, with a combined single limit of not less than Two Million Dollars ($2,000,000) for each occurrence, and at

least Four Million Dollars ($4,000,000) in the aggregate, including excess coverage; and

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

12.2 [Marquee's] Insurance.

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

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

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

. . .

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

. . .

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

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

13. Indemnity

13.1 By [Marquee]. [Marquee] shall indemnify, hold harmless and defend [NRV1] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members,

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

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

. . .

20. Third Party Beneficiary

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

...

28. Attorneys' Fees

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

> the representation of its rights hereunder in or in connection with the bankruptcy of another party, such party, if successful therein, shall be reimbursed immediately by the party in bankruptcy for reasonably incurred attorneys' fees and other costs and expenses.

(Emphasis added.)

III.

LEGAL STANDARDS

A complaint may be dismissed under NRCP 12(b)(5) where it appears beyond a doubt that the complaint could prove no set of facts, which, if true, would entitle the plaintiff to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008). While courts must accept as true all material factual allegations in a complaint for purposes of a motion to dismiss, the factual grounds for plaintiff's entitlement to relief "require more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("on a motion to dismiss, courts are not bound to accept as true legal conclusions couched as factual allegations") (internal quotations omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth"); *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) ("if allegations are indeed more conclusory than factual, then the court does not have to assume their truth.") Further, a Plaintiff may not disguise insufficient claims with vague allegations so as to avoid dismissal as St. Paul attempts to do here with its refusal to identify the NMA. *See Clarendon American Ins. Co. v. Nev. Yellow Cab Corp.*, 2012 WL 786270, *3 (D. Nev. 2012) (dismissing breach of contract claim because Plaintiff neglected to cite the pertinent policy provisions which allegedly imposed a duty on the insurer).

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

F.3d 903, 908 (9th Cir. 2003) (for example, "when a plaintiff's claim about insurance coverage is based on the contents of a coverage plan"); *see also United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153, fn. 3 (2nd Cir. 2002); *Martinez v. Victoria Partners*, 2014 WL 1268705 at *1, fn. 3 (D. Nev., Mar. 27, 2014); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998) (superseded by statute on other grounds); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

The court may also properly consider judicially noticeable documents in context of a motion to dismiss. *Intri-Plex Technologies, Inc. v. Crest Group*, 499 F.3d 1048, 1052 (9th Cir. 2007); *Van Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010); *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847 (1993). For example, courts may take judicial notice of the contents of court files in other lawsuits, including transcripts of proceedings. *See Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Gila River Indian Community,* 626 F.3d 1059, 1075 (9th Cir. 2010); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Sheriff, Clark Cnty. v. Kravetz*, 96 Nev. 919, 920 (1980) (relying upon a preliminary hearing transcript as basis for judicial notice).

Further, given the Nevada Rules of Civil Procedure are "based in large part upon their federal counterparts," Nevada courts consider the federal courts' interpretation of the corresponding federal rule(s) as "strong persuasive authority" when interpreting the Nevada Rules of Civil Procedure. *See Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002) (citing *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119 (1990); *Nelson v. Heer*, 121 Nev. 832, 834 (2005); *Moseley v. Eight Judicial Dist. Court ex rel County of Clark*, 124 Nev. 654, 662-663 (2008). As discussed herein, the NMA is integral to St. Paul's claims against Marquee and, based on St. Paul's failure to attach the agreement to its complaint, Marquee is permitted to attach the agreement to the instant motion to show that St. Paul has failed to state a claim against Marquee for which relief can be granted pursuant to NRCP 12(b)(5). This "incorporation by reference" doctrine allows the Court to consider the NMA without converting the motion into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076-1077 (9th Cir. 2005). Similarly, Marquee may attach various portions of the court file from the Underlying Action, which may similarly be

considered for purposes of the instant motion. *Intri-Plex Technologies, Inc.*, 499 F.3d at 1052; *Van Saher,* 592 F.3d at 960.

IV.

POINTS AND AUTHORITIES

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

St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated by its policy, law and principles of equity to the rights of Cosmopolitan for claims for express indemnity against Marquee. (FAC ¶ 126.) However, pursuant to Section 12.2.6 of the NMA, all policies issued to NRV1, Marquee, and Cosmopolitan are required to contain a waiver of subrogation against Cosmopolitan, Marquee and NRV1. Specifically, Section 12.2.6 states that the waiver of subrogation requirements applies to both "Operator Policies" and "Owner Policies." "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance coverage maintained by any "Owner Insured Party." Section 12.2.3 defines "Owner Insured Parties" as including NRV1, Cosmopolitan, their respective parents, subsidiaries, affiliates, and other related persons and entities. Accordingly, despite St. Paul's contentions otherwise, the waiver of subrogation clause in the NMA expressly applies to Cosmopolitan's insurance policies, including the policy issued by St. Paul.

Upon information and belief, although not necessary to support this motion to dismiss, the St. Paul policy contains an endorsement in which St. Paul agrees to waive its right to recovery for any payment it makes if Cosmopolitan agreed to waive its rights of recovery in a written contract. Marquee anticipates that St. Paul will take issue with Marquee's inability to quote the exact language from the St. Paul policy. However, as noted in Marquee's first motion to dismiss, Marquee is not an insured under the St. Paul policy and accordingly does not have a copy of the policy. Rather, St. Paul has a copy of the policy and can easily admit or refute Marquee's description of the waiver of subrogation language in the policy. St. Paul's failure to also attach the policy to its FAC and its failure to reference the waiver of subrogation language in its policy is again telling, especially where the issue of the policy language was raised in Marquee's prior

motion to dismiss and the Court requested clarification of these details. St. Paul's ongoing strategy to submit vague pleadings in this regard is not sufficient to avoid dismissal of the claims against Marquee. *See Clarendon American Ins. Co.*, 2012 WL 786270 at *3 (D. Nev. 2012).

Waiver of subrogation provisions have been universally enforced. *See Davlar Corp. v. Superior Court*, 53 Cal.App.4th 1121, 1125 (1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 26 Cal.App.4th 1194 (1994) (waiver of rights for damages covered by insurance barred insurer's subrogation suit.); *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 169 Cal.App.4th 415 (2008) (holding tenant's failure to obtain the full amount of liability insurance required by lease did not preclude enforcement of subrogation waiver); *Commerce & Indus. Ins. Co. v. Orth*, 254 Or. 226 (1969) (holding insurer waived its subrogation rights against various contractors); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 119 Wn.2d 334, 342 (1992) (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, 2016 WL 4425095, *7 (D.N.M. Feb. 29, 2016) (finding subrogation waivers serve important public policy goals, such as "encouraging parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity.") (Citation omitted.) Pursuant to the waiver of subrogation provision in the NMA, the parties agreed that Marquee, NRV1 and Cosmopolitan would waive any claims against each other that were paid with insurance.

Marquee anticipates that St. Paul will again argue that the NMA does not have sufficient subrogation waiver language and that Marquee cannot show that the subrogation waiver provision contained in the St. Paul Policy applies to the settlement payments made in the Underlying Action (essentially due to St. Paul's refusal to provide the court with its policy.). However, the intent to waive subrogation rights for losses covered by insurance is clear as a matter of law. Pursuant to Section 12.2.6 of the NMA, Cosmopolitan and Marquee mutually agreed that all insurance policies issued to them would contain a waiver of subrogation of the insurers' rights against Cosmopolitan and Marquee. The NMA further provides that express indemnity only applies to claims that are not paid by insurance proceeds. So, the intent of Cosmopolitan and Marquee waive subrogation rights is clear. To find otherwise would be inconsistent with the terms of the NMA. Accordingly, St.

Paul's subrogation claim for express indemnity fails as a matter of law given it steps into Cosmopolitan's shoes, who waived any subrogation rights where, as here, the Underlying Action was resolved with insurance proceeds.

B. St. Paul's New Allegations Against Marquee Based On The Alleged Acceptance of Cosmopolitan's Defense Is Not Sufficient To Avoid Dismissal Because It Does Not Alter That Marquee's Indemnity Obligation, If Any, Only Applies to Losses Not Covered By Insurance

As noted above, St. Paul's subrogation claim for express indemnity in the FAC is substantially similar to the original complaint except St. Paul has added allegations in the FAC that Marquee accepted Cosmopolitan's contractual indemnity tender, which has no known legal support. (FAC ¶ 25.) Nonetheless, even if this allegation is accepted as true, it does not save St. Paul's deficient pleading because Marquee's acceptance of Cosmopolitan's tender does not change the fact that, pursuant to the terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan only applies to losses not covered by insurance. It is undisputed that the settlement in the Underlying Action was paid by Marquee and Cosmopolitan's insurers. As Cosmopolitan did not sustain any uninsured losses, Marquee owes no indemnity to Cosmopolitan and by extension, St. Paul, whose rights are no greater than Cosmopolitan.

St. Paul alleges that, per written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action. (FAC ¶ 122.) However, St. Paul's limited paraphrasing of the indemnity provision in the NMA is inaccurate and misleading. Specifically, pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify, hold harmless and defend NRV1 and its parents, subsidiaries and affiliates (including Cosmopolitan), from and against losses to the extent incurred as a result of the breach or default by Marquee of any term or condition of the Agreement, or the negligence or willful misconduct of Marquee that is not otherwise covered by the insurance required to be maintained under the Agreement. (Emphasis added.) The NMA further defines "losses", in pertinent part, as "liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance." (Emphasis added.) St. Paul's failure to accurately cite the indemnity

///

provision in the NMA, including the underlined portion of the provision, is crucial as it clearly defeats St. Paul's claim.

As noted above, in considering Marquee's motion to dismiss, the Court is not bound by St. Paul's self-serving and limited paraphrasing of the agreement set forth in the FAC. *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). Rather, the actual language of the indemnity provision in the NMA may be properly considered by the Court for purposes of ruling on the instant motion, as this provision is the foundation for St. Paul's cause of action for subrogation based upon express indemnity.

Nevada courts strictly construe indemnity obligations and will enforce them in accordance with the terms of the contracting parties' agreement. *See United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. Adv. Op. 59 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331 (2011); *Contreras v. American Family Mut. Ins. Co.*, 135 F.Supp.3d 1208, 1231 (D.Nev. 2015); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F.Supp.2d 1262, 1268 (D.Nev. 2008) ("It is well settled that a court should enforce a contract as it is written, should not create a new contract by rewriting unambiguous terms, and has no power to create a new contract.") As explained by the Nevada Supreme Court in *United Rentals*:

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

Id. at 229.

The exclusion of insurance payments from the definition of "losses" in Section 1 of the NMA and the inclusion of the phrase "and not otherwise covered by the insurance required to be maintained hereunder" in the indemnity provision set out in Section 13.1 expressly limit any purported indemnity obligation by Marquee to uninsured losses. Further, construing the waiver of subrogation provision in Section 12.2.6 with the mutual indemnity provisions in Section 13 of the NMA, it is clear that it was the intent of the parties to the agreement to limit their respective indemnity obligations to losses paid out-of-pocket by the respective indemnitees and not losses paid

by their insurers. Cosmopolitan's defense in the underlying action and its joint and several liability for the verdict and resulting settlement were paid for by insurance. (FAC ¶¶ 13-14, 27, 32, 35-36, 68-70.) In short, the indemnity provision only applies to uninsured losses. Here, insurance provided by National Union and St. Paul, among others, paid for the entire settlement of the Underlying Action. Thus, there is no uninsured loss for which Marquee could indemnify Cosmopolitan. Stated another way, as Cosmopolitan has no losses that were not reimbursed by insurance, Cosmopolitan has no right to indemnity from Marquee. Given Cosmopolitan has no right to indemnity from Marquee, St. Paul has no shoes to step into to pursue Marquee. Accordingly, given the expressed intent of the indemnity provision, the waiver of subrogation provision and the fact Cosmopolitan's insurers paid the settlement in the Underlying Action, not Cosmopolitan, St. Paul has no valid claim for express indemnity and, therefore, its claim against Marquee fails on this basis as well.

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

As with St. Paul's subrogation claim based on express indemnity, its subrogation claim for contribution under the Uniform Contribution Act is similarly barred by the waiver of subrogation provision in the NMA as well as the waiver of subrogation endorsement to the St. Paul policy, which St. Paul apparently refuses to provide to the Court.[3] In addition, St. Paul's statutory subrogation claim for contribution fails as there is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death. NRS 17.255. In the Underlying Action, Cosmopolitan was found jointly and severally liable with Marquee on all of Moradi's asserted claims, including the intentional tort claims for assault, battery, and false imprisonment. (FAC ¶¶ 13-14, Ex. B.) Given Cosmopolitan was found by the jury to be jointly liable with Marquee for the intentional tort claims that allegedly contributed to Moradi's injury, such findings preclude Cosmopolitan (and St. Paul) from pursuing contribution from Marquee.

///

[3] Worth noting is that any claim for contribution would also be barred by a determination of good faith settlement pursuant to NRS 17.245.

In addition, pursuant to NRS 17.265, when a tortfeasor has a right to indemnity from another tortfeasor, his claim is for indemnity and he has no right to contribution under the Uniform Contribution Act. As set forth above, the NMA contains an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was covered by insurance. Given the existence of Cosmopolitan's contractually defined right to indemnity from Marquee, it has no right to contribution under the Uniform Contribution Act pursuant to NRS 17.265. Further, although St. Paul asserts a claim against Marquee under NRS 17.275, that statute is of no benefit to St. Paul as it only allows the insurer to be subrogated to the tortfeasor's right of contribution. If the tortfeasor has no right of contribution, then neither does its insurer. As discussed above, Cosmopolitan has no right to contribution from Marquee as it has a contractual right to indemnity from Marquee pursuant to the NMA. Given this right (or entitlement) to indemnity, Cosmopolitan has no statutory claim for contribution under NRS 17.265 as a matter of law. *See also, Calloway v. City of Reno*, 113 Nev. 564, 578 (1997) ("implied indemnity theories are not viable in the face of express indemnity agreements.") Where, as here, Cosmopolitan has no statutory right of contribution against Marquee, St. Paul also has no statutory right of contribution against Marquee.

D. Marquee Is Entitled to Recover Attorneys' Fees from St. Paul

St. Paul claims that, pursuant to the written agreement, Marquee is liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (FAC ¶ 129.) St. Paul is likely referring to Section 28 of the NMA which provides that, in the event of a dispute regarding the enforcement or interpretation of the agreement, the prevailing party shall be reimbursed for reasonably incurred attorneys' fees and other costs and expenses. However, for the reasons discussed above, St. Paul's claims against Marquee fail as a matter of law. Marquee previously advised St. Paul of its position and the baseless nature of its claims, but St. Paul decided to file its frivolous complaint anyway. Given St. Paul's complaint fails to state a claim against Marquee upon which relief can be granted pursuant to NRCP 12(b)(5), this motion to dismiss should be granted and the Court should award Marquee its attorneys' fees and costs as the prevailing party under the terms of the NMA.

Notwithstanding the prevailing party provision in the NMA, NRS 18.010(2)(b) also provides grounds for the Court to award Marquee its attorneys' fees. Pursuant to NRS 18.010(2)(b), the Court may make an allowance of attorneys' fees to a prevailing party "when the court finds that a claim…of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." *See, Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348 (1998) (holding that a claim is groundless if the allegations in the complaint are not supported by any credible evidence); *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089 (1995); *Bergmann v. Boyce*, 109 Nev. 670 (1993) (finding that sanctions are properly imposed when claim is baseless and made without reasonably competent inquiry). St. Paul's claims against Marquee are clearly baseless, made without (or despite) competent inquiry, and not supported by any credible evidence. Despite Marquee's prior notice to St. Paul that it had no viable claim against Marquee, St. Paul nonetheless went forward with the instant action without reasonable grounds. Accordingly, the Court may properly award Marquee its attorneys' fees pursuant to NRS 18.010(2)(b).

///

///

///

///

///

///

///

///

///

///

///

///

///

///

V.

CONCLUSION

For foregoing reasons, St. Paul's FAC against Marquee should be dismissed with prejudice without leave to amend and Marquee should be awarded its attorneys' fees and costs.

DATED: June 25, 2018

HEROLD & SAGER

By: (11333) FUR

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Steven James Aaronoff, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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

CERTIFICATE OF SERVICE

I hereby certify that the **DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT** was submitted electronically for filing and/or service with the Eighth Judicial District Court's Odyssey E-File and Serve System on **June 25, 2018**. Electronic service of the foregoing document shall be made in accordance with the E-Service List[1] as follows:

COUNSEL OF RECORD	EMAIL ADDRESS(ES)	PARTY
Ramiro Morales, Esq. William C. Reeves, Esq. MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	rmorales@mfrlegal.com wreeves@mfrlegal.com mderewetzky@mfrlegal.com	PLAINTIFF
Michael M. Edwards, Esq. MESSNER REEVES LLP 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	medwards@messner.com nforsyth@messner.com lmaile@messner.com efile@messner.com	ASPEN SPECIALTY INSURANCE COMPANY

JuRee A. Bloedel
Employee of HEROLD & SAGER

[1] Pursuant to EDCR 8.05(a), each party who submits an E-filed document through the E-Filing System consents to electronic service pursuant to NRCP 5(b)(2)(D).

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

Attorneys for Defendants NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA & ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

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

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

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

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

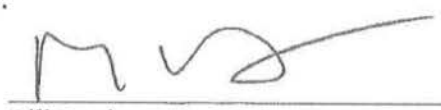
4. As part of my job responsibilities, I am required to be acquainted with the management agreements for the various nightclubs and other venues, including the Nightclub Management Agreement for the Marquee Nightclub.

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

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

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

Dated this 7th day of February, 2018.



Bill Bonbrest

CERTIFICATE OF SERVICE

I hereby certify that the **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** was submitted electronically for filing and/or service with the Eighth Judicial District Court's Odyssey E-File and Serve System on **June 25, 2018**. Electronic service of the foregoing document shall be made in accordance with the E-Service List[1] as follows:

COUNSEL OF RECORD	EMAIL ADDRESS(ES)	PARTY
Ramiro Morales, Esq. William C. Reeves, Esq. MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	rmorales@mfrlegal.com wreeves@mfrlegal.com mderewetzky@mfrlegal.com	PLAINTIFF
Michael M. Edwards, Esq. MESSNER REEVES LLP 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	medwards@messner.com nforsyth@messner.com lmaile@messner.com efile@messner.com	ASPEN SPECIALTY INSURANCE COMPANY

JuRee A. Bloedel
Employee of HEROLD & SAGER

[1] Pursuant to EDCR 8.05(a), each party who submits an E-filed document through the E-Filing System consents to electronic service pursuant to NRCP 5(b)(2)(D).

RFJN

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

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

REQUEST FOR JUDICIAL NOTICE 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 FIRST AMENDED COMPLAINT

Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") hereby requests the Court to take judicial notice pursuant to Nevada Revised Statutes sections 47.130 and 47.150 the following facts:

1. Defendant Marquee and Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") filed a Motion for Partial Summary Judgment re: Punitive Damages in an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C. A true and correct copy of the Motion for Partial Summary Judgment re: Punitive Damages is attached hereto as **Exhibit 1.**

Courts may take judicial notice of the contents of court files in other lawsuits, including transcripts of proceedings. *See Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Gila River Indian Community,* 626 F.3d 1059, 1075 (9th Cir. 2010); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Sheriff, Clark Cnty. v. Kravetz*, 96 Nev. 919, 920 (1980) (relying upon a preliminary hearing transcript as basis for judicial notice).

2. Cosmopolitan filed a Motion for Summary Judgment in an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C. A true and correct copy of the Motion for Summary Judgment is attached hereto as **Exhibit 2.**

Courts may take judicial notice of the contents of court files in other lawsuits, including transcripts of proceedings. *See Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Gila River Indian Community,* 626 F.3d 1059, 1075 (9th Cir. 2010); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Sheriff, Clark Cnty. v. Kravetz*, 96 Nev. 919, 920 (1980) (relying upon a preliminary hearing transcript as basis for judicial notice).

3. Defendant Marquee and Cosmopolitan filed a Twenty-Ninth Supplement to List of Witnesses and Documents Pursuant to NRCP 16.1 in an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C. A true and correct copy of the Twenty-Ninth

///

Supplement to List of Witnesses and Documents Pursuant to NRCP 16.1 is attached hereto as **Exhibit 3.**

DATED: June 25, 2018

HEROLD & SAGER

By: John O'Malley (11333) FOR

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Steven James Aaronoff, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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

EXHIBIT 1

EXHIBIT 1

MPSJ
D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
David A. Dial, Esq.
ddial@wwhgd.com
Admitted Pro Hac Vice
Jeremy R. Alberts, Esq.
Nevada Bar No. 10497
jalberts@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Attorneys for Defendants

[Additional Counsel Listed on Signature Page]

WEINBERG WHEELER HUDGINS GUNN & DIAL

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, an individual, Plaintiff, vs. NEVADA PROPERTY 1, LLC, d/b/a "The Cosmopolitan of Las Vegas", ROOF DECK ENTERTAINMENT, LLC d/b/a "Marquee Nightclub", and DOES 1 through X, inclusive; through X, inclusive [sic], Defendants.	Case No.: A698824 Dept. No.: XX **DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PUNITIVE DAMAGES**

Defendants Nevada Property 1, LLC, d/b/a "The Cosmopolitan of Las Vegas" (hereinafter "the Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a "Marquee Nightclub" (hereinafter "Marquee") (collectively, "Defendants") by and through their attorneys of record, hereby move for partial summary judgment on Plaintiff's assertion of a punitive damages remedy. This *Motion* is supported by the accompanying Memorandum of Points and Authorities and the *Declaration of Jeremy R. Alberts, Esq. in Support of Defendants' Motion for Partial Summary Judgment Re: Punitive Damages*.

NOTICE OF MOTION

PLEASE TAKE NOTICE that **DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PUNITIVE DAMAGES** will come on for hearing in the above-entitled Court on the 07 day of ~~November~~ DECEMBER 2016, at 8:30A a.m./p.m. before Dept. XX of the above-entitled Court.

Dated this 1 day of November, 2016.

D. Lee Roberts, Jr., Esq.
David A. Dial, Esq.
Jeremy R. Alberts, Esq
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Josh Cole Aicklen, Esq.
David B. Avakian, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

This case arises out of an alleged physical altercation at the Marquee nightclub between Plaintiff David Moradi and Marquee's Security Officers. The alleged altercation occurred shortly after Plaintiff physically assaulted Marquee's General Manager. Plaintiff is claiming punitive damages against Defendants Roof Deck Entertainment, LLC ("Marquee") and Nevada Property 1, LLC ("Cosmopolitan"). But, despite extensive discovery, no evidence exists to show that the Marquee or the Cosmopolitan had the requisite mental culpability—oppression, fraud, or malice, express or implied—to entitle Plaintiff to an award of punitive damages.

Statement of Undisputed Facts[1]

1. Plaintiff David Moradi ("Plaintiff") filed this action against Defendants Roof Deck Entertainment, LLC d/b/a Marquee nightclub (hereinafter, "Marquee") and Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas (hereinafter, "Cosmopolitan"). *See Complaint*, docketed (4/4/14).

2. Plaintiff was a guest at the Marquee nightclub during the early morning hours of April 8, 2012. *Id.*

3. The Complaint alleges that as the Plaintiff was attempting to leave the nightclub venue, "Marquee security forcefully grabbed [him], shook him, forcibly pushed him to the left against his will." *Id.* at ¶ 15.

4. The Complaint further alleges that "Marquee security members threw [Plaintiff] into a wall, head first, causing injuries to his head." The Complaint further alleges that "Marquee security members and manager picked [Plaintiff] up and dragged him into the pool area against his will [and] . . . shoved [him] to the ground causing his head to forcefully hit the concrete surface [and] repeatedly hit and smashed [his] head

[1] When referencing the Statement of Undisputed Facts throughout this *Motion*, Defendants will use the abbreviation "SOF" and will refer to the specific paragraph number through use of the symbol ¶. Thus, for example, citation to the first paragraph of the Statement of Undisputed Facts will read "SOF ¶ 1." Defendants assume the truth of these facts for purposes of this *Motion* only.

into the concrete and continually held his head and right eye against the concrete with a high degree of pressure." *Id.* at ¶ 16.

5. The Complaint alleges punitive damages arising out of the conduct of Marquee's security officers. *Id.* at ¶¶, 25, 36, 46.

6. The application process for Marquee's security officers begins with the submission of a written employment application. *See Affidavit of John Ramirez*, ¶ 3, attached hereto as Exhibit "1".

7. Upon receiving the written employment application, Marquee will send the applicant's information to an outside third-party vendor (MicroBilt) for review of the applicant's history of criminal activity. *Id.*

8. MicroBilt has access to Nevada's Civil Name Check ("CNC") database, which is a Nevada criminal history repository. *Id.*

9. Upon completion of the criminal background check, MicroBilt will inform the undersigned as to whether the applicant has a criminal history. *Id.*

10. Prior to Marquee's hiring of security officers Glen Hayes, Daniel Melendez, and Doug Linville, MicroBilt conducted a criminal background investigation with respect to each applicant. *Id.*

11. The results of MicroBilt's investigation revealed no prior history of criminal activity for any of these individuals. *Id.*

12. In addition to conducting a background check, all Marquee security officers must have a Nevada Sheriffs Card. *Id.*

13. The Nevada Gaming Control Board, a Nevada law enforcement agency, does not issue a work card unless the applicant has passed a background check submitted to Nevada Records of Criminal History and an FBI criminal history check. *Id.*

14. Once the background check is passed, the individual is then drug tested and interviewed by the Director of Security. *Id.*

///

///

15. Once a security guard is hired by Marquee, the employee is trained in the company's Use of Force Policy. *See Nightclub Security Policy,* attached hereto as Exhibit "2."

16. The primary purpose of Marquee's Use of Force Policy is to train its security offices to use verbal skills to solve problems without unnecessary force. *See Affidavit of Todd Abdalla,* attached hereto as Exhibit "3".

17. On the night of the subject incident, Marquee security officer, Daniel Melendez, restrained and escorted the Plaintiff to the pool deck immediately following Plaintiff's physically assault of Marquee's General Manager. *See Dep. of Daniel Melendez*, pg. 48-50, attached hereto as Ex. "4."

18. Mr. Melendez testified that his use of force to restrain the Plaintiff was consistent with Marquee's policies and procedures. *See id.* at 44:9-45:7.

19. Mr. Melendez further testified that he does not have authority to deviate from Marquee's use of force policy. *Id.* at 44:19-44:24; 28:5-28:20; 62:5-62:9.

20. David Long, the Director of Security for Marquee at the time of the subject incident, was the only individual with authority to authorize or ratify the use of force exercised by Marquee's security officers. *See Dep. of David Long*, pg. 28:13-28:17, attached hereto as Ex. "5."

21. Mr. Long testified that when he arrived at the pool deck, none of Marquee's security officers were making physical contact with the Plaintiff. *See Marquee Incident Report*, attached hereto as Ex. "6" (Mr. Long stating that "[u]pon my arrival, I observed the subject standing at ease, though still cursing at the staff").

22. The Marquee nightclub is located on the Las Vegas "Strip" on the property identified as Clark County Assessor's Parcel No. 162-20-603-007. *See Nightclub Management Agreement*, (*Ex. A Legal Description of Property*), attached hereto as Exhibit "7".[2]

[2] The Nightclub Management Agreement is subject to the parties' confidentiality agreement, so Defendants will seek leave to file this document under seal as Exhibit "7".

23. The owner of that certain real property located in Las Vegas, Nevada and legally described as Clark County Assessor's Parcel No. 162-20-603-007 is Defendant Nevada Property 1, LLC (hereinafter, "Nevada Property" or "Cosmopolitan"). *Id.*

24. Nevada Property manages and operates the hotel and casino at the property located in Las Vegas, Nevada and legally described as Clark County Assessor's Parcel No. 162-20-603-007. *Id.*

25. On or about April 21, 2010, Nevada Property leased the space that is currently occupied by Marquee nightclub to Nevada Restaurant Venture 1, LLC (hereinafter, "Nevada Restaurant"). *Id.*

26. Nevada Restaurant, as the tenant of the nightclub space, entered into a Nightclub Management Agreement ("NMA") with Defendant Roof Deck Entertainment, LLC (hereinafter, "Marquee") to provide for the operation, management, and supervision of the nightclub venue. *Id.* at Section 3.1.

27. Section 3.1 of the NMA states that Marquee "shall have the full responsibility for and have decision-making authority in all aspects of the day-to-day operation, direction, management and supervision of the Nightclub Venues." *Id.* at Section 3.1.

28. Section 3.1.1 of the NMA states that Marquee shall be "responsible for, without limitation, the recruiting, hiring, training, compensation, supervision and discharge of the Staff. All Staff shall be hired and retained in the name of (Marquee), it being understood that (Marquee) and not (Cosmopolitan), shall be the employer of all staff." *Id.* at Section 3.1.1.

Summary Judgment Standard

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56(c); s*ee Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). An issue of material fact is genuine only when the

evidence is such that a rational jury could return a verdict in favor of the nonmoving party. *Id.* at 731, 121 P.3d at 1031. When a defendant files a motion for summary judgment that identifies the absence of facts sufficient to establish a claim for relief, the claimant must come forward with facts that are both admissible and sufficient to support the asserted claims. *Id.*

If the nonmoving party bears the burden of persuasion at trial, as Plaintiff does here, "the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out . . . that there is an absence of evidence to support the nonmoving party's case." *Cuzze vs. University Cmty. Coll. Sys. of Nev.*, 123 Nev. 578, 602–03, 172 P.3d 131, 134 (2007) (internal quotation omitted).

After the moving party demonstrates no genuine issue of material fact exists, to defeat summary judgment the nonmoving party must show the existence of a genuine issue of material fact. *Id.* at 602, 172 P.3d at 134. The party opposing summary judgment is not entitled to build a case on the "threads of whimsy, speculation and conjecture." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (affirming summary judgment because plaintiff's affidavit was insufficient to "produce the requisite quantum of evidence to enable him to reach the jury with his claims"). Further, speculative arguments about what the facts might be at the time of trial do not suffice to withstand a motion for summary judgment. *Wood,* 121 Nev. 731–32, 121 P.3d at 1031. The nonmoving party must present genuine issues of material fact to avoid summary judgment. *Id.* at 732, 121 P.3d at 1031 (The non-moving party "bears the burden to do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid summary judgment being entered in the moving party's favor.").

"The admissibility of evidence on a motion for summary judgment is subject to NRCP 43(a), and evidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment." *Adamson v. Bowker*, 85 Nev. 115,

119, 450 P.2d 796, 799 (1969). Thus, "[t]he trial court may not consider hearsay or other inadmissible evidence." *Id.*; NRCP 56(e) (summary judgment papers "shall set forth such facts as would be admissible in evidence").

Argument

NRS 42.005 governs punitive damages in Nevada. Subsection 1 of NRS 42.005 states that a party may be liable for punitive damages if the plaintiff has "proven by clear and convincing evidence that the defendant [is] guilty of oppression, fraud or malice." The punitive damages analysis under NRS 42.005 applies only to the conduct of an individual. In this case, Plaintiff is suing Marquee and the Cosmopolitan and not any of the individual security officers. When punitive damages are sought against an employer for the conduct of its employee, the punitive damages analysis begins with NRS 42.007.

Under NRS 42.007, an employer may be liable for punitive damages based on an employee's conduct if:

> (a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others;
>
> (b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or
>
> (c) The employer is personally guilty of oppression, fraud or malice, express or implied.

NRS 42.007 further states that a corporation is not liable for punitive damages "unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation." NRS 42.007(1). The Nevada Supreme Court has confirmed the application of NRS 42.007 to punitive damages claims against a corporation by stating that "NRS 42.007 ensures that employers are subject to punitive damages only for their own culpable conduct and not for the misconduct of lower level employees." *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 746, 192 P.3d 243, 257

(2008). Under NRS 42.007, the plaintiff must prove each statutory element by clear and convincing evidence. *See* NRS 42.007(1); *see also* NRS 42.005.

As demonstrated below, none of the elements of paragraph (a), (b) or (c) of NRS 42.007 have been met by an officer or director of either the Marquee or the Cosmopolitan, and thus punitive damages against these corporate defendants is legally improper.

I. PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES AGAINST THE MARQUEE FAILS AS A MATTER OF LAW.

A. NRS 42.007(1)(a) CANNOT BE SATISFIED BECAUSE THERE IS NO EVIDENCE THAT MARQUEE HAD ADVANCE KNOWLEDGE OF THE ALLEGED WRONGDOERS PROPENSITY TO ENGAGE IN THE ALLEGED MISCONDUCT.

In this case, there is no evidence that Marquee "had advance knowledge that [its security team was] unfit for the purposes of the[ir] employment." NRS 42.007(1)(a). Similarly, there is no evidence that Marquee "employed [its security team] with a conscious disregard of the rights or safety of others." NRS 42.007(1)(a).

The application process for Marquee's security officers begins with the submission of a written employment application. *See* SOF ¶ 6. Upon receiving the written employment application, Marquee will send the applicant's information to an outside third-party vendor (MicroBilt) for review of the applicant's history of criminal activity. *Id.* MicroBilt has access to Nevada's Civil Name Check ("CNC") database, which is a Nevada criminal history repository. *Id.* Upon completion of the criminal background check, MicroBilt will inform the undersigned as to whether the applicant has a criminal history. *Id.*

Prior to hiring security officers Glen Hayes, Daniel Melendez, and Doug Linville, MicroBilt conducted a criminal background investigation with respect to each applicant. The results of MicroBilt's investigation revealed no prior history of criminal activity for any of these individuals. *Id.* In addition to conducting a background check, all Marquee security officers must have a Nevada Sheriffs Card. *Id.* The Nevada Gaming Control Board, a Nevada law enforcement agency, does not issue a work card unless the applicant

has passed a background check submitted to Nevada Records of Criminal History and an FBI criminal history check. *Id.*; *see also* NRS 463.335(5). Once the background check is passed, the individual is then drug tested and interviewed by the Director of Security. *Id.*

Once a security guard is hired by Marquee, the employee is trained in the company's Use of Force Policy. *See* SOF ¶ 15. The primary purpose of Marquee's Use of Force Policy is to train its security offices to use verbal skills to solve problems without unnecessary force. *See* SOF ¶ 16. Marquee also trains its security offices to avoid unnecessary actions and words that could potentially escalate a situation. *Id.* The overall focus of Marquee's Use of Force Policy is to teach security officers how to keep both guests and themselves safe. *Id.* Marquee focuses on teaching its security officers about when force is needed and what force is reasonable. *Id.* It teaches that, if physical force becomes necessary, the level of force must not go beyond what appears to be reasonably necessary to solve a given problem. *Id.* Marquee does not teach neck restraint holds, ankle locks, punching or kicking. *Id.*

The above facts demonstrate that Marquee takes great pride in the hiring and training of its security officers. During discovery, Plaintiff generated no evidence that any of these security officers had any type of violent history prior to their employment with Marquee. In fact, discovery revealed that Marquee has a rigorous and thorough hiring process. The Marquee also takes the training of its security officer's seriously. In short, all of the admissible evidence establishes that Marquee adequately trained and supervised its security officers.

Finally, there is no evidence that any of Marquee's security officers had a propensity to use violence or were otherwise unfit for their assigned tasks. None of the security officers involved in the subject incident had been subject to prior discipline for excessive use of force. Thus, even if the Plaintiff had been physically assaulted by Marquee's security officers, there is no evidence that Marquee had advance knowledge that their security officers were unfit to carry out their assigned duties and there is no evidence that Marquee employed these security officers with a conscious disregard of the

rights or safety of others.

B. NRS 42.007(1)(b) CANNOT BE SATISFIED BECAUSE THERE IS NO EVIDENCE THAT MARQUEE AUTHORIZED OR RATIFIED THE ALLEGED MISCONDUCT.

Under NRS 42.007(1)(b), an employer may be liable for punitive damages if it "expressly authorized or ratified the wrongful act of the employee." The Nevada Supreme Court has held that, in order to establish this evidentiary burden, "the authorization, ratification, or oppression, fraud, or malice must be accomplished by an officer, director, or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct." *Countrywide Home Loans, Inc.*, 124 Nev. at 747, 192 P.3d at 258.

The Nevada Supreme Court has "recognized that determining an individual's managerial capacity depends on what the individual is authorized to do by the principal and whether the agent has the discretion as to what is done and how it is done." *Id.* In *Nittinger v. Holman*, the Nevada Supreme Court looked closely at the issue of whether an employee had the "managerial capacity" to authorize and ratify the conduct of another employee. 119 Nev. 192, 196, 69 P.3d 688, 691 (2003). The *Nittinger* Court looked to the California Supreme Court for guidance on the issue when it quoted from the case of *Egan v. Mutual of Omaha Insurance Co.*:

> The determination whether employees act in a managerial capacity…does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.

Nittinger, 119 Nev. at 196, 69 P.3d at 691 (quoting *Egan v. Mutual of Omaha Insurance Co.*, 169 Cal.Rptr. 691, 620 P.2d 141, 148 (1979)). The Nevada Supreme Court also looked to the New Mexico Supreme Court in addressing the issue:

> A key in determining whether an agent acts in a managerial capacity is to look at the nature of what the agent is authorized to do by the principal and whether the individual has discretion regarding both what is done and how it is done. Job titles, in and of themselves, are not necessarily dispositive.

Nittinger, 119 Nev. at 196, 69 P.3d at 691 (quoting *Albuquerque Concrete v. Pan Am Services*, 118 N.M. 140, 879 P.2d 772, 777 (1994). The Nevada Supreme Court also cited to the Federal Court:

> The fact that [an employee] described herself as a 'manager' is not evidence of the type of managerial capacity that the law requires to charge an employer punitively with the conduct of a managerial agent. *For such to occur, the managerial agent must be of sufficient stature and authority to have some control and discretion and independent judgment over a certain area of [the] business with some power to set policy for the company.*

Nittinger, 119 Nev. at 197, 69 P.3d at 691 (emphasis in the original) (quoting *Steinhoff v. Upriver Restaurant Joint Venture*, 117 F.Supp.2d 598, 604-05 (E.D. Ky. 2000)).

The *Nittinger* case arises out of a security incident at the Gold Coast casino in Las Vegas. 119 Nev. at 193, 69 P.3d at 689. Plaintiffs Dedric Holman and Christina Edwards were allegedly assaulted by security personnel at the casino. *Id.* After an issue arose regarding Edwards not having any ID, a physical altercation ensued between Holman and John Nittinger, who was a security guard for Gold Coast. *Id.* at 193-94, 689-90. Edwards was detained and allegedly sexually assaulted by Dale Roeker, another Gold Coast security guard. *Id.* at 194, 690. Nittinger and Holman continued to fight, until Holman retreated and began to flee. *Id.* Before Holman could get very far, he was tripped by a casino employee and then held on the ground by several security guards. *Id.* The security guards reportedly punched, kicked, and beat Holman with nightsticks while the security shift supervisor, Michael Malloy, watched. *Id.* Gold Coast's Director of Security, Richard Whitaker, was not on duty on the night of the incident. *Id.*

At the district court level, the jury awarded punitive damages against Gold Coast. On appeal, Gold Coast argued that Malloy was not a managerial agent who could ratify the actions of Nittinger and the other security guards. *Id.* at 195, 690. Plaintiffs countered that Malloy, who was in charge of security operations at the time of the incident, was a managerial agent and had power to authorize or ratify the actions of the security guards. *Id.* The Nevada Supreme Court agreed with Gold Coast and reversed the award of

punitive damages. *Id.* at 198, 692. The Court held that while Malloy had the authority to implement the Gold Coast's policy, "[t]here is no evidence that Malloy had the authority to deviate from the established policy or that he had any discretion or could exercise independent judgment." *Id.* Based on that finding, the Court concluded he could "not be classified as a managerial agent." *Id.*

Here, as in *Nittinger*, there was no managerial agent who ratified or authorized Marquee's security officer's alleged conduct. While several members of Marquee's security team were involved in the subject incident, none of these security officers were "managerial agents" who could ratify or authorize the actions of other security officers. The analysis of this punitive damages issue mirrors the analysis in *Nittinger* because the scope of Marquee's security officer's duties are similar to the scope of Gold Coast's security officers duties in *Nittinger*. Accordingly, we will not examine the individual duties of each security officer involved in the subject incident: Daniel Melendez, Glen Hayes, Doug Linville, and David Long.

Daniel Melendez, a Security Officer at Marquee, restrained and escorted the Plaintiff to the pool deck immediately following Plaintiff's physically assault of Marquee's General Manager. *See* SOF ¶ 17. Much like the security officer in *Nittinger*, "the evidence indicates that [Mr. Melendez] merely had the authority to implement [Marquee's] policy and to see that the security guards enforced it." *Nittinger*, 119 Nev. at 198, 69 P.3d at 692. During his deposition, Mr. Melendez testified that his use of force to restrain the Plaintiff was consistent with Marquee's policies and procedures. *See* SOF ¶ 17. Mr. Melendez further testified that he does not have authority to deviate from Marquee's use of force policy. *Id.* at 44:19-44:24; 28:5-28:20; 62:5-62:9. Because Mr. Melendez did not have the authority to deviate from Marquee's use of force policy and because he was not otherwise permitted to exercise independent judgment with respect to his use of force, Mr. Melendez did not ratify or authorize the alleged misconduct at issue in this case.

Glen Hayes Doug Linville, both Marquee Security Officers, were also involved in the restraint of Mr. Moradi. *Id.* at 63:19-63:25; *see also* SOF ¶ 21. Like Melendez, Hayes and Linville were not authorized to deviate from Marquee's use of force policy. Hayes and Linville also were not permitted to exercise independent judgment with respect to Marquee's use of force policy. Accordingly, neither Hayes nor Linville ratified or authorized the alleged misconduct at issue in this case.

David Long, the Director of Security for Marquee at the time of the subject incident, is the only individual who could authorize or ratify the alleged excessive use of force by Marquee's security officers. *See* SOF ¶ 20. Mr. Long's duties and responsibilities include exercising discretion, control, and independent judgment with respect to all matters involving security and the use of force by security officers. Mr. Long also had power to establish Marquee's security policies. *See e.g. id.* at 25; 28; 30; 44. While Mr. Long had the ability to ratify or authorize the alleged excessive use of force by Marquee's security officers, the evidence in this case demonstrates that Mr. Long was not present during the subject incident, and thus he did not (*because he could not*) exercise any authority. By the time Mr. Long arrived at the pool deck, the alleged excessive use of force had ended.

During his deposition, Mr. Long testified that when he arrived at the pool deck, none of Marquee's security officers were making physical contact with the Plaintiff. *See* SOF ¶ 21 (Mr. Long stating that "[u]pon my arrival, I observed the subject standing at ease, though still cursing at the staff"). Further evidence that Plaintiff was not engaged physically with Marquee's security officers exists in the following deposition testimony of Mr. Long:

> Q. So what point in time did you arrive on scene during this incident?
>
> A. At what point in time? I don't know what time it was.

Q. But in relation to as the events occurred?A. When I got there, the guest, or the subject, I guess in this case, Mr. Moradi, was already on his feet. He was verbally abusive but he was not physically aggressive at that point.

Q. So you didn't see any physical aggression from him when you arrived on the scene?

A. When I arrived on the scene, no.

Q. It has here that you observed him standing at ease?

A. Correct.

See SOF ¶ 20. Mr. Melendez also confirms the absence of any physical contact upon Mr. Long's arrival as follows:

Q. Did you ever call Mr. Long, through the radio or otherwise, to come to the gaming area?

A. I did, yes.

Q. When did you do that?

A. When Mr. Moradi was then standing and yelling at us.

Q. After he was unrestrained?

A. Yes.

Q. Any why did you call Mr. Long?

A. Because he's my supervisor, so he needs to be there.

Q. Just out of curiosity, how come you didn't call him earlier?

A. When earlier?

Q. While he was in double mock two holds.

A. Because at that time, I'm trying to give direction and make sure nobody's injuring themselves.

Q. So after Mr. Moradi was unrestrained, that's when you called Mr. Long?

A. Correct.

Q. And what did you tell Mr. Long to do?

A. That he needs to come to the gaming area.

Q. Any other information provided to him?

A. Not over the radio.

Q. So contextually, over the radio, he was told to come to the gaming area, but wouldn't know why yet?

A. No.

Q. Is that correct?

A. I'm guessing so, yes.

Q. Okay. How long was Mr. Long in the gaming area?

A. Just as long as I was, for the incident.

Q. So eight to 10 something minutes?

A. However long it took him to sign the tab, yeah, and after he was let up.

Q. But Mr. Long arrived after Mr. Moradi left?

A. While he was still there.

Q. Oh, he was there when Mr. Moradi was there?

A. He was there after he was let up, yes.

See SOF ¶ 19. The above testimony demonstrates that Mr. Long did not even have the opportunity to authorize or ratify the alleged misconduct by Marquee's security officers. Accordingly, there is no evidence that Marquee expressly authorized or ratified the allegedly misconduct of its security officers.

C. NRS 42.007(1)(c) Cannot be Satisfied Because There is No Evidence that Marquee is Guilty of Oppression, Fraud or Malice.

Looking to NRS 42.007(1)(c), a corporation may be liable for exemplary or punitive damages if the "[t]he employer is personally guilty of oppression, fraud, or malice, express or implied." The statute goes on to explain, "[i]f the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct

on behalf of the corporation." NRS 42.007(1). Therefore, under NRS 42.007(1)(c), the employer may be personally guilty of oppression, fraud or malice, express or implied, if the managerial agent described above is personally guilty of oppression, fraud or malice, express or implied. *See ETT, Inc. v. Delegado*, 126 Nev. 895, *5, 367 P.3d 767 (2010); *Countrywide Home Loans, Inc.*, 124 Nev. at 748, 192 P.3d at 258.

In this case, Mr. Long would need to be personally guilty of oppression, or malice, express or implied, in order for Marquee to be liable for punitive damages under NRS 42.007(1)(c).Under the statute, malice, fraud and oppressions are defined as follows:

> (a) "Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others;
>
> (b) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

NRS 42.001. The statute also defines conscious disregard as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." *Id.*

Applying NRS 42.007(1)(c) to Mr. Long, there is no evidence that he acted with oppression or malice, express or implied. None of the actions taken by Mr. Long on the morning of the subject incident can be described as malicious, as Mr. Long did not engage in any "conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." NRS 42.001(3). Also, none of the actions taken by Mr. Long can be described as oppressive, since his conduct on the morning of the incident did not amount to conduct "that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS 42.001(4). Rather, the evidence shows that Mr. Long was not involved in (or even aware of) the subject incident until after the situation had completely deescalated. *See* SOF ¶ 21. Mr. Long was not present for Plaintiff's head butting of Mr. Mata. Mr. Long was not present when Plaintiff was initially restrained by Mr. Melendez

following the head butt. Mr. Long was also not present during the alleged excessive use of force by Marquee's security officers. Mr. Long arrived on the scene ***after*** Plaintiff was on his feet and standing several feet away from Marquee's security officers. *See id.*; *see also* SOF ¶ 20; *see also* SOF ¶ 19. Therefore, under no circumstance can it be said that Mr. Long was guilty of oppression or malice, express or implied, as applied to the subject incident. It is impossible to conclude otherwise, as, again, Mr. Long was never involved in the subject incident when the alleged misconduct occurred.

Looking separately at the definition of "conscious disregard" does not change this outcome. There is no merit to the argument that Mr. Long had "knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NRS 42.001(1). The evidence shows that Mr. Long was not aware of the subject incident until after the alleged excessive use of force. *See* SOF ¶ 19. Because the evidence does not support NRS 42.007(1)(c), it cannot be the basis for punitive damages against Marquee. This is especially true in light of the heightened standard for punitive damages.

In light of the forgoing, Plaintiff's claim for punitive damages should not proceed against Marquee, as Plaintiff cannot satisfy the requirements of NRS 42.007.

II. PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES AGAINST THE COSMOPOLITAN FAILS AS A MATTER OF LAW.

In the unlikely event that the Cosmopolitan's pending *Motion for Summary Judgment* is denied, Defendants asks this Court to grant partial summary judgment with respect to Plaintiff's request for punitive damages against the Cosmopolitan for the following reasons.

A. NRS 42.007(1)(a) Cannot Be Satisfied because the Cosmopolitan Did Not Have Any Employees Involved in the Subject Incident.

Under NRS 42.007(1)(a), an employer may be liable for punitive damages based on an employee's conduct if "[t]he employer had advance knowledge that the employee

was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others."

Applying NRS 42.007(1)(a), the subject incident did not involve any employee of the Cosmopolitan, and thus it is impossible to find that the Cosmopolitan is liable for punitive damages under NRS 42.007(1)(a). Removing any doubt that the Cosmopolitan does not exercise control over Marquee's security officers, the Nightclub Management Agreement, which governs the Marquee's operations, states that "***[a]ll Staff shall be hired and retained in the name of (Marquee), it being understood that (Marquee) and not (Cosmopolitan), shall be the employer of all staff***." *See* SOF ¶ 28. Therefore, it cannot be said that the Cosmopolitan employed Marquee's security officers with a conscious disregard of the rights or safety of others.

B. NRS 42.007(1)(b) Cannot be Satisfied Because There is No Evidence that The Cosmopolitan Authorized or Ratified the Alleged Misconduct.

An employer may be liable for the wrongful conduct of an employee if "[t]he employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded." NRS 42.007(1)(b). Applying NRS 42.007(1)(b), it was impossible for the Cosmopolitan to authorize or ratify the alleged wrongful acts of Marquee's Security Officers because, as noted above, the Cosmopolitan was not involved in (or even aware of) the subject incident until the following day. Furthermore, under the Nightclub Management Agreement, Marquee has "full responsibility for and has decision-making authority in all aspects of the day-to-day operation, direction, management and supervision of the Nightclub venues." *Id.* Therefore, the Cosmopolitan was not in a position to ratify or authorize any actions taken by Marquee employees. In light of those facts, punitive damages cannot be levied against the Cosmopolitan under NRS 42.007(1)(b).

///

///

///

C. NRS 42.007(1)(c) Cannot be Satisfied Because There is No Evidence that the Cosmopolitan is Personally Guilty of Oppression, Fraud or Malice.

NRS 42.007(1)(c) states that a corporation may be liable for exemplary or punitive damages if the "[t]he employer is personally guilty of oppression, fraud, or malice, express or implied." Under NRS 42.007(1)(c), the employer may be personally guilty of oppression, fraud or malice, express or implied, if the corporation has a managerial agent that is personally guilty of oppression, fraud or malice, express or implied. *See ETT, Inc. v. Delegado*, 126 Nev. 895, *5, 367 P.3d 767 (2010); *Countrywide Home Loans, Inc.*, 124 Nev. at 748, 192 P.3d at 258.

Application of NRS 42.007(1)(c) to the Cosmopolitan, renders the same result found under NRS 42.007(1)(a) and (b). The Cosmopolitan's employees were not involved in the subject incident, so there was no managerial agent of the Cosmopolitan that could be guilty of oppression, fraud, or malice, express or implied. *See* SOF ¶ 27. Moreover, the Cosmopolitan did not have authority to direct or control any other of the employees of the Marquee, so none of Marquee's employees can be classified as a managerial agent of the Cosmopolitan. *Id.* Therefore, the Cosmopolitan cannot be liable for punitive damages based on NRS 42.007(1)(c).

In conclusion, punitive damages may not be awarded against the Cosmopolitan, as the Cosmopolitan, was not involved in the incident that took place at Marquee on April 8, 2012, in such way that would satisfy the requirement of NRS 42.007. Furthermore, Plaintiff has not (and cannot) offer any clear and convincing evidence to show otherwise. Finding that the Cosmopolitan may be liable for punitive damages in this case would end the Nevada Supreme Court's "emphasis on the limited role and deterrent purpose of punitive damages awards: to punish wrongdoers and thereby deter the commission of wrongful acts." *Nittinger*, 119 Nev. at 198, 69 P.3d at 692 (quoting *White v. Ultramar, Inc.*, 21 Cal.4th 563, 88 Cal.Rptr.2d 19, 981 P.2d 944, 954 (1999).

Therefore, the Cosmopolitan asks this Court to grant this Motion for Partial Summary Judgment and preclude the issue of punitive damages from going to the jury.

Relief Requested

For the reasons stated herein, Defendants respectfully request that this Court grant its Motion for Partial Summary Judgment and not allow Plaintiff's claim for punitive damages to go forward.

Dated this 1 day of November, 2016.

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

D. Lee Roberts, Jr., Esq.
David A. Dial, Esq.
Jeremy R. Alberts, Esq
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Josh Cole Aicklen, Esq.
David B. Avakian, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118

Attorneys for Defendants

EXHIBIT 2

EXHIBIT 2

MSJD
D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
David A. Dial, Esq.
ddial@wwhgd.com
Admitted Pro Hac Vice
Jeremy R. Alberts, Esq.
Nevada Bar No. 10497
jalberts@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Attorneys for Defendants

(Additional Counsel Listed on Signature Page)

Electronically Filed
11/01/2016 02:16:58 PM

CLERK OF THE COURT

WEINBERG WHEELER HUDGINS GUNN & DIAL

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, an individual,

Plaintiff,

vs.

NEVADA PROPERTY 1, LLC, d/b/a "The Cosmopolitan of Las Vegas", ROOF DECK NTERTAINMENT, LLC d/b/a "Marquee Nightclub", and DOES 1 through X, inclusive; through X, inclusive (sic),

Defendants.

Case No.: A698824
Dept. No.: XX

DEFENDANT NEVADA PROPERTY 1, LLC'S MOTION FOR SUMMARY JUDGMENT

Defendant Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas (hereinafter, "Cosmopolitan") by and through its attorneys of record, hereby moves for summary judgment on all claims asserted against it by the Plaintiff. This Motion is supported by the accompanying Memorandum of Points and Authorities and the *Declaration of Jeremy R. Alberts in Support of Defendant Cosmopolitan's Motion for Summary Judgment*.

/ / /

NOTICE OF MOTION

PLEASE TAKE NOTICE that **DEFENDANT NEVADA PROPERTY 1, LLC'S MOTION FOR SUMMARY JUDGMENT** will come on for hearing in the above-entitled Court on the 07 day of ~~November~~ DECEMBER 2016, at 8:30A a.m./p.m. before Dept. XX of the above-entitled Court.

Dated this 1 day of November, 2016.

D. Lee Roberts, Jr., Esq.
David A. Dial, Esq.
Jeremy R. Alberts, Esq
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Josh Cole Aicklen, Esq.
David B. Avakian, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118

Attorneys for Defendants

WEINBERG WHEELER HUDGINS GUNN & DIAL

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

On April 8, 2012, Plaintiff David Moradi purchased a table at Defendant Roof Deck Entertainment, LLC's Marquee nightclub (hereinafter, "Marquee"). Plaintiff alleges that when he attempted to leave the nightclub, he was physically assaulted and forcibly detained by members of Marquee's Security Officers. Plaintiff filed this lawsuit against the Marquee nightclub and Nevada Property 1, LLC (hereinafter, "Cosmopolitan").

The purpose of this Motion is to bring an end to the Cosmopolitan's involvement in this case. The Cosmopolitan was likely brought into this case as a precautionary measure. However, the evidence is clear that the Cosmopolitan has nothing to do with this case. The Cosmopolitan does not operate or manage the Marquee nightclub. The Cosmopolitan does not have any direction or control over Marquee's staff. Rather, the Cosmopolitan operates and manages a hotel (*which is located several floors above the Marquee*) and a casino (*which is located several floors below the Marque*). Further, there is no evidence that the Cosmopolitan or any of its employees, were involved in (*or even aware of*) the subject incident until the following day when Plaintiff filed a report with Cosmopolitan's security office.

Notwithstanding the forgoing, Plaintiff claims that the Cosmopolitan is liable for several intentional torts. Before the Cosmopolitan can be held liable for an intentional tort, Plaintiff must demonstrate that the tort was committed (1) by an employee of the Cosmopolitan (2) during the course and scope of his/her employment with the Cosmopolitan. In short, Plaintiff must present evidence to support a finding of *respondeat superior* liability against the Cosmopolitan. Yet, there is no evidence that the alleged tortfeasors (*i.e. Marquee's Security Officers*) were employed by the Cosmopolitan. Accordingly, Plaintiff's intentional tort claims against the Cosmopolitan fail as a matter of law.

Plaintiff also asserts a single cause of action for negligence against the Cosmopolitan. In order to impose a duty of care against the Cosmopolitan, Plaintiff must

show that the wrongful act was foreseeable ***and*** also show that the Cosmopolitan failed to take reasonable precautions for his safety. As demonstrated below, there is no evidence that the alleged physical assault by Marquee's Security Officers was foreseeable. Further, the evidence demonstrates that the Cosmopolitan employed basic minimum precautions to ensure the safety of its patrons. Because the subject incident was unforeseeable and because the Cosmopolitan employs basic minimum precautions to ensure the safety of its patrons, the Cosmopolitan owed Plaintiff no duty and his claim fails as a matter of law.

Finally, the Cosmopolitan's role in this case is neither complicated nor disputed. The Cosmopolitan is the landlord for the nightclub space that is occupied and managed by Marquee. Under Nevada law, a landlord is not liable for an injury caused by the negligence of the tenant. Accordingly, the Cosmopolitan is clearly, and fairly, insulated from liability for Plaintiff's injuries. Thus, even assuming that Plaintiff's injuries were indeed the result of the alleged altercation with Marquee's Security Officers, the Cosmopolitan, as a mere landlord, cannot be held liable for the conduct of Marquee's Security Officers as a matter of law.

Summary judgment in favor of the Cosmopolitan is mandated because the alleged tortfeasors were not employed by the Cosmopolitan and there is no evidence that the Cosmopolitan violated a legal duty owed to Plaintiff.

Statement of Undisputed Facts[1]

1. Plaintiff David Moradi ("Plaintiff") filed this action against Defendants Roof Deck Entertainment, LLC d/b/a Marquee nightclub (hereinafter, "Marquee") and Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas (hereinafter, "Cosmopolitan"). *See Complaint*, docketed (4/4/14).

2. Plaintiff was a guest at the Marquee nightclub during the early morning hours of April 8, 2012. *Id.*

[1] When referencing the Statement of Undisputed Facts throughout this *Motion*, Defendants will use the abbreviation "SOF" and will refer to the specific paragraph number through use of the symbol ¶. Thus, for example, citation to the first paragraph of the Statement of Undisputed Facts will read "SOF ¶ 1." Defendants assume the truth of these facts for purposes of this *Motion* only.

3. The Complaint alleges that as the Plaintiff was attempting to leave the nightclub venue, "Marquee security forcefully grabbed [him], shook him, forcibly pushed him to the left against his will." *Complaint*, ¶ 15, docketed (4/4/14).

4. The Complaint further alleges that "Marquee security members threw [Plaintiff] into a wall, head first, causing injuries to his head." The Complaint further alleges that "Marquee security members and manager picked [Plaintiff] up and dragged him into the pool area against his will [and] . . . shoved [him] to the ground causing his head to forcefully hit the concrete surface [and] repeatedly hit and smashed [his] head into the concrete and continually held his head and right eye against the concrete with a high degree of pressure." *Id.* at ¶ 16.

5. Plaintiff is asserting a negligence claim and several intentional tort claims against the Marquee and the Cosmopolitan. *See generally Complaint*, docketed (4/4/14).

6. Plaintiff is not asserting any claims against the individual members of Marquee's security team identified in his Complaint. *Id.*

7. On April 8, 2012, at approximately, 2:40 p.m., Plaintiff reported to the Cosmopolitan that he had been physical assaulted at the Marquee nightclub by Marquee's security officers during the early morning hours of April 8, 2012. *See Cosmopolitan Incident Report*, attached hereto as Exhibit 1.

8. The Marquee nightclub is located on the Las Vegas "Strip" on the property identified as Clark County Assessor's Parcel No. 162-20-603-007. *See Nightclub Management Agreement*, (*Ex. A Legal Description of Property*), attached hereto as Exhibit 2.[2]

///

///

///

[2] The Nightclub Management Agreement is subject to the parties' confidentiality agreement, so Defendants will seek leave to file this document under seal as Exhibit "2".

9. The owner of that certain real property located in Las Vegas, Nevada and legally described as Clark County Assessor's Parcel No. 162-20-603-007 is Defendant Nevada Property 1, LLC (hereinafter, "Nevada Property" or "Cosmopolitan"). *Id.*

10. Nevada Property manages and operates the hotel and casino at the property located in Las Vegas, Nevada and legally described as Clark County Assessor's Parcel No. 162-20-603-007. *Id.*

11. On or about April 21, 2010, Nevada Property leased the space that is currently occupied by Marquee nightclub to Nevada Restaurant Venture 1, LLC (hereinafter, "Nevada Restaurant"). *Id.*

12. Nevada Restaurant, as the tenant of the nightclub space, entered into a Nightclub Management Agreement ("NMA") with Defendant Roof Deck Entertainment, LLC (hereinafter, "Marquee") to provide for the operation, management, and supervision of the nightclub venue. *Id.* at Section 3.1.

13. Under the terms of the NMA, Marquee has taken possession of and occupies the nightclub space and performs the tenant's maintenance obligations under the Lease. *Id.* at Section 3.1.3.

14. Under the terms of the NMA, Marquee manages and operates all aspects of the nightclub venue on behalf of Nevada Restaurant. *Id.*

15. Section 3.1 of the NMA provides that Marquee "shall have the full responsibility for and have decision-making authority in all aspects of the day-to-day operation, direction, management and supervision of the Nightclub Venues." *Id.* at Section 3.1.

16. Section 3.1.1 of the NMA provides that Marquee shall be "responsible for, without limitation, the recruiting, hiring, training, compensation, supervision and discharge of the Staff. All Staff shall be hired and retained in the name of (Marquee), it being understood that (Marquee) and not (Cosmopolitan), shall be the employer of all staff." *Id.* at Section 3.1.1.

///

17. Section 7.1 of the NMA similarly provides that Marquee "shall engage staff in sufficient quantity and experience in order to properly and adequately perform [Marquee's] obligations under this Agreement. ***All staff shall be employees of [Marquee] or its Affiliate.***" *Id.* at Section 7.1 (emphasis added).

18. Section 8.9.2 of the NMA states that Marquee shall notify the Cosmopolitan of any incident that occurs on Marquee's property. *Id.* at Section 8.9.2.

19. The only evidence of prior incidents at the Marquee are the six (6) Marquee incident reports. *See Marquee Prior Incident Reports*, attached hereto as Exhibit 3.

20. Plaintiff's purported security expert, Anthony Nichter, has opined regarding proper industry standards for nightclub security officers. *See Report of Anthony D. Nichter*, attached hereto as Exhibit 4.

Summary Judgment Standard

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c); *see also Cuzze v. University & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Summary judgment may be granted "as to all or any part thereof" as it relates to Plaintiff's Complaint. NRCP 56(b).

When a defendant files a motion for summary judgment that identifies the absence of facts sufficient to establish a claim for relief, the claimant must come forward with facts that are both admissible and sufficient to support the asserted claims. "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" *Cuzze*, 123 Nev. at 602–03, 172 P.3d at 134 (affirming summary judgment against plaintiff who failed to provide evidence in support of alleged causes of action).

///

The party opposing summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (affirming district court's decision to grant summary judgment motion because affidavit submitted by plaintiff was insufficient to "produce the requisite quantum of evidence to enable him to reach the jury with his claims"). Speculative arguments about what the facts might be at the time of trial do not suffice to withstand a motion for summary judgment. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731-32, 121 P.3d 1026, 1031 (2005) (affirming summary judgment against plaintiff who failed to demonstrate the existence of a genuine issue of material fact).

"The admissibility of evidence on a motion for summary judgment is subject to NRCP 43(a), and evidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment." *Adamson v. Bowker*, 85 Nev. 115, 119, 450 P.2d 796, 799 (1969). Thus, "[t]he trial court may not consider hearsay or other inadmissible evidence." *Id.*; NRCP 56(e) (summary judgment papers "shall set forth such facts as would be admissible in evidence").

Argument

Summary judgment in favor of the Cosmopolitan is mandated as to Plaintiff's intentional tort and negligence claims.

As it relates to Plaintiff's intentional tort claims, there is no evidence that the Cosmopolitan or any of its employees, were involved in (*or even aware of*) the subject incident between Plaintiff and Marquee's Security Officers. The Cosmopolitan cannot be held liable for intentional torts that were allegedly committed by other defendants.

As it relates to Plaintiff's negligence claim, there is no evidence that the Cosmopolitan violated any duty owed to the Plaintiff. Finally, it is well established a landlord, such as the Cosmopolitan, is not liable for an injury caused by the negligent action of the occupant of the leased space. For these reasons and for the reasons set forth more fully below, summary judgment should be granted for the Cosmopolitan.

///

I. PLAINTIFF'S INTENTIONAL TORT CLAIMS FAIL AS A MATTER OF LAW BECAUSE THE ALLEGED TORTFEASORS WERE NOT EMPLOYEES OF THE COSMOPOLITAN, NOR UNDER THE DIRECT CONTROL OF THE COSMOPOLITAN.

In this case, Plaintiff is only suing Marquee and the Cosmopolitan and not any of the alleged individual tortfeasors. *See* SOF ¶ 1. The absence of the alleged individual tortfeasors is not necessarily fatal to Plaintiff's tort claims. However, in order for these claims to survive, Plaintiff must provide evidence that the intentional torts were committed by an employee of the Cosmopolitan. Plaintiff must also provide evidence that a Cosmopolitan's employee was acting in the course and scope of his/her employment. *See* NRS 41.130; NRS 41.745; *see also Wood*, 121 Nev. 724, 121 P.3d 1026 (employer not liable for employee's sexual assault because the assault was not committed during the course and scope of his employment). In short, Plaintiff must present evidence to support a finding of *respondeat superior* liability against the Cosmopolitan under NRS 41.745.

NRS 41.745 codifies the legal doctrine of *respondeat superior* liability and, in Nevada, "*respondeat superior* liability attaches only when the employee is under the control of the employer."[3] *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) (quoting *Molino v. Asher*, 96 Nev. 814, 817, 618 P.2d 878, 879 (1980)). Indeed, "[t]he employer can be vicariously responsible ***only for the acts of his employees*** not someone else." *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978) (emphasis added). Under NRS 41.745, an employee is defined as "any person who is employed by an employer, including, without limitation, any present or former officer or employee, [or] immune contractor . . . ." NRS 41.745(3)(a).

Here, Plaintiff must show that the alleged tortfeasors were employed and under the direct control of the Cosmopolitan. *See Rockwell*, 112 Nev. at 1223. If the tortfeasors were not under the Cosmopolitan's direct control, the Cosmopolitan cannot be held liable

[3] Plaintiff did not allege *respondeat superior* in the Complaint, nor has Plaintiff presented any evidence to support a finding of *respondeat superior* liability under NRS 41.745.

for their alleged intentional torts. Plaintiff's Complaint alleges that the intentional torts[4] were committed by members of Marquee's security team. Specifically, Plaintiff alleges that:

> 15. . . . ***Marquee security*** forcefully grabbed David, shook him, forcibly pushed him to the left against his will.
>
> 16. . . . ***Marquee security*** members threw David into a wall, head first, causing injuries to his head. After that, the ***Marquee security*** members and manager picked David up and dragged him into the pool area against his will. There, the ***Marquee security*** members and manager shoved David to the ground causing his head to forcefully hit the concrete surface. The ***Marquee security*** members and manager repeatedly hit and smashed David's head into the concrete and continually held his head and right eye against the concrete with a high degree of pressure. After this violent attack, and while still holding David's head against the concrete, the ***Marquee security*** staff and manager repeatedly stated, "are you going to cooperate and give your I.D. back?" Believing he could be killed, David agreed in order to end the violent attack.
>
> . . . .
>
> 24. . . . Plaintiff was willfully, maliciously and without just cause or provocation assaulted and battered by security guards/employees and/or ***agents of the Marquee Nightclub***. *This conduct was ratified, encouraged and countenanced by Cosmopolitan's employees/agents.*[5] Specifically, Plaintiff was grabbed, shaken, shoved against a wall where he hit his head, forced to the ground, had his head, face, and eye smashed into the concrete numerous times, and held forcefully against the ground.
>
> . . . .

[4] Plaintiff's intentional tort claims include assault & battery, intentional infliction of emotional distress; and false imprisonment. *See* SOF ¶ 1.

[5] The allegation that the Cosmopolitan's employees "ratified, encouraged and countenanced" the alleged assault and battery is not supported by any evidence. The evidence to date is that the Cosmopolitan was not involved *in any manner* in the subject incident at Marquee. Cosmopolitan's involvement in this matter was limited to taking Plaintiff's statement the day after the subject incident. *See Depo of Rick Dang*, pg. 25-28, attached hereto as Exhibit 5.

> 43. [D]uring his time on the property, Plaintiff was physically ***abused by Marquee personnel*** *and/or employees of Cosmopolitan*[6] who refused to allow Plaintiff to leave but, on the contrary, then and there, without any probable or reasonable cause therefore, unlawfully detained Plaintiff by forcing him into a room and a pool area, then refusing to let him go.

SOF ¶ 1, at ¶¶ 15, 16, 24, 43 (emphasis added). There is no evidence or even an allocation that Marquee's Security Officers were employed by the Cosmopolitan. There is also no evidence that Marquee's Security Officers were under the direct control of the Cosmopolitan. What the evidence does show is that ***Marquee*** was responsible for the "recruiting, hiring, training, compensation, supervision and discharge of [its] Staff." SOF ¶15. Removing any doubt on this issue, the Nightclub Management Agreement clearly states that "***[a]ll Staff shall be hired and retained in the name of (Marquee), it being understood that (Marquee) and not (Cosmopolitan), shall be the employer of all staff***." SOF ¶15 (emphasis added). The Cosmopolitan does not pay wages to or otherwise compensate Marquee's staff or security team. *See id.* The Cosmopolitan does not have the ability to hire or fire any member of Marquee's staff or security team. *Id.* The Cosmopolitan does not have the ability to control the hours or location of Marquee's staff or security team. *See* SOF ¶¶ 14, 15. Quite simply, Marquee's security team was not "employed" by the Cosmopolitan.

Since Marquee's security team was not employed by the Cosmopolitan, the Cosmopolitan cannot be held liable for intentional torts allegedly committed by Marquee's security team. Accordingly, Plaintiff's intentional tort claims against the Cosmopolitan fail as a matter of law.

///

///

---

[6] The allegation that Plaintiff was "physically abused by Marquee personnel *and/or employees of Cosmopolitan"* is not supported by any evidence. The evidence to date is that the Cosmopolitan was not involved *in any manner* in the subject incident at Marquee. Cosmopolitan's involvement in this matter was limited to taking Plaintiff's statement the day after the subject incident. *See Depo of Rick Dang*, pg. 25-28, attached hereto as Exhibit 5.

II. PLAINTIFF'S NEGLIGENCE CLAIM FAILS BECAUSE THE ALLEGED ALTERCATION DID NOT INVOLVE ANY EMPLOYEE OF THE COSMOPOLITAN.

To "succeed on a negligence claim for innkeeper liability," a plaintiff must establish four elements: "(1) duty, (2) breach, (3) proximate causation, and (4) damages." *Smith v. Mahoney's Silver Nugget, Inc.*, 265 P.3d 688, 690 (2011) (citing *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 864 P.2d 796 (1993)). There is no evidence in support of the duty element of Plaintiff's negligence claim.

NRS 651.015 governs innkeeper liability in the situation where a person not employed by the Cosmopolitan is alleged to have physically assaulted the Plaintiff. It provides:

> 1. An owner or keeper of any hotel . . . is not civilly liable for the death or injury of a patron or other person on the premises caused by another person who is not an employee under the control or supervision of the owner or keeper unless:
>
> (a) The wrongful act which caused the death or injury was foreseeable; and
>
> (b) There is a preponderance of evidence that the owner or keeper did not exercise due care for the safety of the patron or other person on the premises.
>
> 2. An owner or keeper of any hotel . . . is civilly liable for the death or injury of a patron or other person on the premises caused by another person who is not an employee under the control or supervision of the owner or keeper if:
>
> (a) The wrongful act which caused the death or injury was foreseeable; and
>
> (b) The owner or keeper failed to take reasonable precautions against the foreseeable wrongful act.
>
> ***The court shall determine as a matter of law whether the wrongful act was foreseeable and whether the owner or keeper had a duty to take reasonable precautions against the foreseeable wrongful act of the person who caused the death or injury.***
>
> 3. For the purposes of this section, a wrongful act is not foreseeable unless:

> (a) The owner or keeper failed to exercise due care for the safety of the patron or other person on the premises; or
>
> (b) Prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.

NRS 651.015 (emphasis added).

The Nevada Supreme Court in *Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.* construed this statute as it applied to the Silver Nugget hotel/casino. 127 Nev. 855, 265 P.3d 688 (2011). The Court stated: "If an injury is unforeseeable, then the innkeeper owes no duty, and the district court has no occasion to consider the remaining elements of the plaintiff's cause of action, including breach, which is addressed in NRS 651.015(2)(b). The determination of foreseeability as it relates to an innkeeper's duty of care to a patron must be made by the district court as a matter of law. *See* NRS 651.015(2)." *Id.* at 859, 265 P.3d at 691. "After review of the legislative history, [the Court] conclude[d] that NRS 651.015(3) allows a judge to evaluate evidence of '[p]rior incidents of similar wrongful acts' or any other circumstances related to the exercise of 'due care' when imposing a duty under NRS 651.015(2)." *Id.* at 860, 265 P.3d at 691.

In this case, in order to impose a duty of care on the Cosmopolitan, Plaintiff must show that the wrongful act was foreseeable (NRS 651.015(2)(a)) ***and*** also show that the Cosmopolitan failed to take reasonable precautions to protect his safety. NRS 651.015(2)(b). Under NRS 651.015(3), the wrongful act is not foreseeable unless the Cosmopolitan failed to exercise due care for the Plaintiff, or prior incidents of similar wrongful acts had occurred and the Cosmopolitan had notice of these prior incidents.

A. THE COSMOPOLITAN EMPLOYED "BASIC MINIMUM PRECAUTIONS" TO ENSURE PATRON SAFETY.

The Cosmopolitan exercises due care to ensure the safety of its patrons. Courts in Nevada have construed "due care" to mean "the ***basic minimum precautions*** that are reasonably expected of an innkeeper." *Racine v. PHW Las Vegas, LLC*, 46 F. Supp. 3d

1028, 1033 (D. Nev. 2014) (emphasis added). The Nevada Supreme Court defines basic minimum precautions as "an innkeeper's ***outright failure to take reasonable precautions*** to protect its patrons . . . ." *Estate of Smith,* 127 Nev. at 860, 265 P.3d at 692 (emphasis added).

Here, it is apparent that the Cosmopolitan employed basic minimum precautions to ensure the safety of its patrons. There is no evidence to suggest that the Cosmopolitan knew or should have known that Marquee's security team would engage in the alleged conduct identified in Plaintiff's Complaint:

> 16. . . . ***Marquee security*** members threw David into a wall, head first, causing injuries to his head. After that, the ***Marquee security*** members and manager picked David up and dragged him into the pool area against his will. There, the ***Marquee security*** members and manager shoved David to the ground causing his head to forcefully hit the concrete surface. The ***Marquee security*** members and manager repeatedly hit and smashed David's head into the concrete and continually held his head and right eye against the concrete with a high degree of pressure. After this violent attack, and while still holding David's head against the concrete, the ***Marquee security*** staff and manager repeatedly stated, "are you going to cooperate and give your I.D. back?" Believing he could be killed, David agreed in order to end the violent attack.

SOF ¶ 1, at ¶ 16. Plaintiff retained purported security expert, David A. Nichter, to provide an opinion regarding what would satisfy "basic minimum precautions." SOF ¶ 20. While Mr. Nichter is highly critical of Marque and the conduct of Marquee's Security Officers, he does not identify any violation of "basic minimum precautions" by the Cosmopolitan. Thus, even Plaintiff's own experts agree that the Cosmopolitan did not breach a duty of care to the Plaintiff.

Finally, in accordance with the Nightclub Management Agreement, Marquee is contractually obligated to hire, retain and employ a team of security officers whenever the venue is occupied by guests. *See* SOF ¶ 15. Marquee is also contractually obligated to notify the Cosmopolitan of any incident that occurs on Marquee's property. *See* SOF ¶ 17. This is further evidence that the Cosmopolitan has not exercised an "outright failure

to take reasonable precautions to protect its patrons . . . ." *Estate of Smith,* 127 Nev. at 860, 265 P.3d at 692. Accordingly, under *Estate of Smith*, it is clear the Cosmopolitan provided the requisite minimum precautions.

B. THERE WERE NO OTHER PRIOR INCIDENTS OF SIMILAR WRONGFUL ACTS AT MARQUEE.

NRS 651.015(3)(b) provides that foreseeability may be determined by an owner's knowledge of prior similar wrongful acts. "Prior incidents" require a determination that a pattern of similar incidents exists, and that the established pattern was known to the innkeeper. *Estate of Smith*, 127 Nev. at 860, 265 P.3d at 693. To determine foreseeability for the purposes of establishing duty, the district court must consider evidence of prior similar acts in a similar location. *Id.* at 692.

In *Estate of Smith*, the Court held that multiple criminal incidents were not sufficiently similar to a shooting that occurred inside the casino to make the shooting foreseeable. *Id.* While various criminal incidents occurred on the premises, the Court distinguished the minor factual differences in these prior incidents and concluded that the subject shooting was unforeseeable. *Id.* By way of example, the Court noted that the incidents that occurred inside the casino did not involve a weapon and did not result in a fatality. *Id.* The Court further noted that while some of the incidents that occurred outside the casino may have involved firearms, none of the participants in these prior incidents were a casino patron. *Id.* The Nevada Supreme Court found these minor factual differences sufficient to render the shooting unforeseeable. In other words, because the prior incidents were not *sufficiently* similar to the place and manner of the shooting, the court concluded "that the fatal shooting was unforeseeable under NRS 651.015(3)(b)." *Id.*

There is no evidence of any prior instances of similar misconduct by Marquee's Security Officers. This is not even a close call. During discovery, Marquee produced six (6) prior incident reports. *See* SOF ¶ 19. These prior incident reports identify physical altercations between guests and physical assaults against members of Marquee's staff. *Id.* In each incident, the unruly guest was either detained or restrained (*depending on the*

level of danger posed by the unruly guest) and trespassed from the property. *Id.* None of these prior incidents came anywhere close to the level of violence alleged in Paragraph 16 of Plaintiff's Complaint. *See* SOF ¶ 1, at ¶ 16.

In sum, no prior incidents of similar wrongful acts have occurred at the Cosmopolitan prior to the subject incident involving the Plaintiff. "If an injury is unforeseeable, then the innkeeper owes no duty, and the district court has no occasion to consider the remaining elements of the plaintiff's cause of action, including breach, which is addressed in NRS 651.015(2)(b)." *Mahoney's Silver Nugget*, 265 P.3d at 691. Thus, the law does not impose a duty of care on the Cosmopolitan because there is no "prior incident[] of similar wrongful acts." *Id.*

III. PLAINTIFF'S NEGLIGENCE CLAIM ALSO FAILS BECAUSE THE COSMOPOLITAN CANNOT BE HELD LIABLE FOR PLAINTIFF'S INJURIES AS A MERE LANDLORD OF THE LEASED PREMISES.

Defendant Nevada Property 1, LLC (i.e. "Cosmopolitan") is the landlord of the nightclub space. Nevada law governing a landlord's liability for third-party acts and injuries on a leased premises was firmly established in the early twentieth century, and has not since been disturbed. Specifically, for the past 95 years, Nevada law on this issue has been clear:

> There is no doubt that in cases of injuries to third-parties from the use of leased premises it is **the general rule that *prima facie* the breach of duty, and therefore the liability, is that of the occupant and not of the landlord**, and that in order to render the latter liable, more must be shown than merely that the premises on which or from which the injury arose were by him leased to another.

Johnston v. Rosaschi, 44 Nev. 386, 194 P. 1063, 1065 (1921) (emphasis added). More succinctly, it is well-established Nevada law that "**[a] landlord is not liable for injury caused by the negligent actions of its tenant**." *FGA, Inc. v. Giglio*, 128 Nev. Adv. Op. 26, 278 P.3d 490, 501 (2012) (citing *Wright v. Schum*, 105 Nev. 611, 612-613, 781 P.2d 1142, 1142-43 (1989)) (emphasis added).

Nevada law has never deviated from this basic, but rational, principle: "a lessor of land is not subject to liability to his lessee or others upon the land with the consent of the

lessee or sublessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession." *Hughes v. Ethel M Chocolates, Inc.*, 2013 WL 1792172, at *3 (D. Nev. Apr. 25, 2013) (quoting RESTATEMENT (SECOND) OF TORTS § 355); *see also Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001) (holding that the duty to aid a party in peril is owed by the "party who is in control of the premises"). In *Hughes*, this Court's federal counterpart, interpreting Nevada law, made it clear that "Nevada follows this 'traditional common law rule."" *Id.* (citing *Wright*, 105 Nev. at 613, 781 P.2d at 1143; *Turpel v. Sayles*, 101 Nev. 35, 692 P.2d 1290 (1985)).

In this case, the Cosmopolitan's role is neither complicated nor disputed: they are the landlords for the nightclub space that is occupied and managed by Marquee. *See* SOF ¶ 11. As detailed above, the Cosmopolitan was not involved in the operations of the nightclub—day-to-day, administrative, strategic, or otherwise—at any point since the inception of Marquee. *Id.* at ¶ 13. Nor is the Cosmopolitan involved in the hiring, retention, training, or supervision of the nightclub's employees. *Id.* at ¶ 15. The Cosmopolitan does not collect any of the nightclub's revenues, other than those contributing to the tenant's monthly rent payments. In simpler terms and for all purposes related to this case, the lease agreement effectuated Marquee's assumption of complete and exclusive control of the leased premises.

Accordingly, under *Rosaschi*—a decision subsequently reinforced by the Nevada Supreme Court in *Wright*, *Harry*, *Giglio* and *Lee*—the Cosmopolitan is clearly, and fairly, insulated from liability for Plaintiff's injuries. Such liability, if any, is instead "that of the ***occupant*** and ***not*** of the landlord." *Rosaschi*, 44 Nev. 386, 194 P. at 1065 (emphasis added). Thus, even assuming, arguendo, that Plaintiff's injuries were indeed the result of the negligent acts of Marquee's Security Officers, the Cosmopolitan, as mere landlords, cannot be held liable for the same as a matter of law.

///

///

///

Relief Requested

For the foregoing reasons, Defendants respectfully request that this Court GRANT Defendant Nevada Property 1, LLC's Motion for Summary Judgment.

Dated this 1 day of November, 2016.

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

D. Lee Roberts, Jr., Esq.
David A. Dial, Esq.
Jeremy R. Alberts, Esq
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Josh Cole Aicklen, Esq.
David B. Avakian, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2016, a true and correct copy of the foregoing **DEFENDANT NEVADA PROPERTY 1, LLC'S MOTION FOR SUMMARY JUDGMENT** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

Ruth L. Cohen, Esq.
Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Road, Suite 200
Las Vegas, NV 89103

Rahul Ravipudi, Esq.
Matthew J. Stumpf, Esq.
Brian Poulter, Esq.
PANISH SHEA & BOYLE LLP
11111 Santa Monica Blvd., Ste. 700
Los Angeles, CA 90025

Attorneys for Plaintiff

Josh Cole Aicklen, Esq.
David B. Avakian, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118

Attorneys for Defendants,
ROOF DECK ENTERTAINMENT, LLC
dba Marquee Nightclub and
NEVADA PROPERTY 1, LLC, dba
The Cosmopolitan of Las Vegas

/s/ Esther Ibarra

An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

WEINBERG WHEELER HUDGINS GUNN & DIAL

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2016, a true and correct copy of the foregoing **DEFENDANT NEVADA PROPERTY 1, LLC'S MOTION FOR SUMMARY JUDGMENT** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

Ruth L. Cohen, Esq.
Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Road, Suite 200
Las Vegas, NV 89103

Rahul Ravipudi, Esq.
Matthew J. Stumpf, Esq.
Brian Poulter, Esq.
PANISH SHEA & BOYLE LLP
11111 Santa Monica Blvd., Ste. 700
Los Angeles, CA 90025

Attorneys for Plaintiff

Josh Cole Aicklen, Esq.
David B. Avakian, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118

Attorneys for Defendants,
ROOF DECK ENTERTAINMENT, LLC
dba Marquee Nightclub and
NEVADA PROPERTY 1, LLC, dba
The Cosmopolitan of Las Vegas

/s/ Esther Ibarra

An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

WEINBERG WHEELER HUDGINS GUNN & DIAL

EXHIBIT 3

EXHIBIT 3

SLWD
D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
David A. Dial, Esq.
ddial@wwhgd.com
Admitted Pro Hac Vice
Jeremy R. Alberts, Esq.
Nevada Bar No. 10497
jalberts@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Attorneys for Defendants

[Additional Counsel Listed on Signature Page]

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, an individual, Plaintiff, vs. NEVADA PROPERTY 1, LLC, d/b/a "The Cosmopolitan of Las Vegas", ROOF DECK ENTERTAINMENT, LLC d/b/a "Marquee Nightclub", and DOES 1 through X, inclusive; through X, inclusive [sic], Defendants.	Case No.: A698824 Dept. No.: XX **DEFENDANTS' TWENTY-NINTH SUPPLEMENT TO LIST OF WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1**

Defendants, NEVADA PROPERTY 1, LLC, d/b/a "The Cosmopolitan of Las Vegas" and ROOF DECK ENTERTAINMENT, LLC d/b/a "Marquee Nightclub," by and through their counsel of record, and submit this Supplemental List of Witnesses And Documents pursuant to NRCP 16.1.

NEW DISCLOSURES OF WITNESSES AND DOCUMENTS ARE SHOWN IN BOLD

LIST OF WITNESSES

1. David Moradi, Plaintiff
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Mr. Moradi is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

2. Shanna Crane-Lichwa
Former Marquee Waitress
Address Currently Unknown

Ms. Crane is expected to testify regarding her knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

3. Ramon Mata
Marquee General Manager
c/o Jeremy R. Alberts, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

Mr. Mata is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

4. Daniel Melendez
Marquee Front Door Security Manager
c/o Jeremy R. Alberts, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

///

///

Mr. Melendez is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

5. David Long
Former Marquee Supervisor/Security Director
Address Currently Unknown

Mr. Long is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident.

6. Person Most Knowledgeable
Medic West Ambulance/EMT
9 West Delhi Avenue
North Las Vegas, NV 89032

The Person Most Knowledgeable is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident.

7. Tony Marcum
Independent Host
Contact information currently unknown

Mr. Marcum is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

~~8. Ricardo Wade~~
~~Former Marquee Assistant Security Manager~~
~~4515 S. Durango Dr., Apt 2153~~
~~Las Vegas, NV 89147~~

~~Mr. Wade is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident.~~ Pursuant to the agreement of the parties, Defendants are de-designating Ricardo Wade as a witness in this matter. The parties agree that Mr. Wade will not be produced as a witness at trial.

~~9. Glenn R. Hayes~~
~~Former Employee - Security Officer~~
~~Contact information currently unknown~~

~~Mr. Hayes is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident.~~ Pursuant to the agreement of the parties, Defendants are de-

designating Glenn R. Hayes as a witness in this matter. The parties agree that Mr. Hayes will not be produced as a witness at trial.

10. Rick Dang
Cosmopolitan Security Agent (Report writer)
c/o Jeremy R. Alberts, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

Mr. Dang is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

11. PMK/Treating Physician
The Spine & Brain Institute
8530 W. Sunset Road
Las Vegas, NV 89113

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident.

12. PMK/Treating Physician
Centennial Medical Imaging
7610 W. Cheyenne, Ste. 100
Las Vegas, NV 89129

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident.

13. PMK/Treating Physician
Radar Medical Group
2628 W. Charleston Blvd.
Las Vegas, NV 89102

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident.

14. PMK/Treating Physician
Desert Springs Hospital Medical Center
2075 E. Flamingo Rd.
Las Vegas, Nevada 89119

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident.

15. PMK/Treating Physician
David Silverman, M.D., P.C.
239 Central Park West, Apt. 1AN
New York, NY 10024-6038

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident. Further, this witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

16. PMK/Treating Physician
Dr. James Loong, Ph.D./Las Vegas Neurology
7345 South Durango Dr., Ste. B107-307
Las Vegas, Nevada 89113

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident.

17. PMK/Treating Physician
Artis Forensic Neuropsychology
P.O. Box 729
Midway, UT 84049

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident.

18. PMK/Treating Physician
In House Doctor
P.O. Box 15570
Las Vegas, NV 89114

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident.

///

///

///

19. Brendan McHugh
c/o Paul T. Weinstein, Esq.
Emmet, Marvin & Martin, LLP
120 Broadway 32nd Floor
New York City, NY 10271

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities. Further this witness is expected to testify consistent with any future deposition testimony given in relation to this matter.

20. Joseph Krigsfeld
Former Senior Analyst of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

21. Tom Lin
Former Analyst of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

22. Ian Gallagher
Former Trader of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

23. Jin-Woo Chung
Former Analyst of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

24. Gerard Goetz
Former Analyst of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

///

25. Allen Chachkes
Former Analyst of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

26. Steve Langelotti
Former Trader of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

27. Roman Roik
Former Senior Analyst of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

28. Martin Shkreli
Former CEO of KaloBios Pharmaceuticals
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of KaloBios Pharmaceuticals, including but not limited to the appointment of David Moradi to the Board of Directors for KaloBios Pharmaceuticals.

29. Tony Chase
Former Board of Director of KaloBios Pharmaceuticals
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of KaloBios Pharmaceuticals.

30. Marek Biestek
Former Board of Director of KaloBios Pharmaceuticals
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of KaloBios Pharmaceuticals.

31. Tom Fernandez
Former Board of Director of KaloBios Pharmaceuticals
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of KaloBios Pharmaceuticals.

32. Michael Harrison
Former Board of Director of KaloBios Pharmaceuticals
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of KaloBios Pharmaceuticals.

33. Dr. Cameron Durrant
Chairman of the Board of KaloBios Pharmaceuticals
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of KaloBios Pharmaceuticals.

34. Ronald Barliant
Board of Directors of KaloBios Pharmaceuticals
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of KaloBios Pharmaceuticals.

35. PMK/Treating Physician
Anne Elizabeth Hirky, PhD
740 West End Avenue, Ste. 101
New York City, NY 80025

The PMK/Treating Physician is expected to testify regarding her knowledge of the facts and circumstances surrounding the subject incident. Further, this witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

36. PMK/Treating Physician
Jeffery Rubin, MD
4 E 89th St., 1C
New York City, NY 80128

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident. Further, this witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the

completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

37. PMK/Treating Physician
Samuel Whitaker, MD
Address unknown

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident.

38. PMK/Treating Physician
Barry Cohen, MD
73 Spring Street, Ste. 204
New York City, NY 10012

The PMK/Treating Physician is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident. Further, this witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

39. Michael Goldberg
Former Trader for Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

40. Laura Sheehy
Former Employee of Anthion Management, LLC
Address Unknown

This witness will testify regarding his knowledge regarding the management and operations of Anthion Management, LLC and any related entities.

41. Person Most Knowledgeable / Custodian of Records
Las Vegas Metropolitan Police Department
400 S. Martin L. King Blvd.,
Las Vegas, NV 89106

This witness is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident and the authenticity of the documents provided in response to subpoena duces tecum.

42. Officer Marcia Coon, Badge 8958
c/o Las Vegas Metropolitan Police Department
400 S. Martin L. King Blvd.,
Las Vegas, NV 89106

This witness is expected to testify regarding his/her knowledge of the facts and circumstances surrounding the subject incident and the authenticity of the documents provided in response to subpoena duces tecum.

43. Person Most Knowledgeable / Custodian of Records
Barry Chaiken, MD
625 Park Ave.
New York City, NY 10065

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business.

44. Person Most Knowledgeable / Custodian of Records
Martin O'Malley, MD / Foot and Ankle Orthopaedic Surgery
420 East 72nd Ave
New York City, NY 10021

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business.

45. Person Most Knowledgeable / Custodian of Records
Maurice Khosh, MD
580 Park Ave., Ste 1be
New York City, NY 10065

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. Further, this witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

///

46. Person Most Knowledgeable / Custodian of Records
US Department of Transportation, Federal Aviation Administration
PO Box 25082
Oklahoma City, OK 73125

This witness is expected to testify regarding the completeness and accuracy of the information provided in response to a request for information pertaining to prior accident, incidents or enforcement actions.

47. Solomon Kibriye
Barclays
745 Seventh Ave.
New York City, NY 10019

This witness is expected to testify regarding the response to Subpoena Duces Tecum dated August 18, 2016.

48. Cecilia Perez – Goldman Sachs Legal Department
200 West Street
New York City, NY 10282

This witness is expected to testify regarding the response to Subpoena Duces Tecum dated August 18, 2016, and the authenticity of the materials provided.

49. Edward S. Feig, Associate General Counsel for KPMG
560 Lexington Ave.
New York City, NY 10022

This witness is expected to testify regarding the response to Subpoena Duces Tecum dated August 30, 2016, and the authenticity of the materials provided.

50. Person Most Knowledgeable / Custodian of Records
Medic West
2215 Renaissance Dr., Ste. B
Las Vegas, NV

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business.

51. Dimitri Mitropoulos
c/o Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

This witness is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident.

52. Amit Malik
360 E. Desert Inn Rd., #1006
Las Vegas, NV 89109

This witness is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident and Plaintiff's prior history at nightclubs and dayclubs in Las Vegas.

53. Aryeh Davis
Pequot Capital Management, Inc.
COO & General Counsel
77 Bedford Road
Katonah, NY 10536

This witness is expected to testify regarding the response to Subpoena Duces Tecum, and the authenticity of the materials provided.

54. Keith Lewis, MD
2559 Wigwam Pkwy.
Henderson, NV 89074

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

55. Terrence Scipione, MD
c/o Christina M. Alexander
Hutchison & Steffen
10080 West Alta Drive, Ste. 200
Las Vegas, NV 89145

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

56. Derek Duke, MD
Spine & Brain Institute
861 Coronado Center Dr., #200
Henderson, NV 89052

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any deposition testimony.

57. Russell Shah, MD
2628 W. Charleston Blvd.
Las Vegas, NV 89102

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any deposition testimony.

58. Paul Janda, DO
2010 Goldring Ave.
Las Vegas, NV 89106

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any deposition testimony.

59. Alina Fong, MD
1034 N. 500 W.
Provo, UT 84604

This witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

60. Robert Gardner, CPP
590 w. Main St., Ste. 101
Santa Paula, CA 93060

Mr. Gardner is an expert in the field of security, and will provide expert testimony in relation to his specialty and in rebuttal to any experts designated by or expert opinions offered by other parties involved in this matter. Further, he will testify consistent with any deposition testimony given in relation to this case.

61. Michael Hutchison, MD PhD
345 East 37th St., Ste. 320
New York City, NY 10016

Dr. Hutchison is an expert in the field of Neurology, and will provide expert testimony in relation to his specialty and in rebuttal to any experts designated by or expert opinions offered by other parties involved in this matter. Further, he will testify consistent with any deposition testimony given in relation to this case.

62. Mark Mills, MD
6635 Hillandale Rd.
Chevy Chase, Maryland 20815

Dr. Mills is an expert in the field of forensic medicine, and will provide expert testimony in relation to his specialty and in rebuttal to any experts designated by or expert opinions offered by other parties involved in this matter. Further, he will testify consistent with any deposition testimony given in relation to this case.

63. Jay Rogers
17310 Red Hill Ave., Ste. 135
Irvine, CA 92614

Mr. Rodgers is an expert in the field of financial services, investments and research analysis, and will provide expert testimony in relation to his specialty and in rebuttal to any experts designated by or expert opinions offered by other parties involved in this matter. Further, he will testify consistent with any deposition testimony given in relation to this case.

64. Stephen Rothman, MD
9233 W. Pico Blvd., Ste. 210
Los Angeles, CA 90035

Dr. Rothman is an expert in the field of radiology, and will provide expert testimony in relation to his specialty and in rebuttal to any experts designated by or expert opinions offered by other parties involved in this matter. Further, he will testify consistent with any deposition testimony given in relation to this case.

65. Stephen Sands, PsyD
161 Fort Washington Ave (IP-717)
New York, NY 10032

Dr. Sands is an expert in the field of Neuro Psychology, and will provide expert testimony in relation to his specialty and in rebuttal to any experts designated by or expert

opinions offered by other parties involved in this matter. Further, he will testify consistent with any deposition testimony given in relation to this case.

66. Heather Xitco
Dolan Xitco
501 W. Broadway, Suite 710
San Diego, CA 92101

Ms. Xitco is an expert in the economics, and will provide expert testimony in relation to her specialty and in rebuttal to any experts designated by or expert opinions offered by other parties involved in this matter. Further, she will testify consistent with any deposition testimony given in relation to this case.

67. Gail Cacciatore
Cosmopolitan Surveillance
c/o Jeremy R. Alberts, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

Ms. Cacciatore is expected to testify regarding her knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

68. Ruth Cohen, Esq.
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Ms. Cohen is expected to testify regarding her knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

69. Susan Grieson
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Ms. Grieson is expected to testify regarding her knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

70. Christopher Moradi
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Mr. Moradi is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

71. Daniel Moradi
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Mr. Moradi is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

72. Steven Cochran
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Mr. Cochran is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

73. Melissa Cochran
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Ms. Cochran is expected to testify regarding her knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

74. Dr. William Orrison
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Dr. Orrison is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

75. Dr. Raymond Yung
Address Currently Unknown

Dr. Young is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further, this witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

76. Dr. Davis Nguyen
Address Currently Unknown

Dr. Nguyen is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further, this witness is expected to testify regarding the medical care, treatment and cost of treatment of Plaintiff as well as the completeness and accuracy of the medical records and bills generated in the normal course of business. This witness is also expected to testify consistent with any future deposition testimony.

77. Marcus Williams
c/o Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Rd., Ste. 220
Las Vegas, NV 89103
(702) 366-1888

Mr. Williams is expected to testify regarding his knowledge of the facts and circumstances surrounding the subject incident. Further this witness is expected to testify consistent with any deposition testimony given in relation to this matter.

78. Custodian of Records for Louis Vuitton USA Inc.
c/o Resident Agent CSC Services of Nevada, Inc.
2215-B Renaissance Dr.
Las Vegas, NV 89119

This witness may testify as to the actions of Plaintiff following the incident the is the subject of this litigation.

79. Custodian of Records for Louis Vuitton North America, Inc..
c/o Resident Agent CSC Services of Nevada, Inc.
2215-B Renaissance Dr.
Las Vegas, NV 89119

This witness may testify as to the actions of Plaintiff following the incident the is the subject of this litigation.

The following witnesses may testify as to investment in the Anthion Fund:

80. Person Most Qualified
Ogier Fiduciary Services (Cayman) Limited
89 Nexus Way
Camana Bay
Grand Cayman, KY1 9007
Cayman Islands

81. Person Most Qualified
Protégé Partners
25 W 53rd St, New York, NY 10019

82. Person Most Qualified
Fisher Enterprise Capital Management
New York, NY 10017
Business Phone: 2127594400

83. Person Most Qualified
UBS Global Asset Management Americas
1285 Avenue of the Americas
New York, NY 10019-6028
Phone 1-212-882-5000

84. Person Most Qualified
Lakeview Multi-Strategy Fund, L.P.
2711 Centerville Road Suite 400,
Wilmington, DE 19808.

85. Person Most Qualified
Kenneth Rainin Foundation
155 Grand Avenue,
Oakland, CA 94612

86. Jess Cockrum
[address unknown]

87. Gerard W. Goetz - LP
[address unknown]

88. Roman S Roik - LP
[address unknown]

89. Jerome L Simon
[address unknown]

90. Hilary Bates
[address unknown]

91. Charles S. Leykum
[address unknown]

Defendants reserve the right to supplement this witness list as discovery continues, and hereby incorporates the witness list submitted by any other party to this matter solely for the purpose of identifying individuals likely to have discoverable information. The inclusion of a witness herein is not a concession that the witness will be called at trial, or that the witness has relevant information. The witnesses disclosed herein are listed solely for the purpose of identifying individuals which may potentially have discoverable information.

LIST OF DOCUMENTS

1. Check Report for Marquee Las Vegas, Bates Stamp No. MORA 00001.
2. Marquee Security Guidelines, Bates Stamp Nos. MORA 00002 – 00007.
3. Marquee Incident Policies and Procedures, Bates Stamp Nos. MORA 00008 – 00010.
4. Marquee Security Reference Sheets, Bates Stamp Nos. MORA 00011 – 00021.
5. Marquee Security Incident Report, Bates Stamp Nos. MORA 00022 – 00026.
6. Cosmopolitan Incident Report with Preservation letter attached (photos in color), Bates Stamp Nos. MORA 00027 – 00030, 5369-5375.
7. Plaintiff's Written Statement, Bates Stamp Nos. MORA 00043 – 46.

8. Surveillance Video, Bates Stamp No. MORA 00047.

9. The Spine & Brain Institute Medical Records, Bates Stamp Nos. MORA 00166 – 00184.

10. Centennial Medical Imaging Medical Records, Bates Stamp Nos. MORA 00185 – 00276.

11. Radar Medical Group, Bates Stamp Nos. MORA 00277 – 00527.

12. Desert Springs Hospital Medical Center Medical Records, Bates Stamp Nos. MORA 00528 – MORA 00563.

13. David Silverman, M.D., Medical Records and Billing, Bates Stamp Nos. MORA 00564 – 00615.

14. Dr. James Loong, Ph.D./Las Vegas Neurology, Bates Stamp Nos. MORA 00616 – 00718.

15. Artis Forensic Neuropsychology Medical and Billing Records, Bates Stamp Nos. MORA 00719 – 00731.

16. In House Doctor Medical Records, Bates Stamp Nos. MORA 00732 – 00733.

17. DVD containing diagnostic images from Centennial Medical Imaging, Bates Stamp No. MORA 00734.

18. Jeffrey Rubin, M.D., P.C. Medical and Billing Records, Bates Stamp Nos. MORA 00780 – MORA 00795.

19. Table Section Checklist, Bates Stamp Nos. MORA 000796 – 00797.

20. Dayclub Rover Check List, Bates Stamp Nos. MORA 00798 - 00799.

21. Nightclub New Hire Security Checklist, Bates Stamp Nos. MORA 00800 – 00801.

22. Front Door Checklist, Bates Stamp Nos. MORA 00802 – 00803.

23. MARQUEE Las Vegas Security New Hire Quiz, Bates Stamp Nos. MORA 00804 – 00805.

24. Property Map dated April 7, 2012, Bates Stamp Nos. MORA 00806 – 00809.

25. Property Map, Bates Stamp Nos. MORA 00810 – 00814.

26. Camera List Properties, Bates Stamp Nos. MORA 00815 – 00821.

27. Surveillance 101, Bates Stamp Nos. MORA 00822 – 00841.

28. MARQUEE Las Vegas Security Schedule, Bates Stamp Nos. MORA 00842 – 00848.

29. MARQUEE Nightclub & Dayclub Security Management Schedule, Bates Stamp

Nos. MORA 00849.

30. Email to Todd Abdalla from David Long dated April 8, 2012 RE Marquee Manager Log 4.7.12**Dennis Fears**, Bates Stamp Nos. MORA 00850 – 00855.

31. MARQUEE employee file regarding Glen R. Hayes, Jr., Bates Stamp Nos. MORA 00856 - 00946.

32. TAO employee file regarding David Long, Bates Stamp Nos. MORA 00947 – 01059.

33. MARQUEE employee file regarding Ramon A. Mata, Bates Stamp Nos. MORA 01060 – 01146.

34. MARQUEE employee file regarding Daniel S. Melendez, Bates Stamp Nos. MORA 01147 – 01242.

35. TAO employee file regarding Ricardo L. Wade, Bates Stamp Nos. MORA 01243 – 01341.

36. MARQUEE Las Vegas Security Incident Report, Bates Stamp Nos. MORA 01342 – 01349.

37. Notice of Injury or Occupational Disease for Ramon Mata, employee of Roof Deck Entertainment d/b/a Marquee, Bates Stamp No. MORA 01350.

38. DVD containing surveillance of table signing, Bates Stamp No. MORA 01351.

39. TAO Nightly Surveillance Report dated 4/7/12-4/8/12, Bates Stamp No. MORA 01352 (Redacted).

40. Camera Maps dated April 9, 2010, Bates Stamp No. MORA 01353-01358.

41. TimePro Punches dated 4/7/2012-4/8/12, Bates Stamp No. MORA 01359-01389.

42. MARQUEE Maps dated April 7, 2012, Bates Stamp No. MORA 01390-01393.

43. Morgan Stanley Records, Bates Stamp No. MORA 1449 – 4473; MS 1-6051.

44. Morgan Stanley Fund Services Custodian of Records Affidavit, Bates Stamp No. MORA 4474 – 4475.

45. Morgan Stanley Co., LLC Custodian of Records Affidavit, Bates Stamp No. MORA 4476 – 4477.

46. David Moradi's 2010, 2011, 2012 and 2013 IRS Income Tax Returns, Bates Stamp No. MORA 4478 – 5111.

47. Debtors Motion for Entry of an Order Approving One –Time Equity Award for Its Board Members and Chief Executive Officer, MORA 5112-5138.

48. Exhibit 4 to Debtors Motion for Entry of an Order Approving One –Time Equity Award for Its Board Members and Chief Executive Officer, MORA 5139-5157

49. Surveillance Video (Table 53 Signings; 4/8/2012); Disk: MORA 5158.

50. Surveillance Video (Table Signings: 4/7/2012-4/8/2012); Disk: MORA 5159.

51. Surveillance Video (Moradi Prior Reservations); Disk: MORA 5160.

52. Marquee Las Vegas Credit Card Financial Steps, MORA 5161 – 5166.

53. Receipts 04/22/2011 – 04/23/2011, MORA 5167 – 5169.

54. Receipts 05/27/2011 – 05/28/2011, MORA 5170 – 5172.

55. Receipts 04/08/2012, MORA 5173 – 5177.

56. Receipts 01/28/2012, MORA5178 – 5182.

57. "Native" Excel sheets received from Morgan Stanley as part of Subpoena Response:

    a. MS-0006045.xls

    b. MS-0006046.xls

    c. MS-0006047.xls

    d. MS-0006048.xls

    e. MS-0006049.xls

    f. MS-0006050.xls

    g. MS-0006051.xls

58. Documents received from Las Vegas Metropolitan Police Department in response to Subpoena Duces Tecum, LVMPD 1-22

59. Medical records received from Barry Chaiken, MD in response to subpoena duces tecum, CHAIKEN 1-4.

60. Medical records received from Martin O'Malley, MD / Foot and Ankle Orthpaedic Surgery in response to Subpoena Duces Tecum, OMALLEY 1-18.

61. Medical records received from Maurice Khosh, MD in response to Subpoena Duces Tecum, KHOSH 1-33.

62. Documents received from US Department of Transportation, Federal Aviation Administration in response to request for information pertaining to accidents, incidents, or enforcement actions, FAA 1-2; medical certificate received from Federal Aviation Administration in response to request, FAA 3-8.

63. Letter dated August 18, 2016 fro Barclays regarding no responsive documents, BARCLAYS 1.

64. Letters dated August 18, 2016 and responsive documents from Goldman Sachs to Subpoena Duces Tecum, GS 1-387.

65. David Moradi Voluntary Statement to Cosmopolitan of Las Vegas dated

04/08/2012, MORA 5183-5184.

66. Documents received in response to Subpoena Duces Tecum to KPMG, KPMG 1-13.

67. Declaration of no medical records received from Medic West in response to Subpoena Duces Tecum, MW 1-8.

68. Medical records received from Barry Cohen, MD in response to subpoena duces tecum, COHEN 1-8.

69. Records received in response to Subpoena Duces Tecum to Pequot Capital Management, PCM 1-39.

70. Records received in Response to Subpoena Duces Tecum to Anne Hirky, PhD, HIRKY 1-47.

71. Nightclub Management Agreement between Nevada Restaurante Venture 1, LLC and Roof Deck Entertainment (*This document will not be produced until the Stipulation and Order regarding Confidentiality is entered*). MORA 5185 – 5334

72. *Allstate Insurance Co. v. Shah et al.*, Case 2:15-cv-01786-APG-CWH: Complaint for Damages and Demand for Jury Trial, 09/17/2015, SHAH 1-41.

73. *Allstate Insurance Co. v. Shah et al.*, Case 2:15-cv-01786-APG-CWH: Defendants Russell J. Shah, MD Dipti R. Shah, MD, Russell J. Shah, MD, LTD, Dipti R. Shah, MD, LTD and Radar Medical Group, LLP dba University Urgent Care's Motion to Dismiss, 10/09/2015, SHAH 42-69.

74. *Allstate Insurance Co. v. Shah et al.*, Case 2:15-cv-01786-APG-CWH: Plaintiff's Opposition to Defendants' Motion to Dismiss, 10/26/2015, SHAH 70-104.

75. *Allstate Insurance Co. v. Shah et al.*, Case 2:15-cv-01786-APG-CWH: Notice of Errata re Plaintiff's Opposition to Defendants' Motion to Dismiss, 11/09/2015, SHAH 105-106.

76. *Allstate Insurance Co. v. Shah et al.*, Case 2:15-cv-01786-APG-CWH: Order 11/09/2015, SHAH 107-108.

77. Article: *Guidelines for Ethical Use of Neuroimages in Medical Testimony: Report of Multidisciplinary Consens Conference*, 08/29/2013, ARTICLE 1-6.

78. Table 53 Cash Purchase, MORA 5335.

79. Anthion Management, LLC 13F statements from www.sec.gov, 12/2010 to 03/2013, MORA 5336 – 5366.

80. Expert Reports of Robert Gardner previously disclosed via Disclosure of Expert Witnesses (08/18/16) and Rebuttal Expert Witness Disclosure (09/19/16).

81. Curriculum Vitae, List of Testimony and Fee Scheduled of Robert Gardner previously disclosed via Disclosure of Expert Witnesses (08/18/16).

82. Expert Reports of Michael Hutchison, MD PhD previously disclosed via Disclosure of Expert Witnesses (08/18/16) and Rebuttal Expert Witness

Disclosure (09/19/16).

83. Curriculum Vitae, List of Testimony and Fee Scheduled of Michael Hutchison, MD PhD previously disclosed via Disclosure of Expert Witnesses (08/18/16).

84. Expert Reports of Mark Mills, MD previously disclosed via Disclosure of Expert Witnesses (08/18/16).

85. Curriculum Vitae, List of Testimony and Fee Scheduled of Mark Mills, MD previously disclosed via Disclosure of Expert Witnesses (08/18/16).

86. Expert Reports of Jay Rogers previously disclosed via Disclosure of Expert Witnesses (08/18/16) and Rebuttal Expert Witness Disclosure (09/19/16).

87. Curriculum Vitae, List of Testimony and Fee Scheduled of Jay Rogers previously disclosed via Disclosure of Expert Witnesses (08/18/16).

88. Expert Reports of Steven Rothman, MD previously disclosed via Disclosure of Expert Witnesses (08/18/16).

89. Curriculum Vitae, List of Testimony and Fee Scheduled of Steven Rothman, MD previously disclosed via Disclosure of Expert Witnesses (08/18/16).

90. Expert Reports of Stephen Sands, PsyD previously disclosed via Disclosure of Expert Witnesses (08/18/16) and Rebuttal Expert Witness Disclosure (09/19/16).

91. Curriculum Vitae, List of Testimony and Fee Scheduled of Stephen Sands, PsyD previously disclosed via Disclosure of Expert Witnesses (08/18/16).

92. Expert Report of Heather Xitco previously disclosed via Rebuttal Expert Witness Disclosure (09/19/16).

93. Curriculum Vitae, List of Testimony and Fee Scheduled of Heather Xitco previously disclosed via Rebuttal Expert Witness Disclosure (09/19/16).

94. All deposition exhibits to be marked at future depositions.

95. Plaintiff Responses to Written Discovery.

96. All deposition exhibits not previously disclosed via NRCP 16.1:

DEPO EX – 01 - DANG, Rick - Notice of Deposition	DEPO 1-9
DEPO EX A - Lichwa - Notice of Deposition	DEPO 10-11
DEPO EX 01 - Melendez - Marquee Nightclub Floor Plan	DEPO 12
DEPO EX 08 - Mata - Photograph	DEPO 13
DEPO EX 07 - Mata - Photograph	DEPO 14
DEPO EX 06 - Mata - Photograph	DEPO 15

DEPO EX 05 - Mata - Photograph	DEPO 16
DEPO EX 04 - Mata - Photograph	DEPO 17
DEPO EX 02 - Mata - Marquee Nightclub Floor Plan	DEPO 18
DEPO EX 01 - Mata - Notice of Deposition	DEPO 37-38
DEPO EX 18 - Abdalla Vol 2 - TimePro Printout dated 4-7-12	DEPO 27
DEPO EX 15 - Abdalla Vol 2 - Marquee Nightclub Floor Plan	DEPO 28
DEPO EX 14 - Abdalla Vol 2 - Notice of Deposition	DEPO 29-36
DEPO EX 01 - Abdalla Vol 1 - Notice of PMK for Roof Deck	DEPO 19-26

97. All documents produced by Plaintiff counsel via NRCP 16.1, letter or Response to Request for Production:

Initial	Desert Springs Hospital records	MORADI 1-14
Initial	Flamingo Emer. Physi. Bills	MORADI 15
Initial	Radar Medical Group records	MORADI 16-28
Initial	Centennial Medical Imaging records/bills	MORADI 29-117
Initial	The Spine & Brain Institute records	MORADI 118-121
Initial	Artis Forensics Neuropsychology records	MORADI 122-124
Initial	Las Vegas Neurology records	MORADI125-134
RSPN to RFP	Records - medical	MORADI 1-115
RSPN to RFP	Medical records	MORADI 116-205
RSPN to RFP	Photographs	MORADI 8, 109-115
RSPN to RFP	Proof of Loss of Earnings --> tax returns from 2010-2013	MORADI 207-655
RSPN to RFP	Documents showing Anthion Mgmt Lost Revenue after Apr 2012	MORADI 658-777
RSPN to RFP	Plaintiff Driver's License	MORADI 656-657
RSPN to RFP	Credit Card Statement for American Express Centurian	MORADI 778-789

RSPN to RFP	Form D related to marketing materials used in solicitation of investors	MORADI 790-794
LTR	Moradi person tax return for 2013	bates 1-194
LTR	American Express statement showing charges for 4/8/2012 unredacted	bates 195-206
2nd Supp	Anthion Master Fund Audit Documents from Rothstein Kass	MORADI 797-825
2nd Supp	Anthion Master Fund Documents from Morgan Stanley Fund Services	MORADI 826-897
2nd Supp	Anthion Monthly Net Performance	MORADI 898-899

2nd Supp	Photographs	MORADI 900-942
2nd Supp	fMRI Statistical Report	MORADI 943-946
2nd Supp	Stratum Investor Reports	MORADI 947-960
2nd Supp	Cochran Documents	MORADI 961-1006
ROC - ltr	Moradi color photos	MORADI 900-942
ROC - ltr	Longwood MRI 6/13/14; Centennial MRI 12/13 & 2/14	DISK
3rd Supp	David Moradi's UCLA transcript	MORADI 1007
4th Supp	09/19/16 Ltr from Orrison to Janda	MORADI 1008
5th Supp	Photos of Cameras at Marquee Nightclub taken by David Nichter	MORADI 1009-1021
5th Supp	Surveillance at Marquee Nightclub for Case A687601 - Cochran v. NV Property 1	MORADI 1022

98. Letter and Flashdrive (index of all flashdrive materials attached) received from B. McHugh, MORA 5367-5368.

99. Materials received from counsel for B. McHugh following entry of protective order, BM 1-3133.

100. Article, Avoiding Dual Agency in Clinical and Medicolegal Practice (*Journal of Psychiatric Practice*) September 2015

101. Article, Mild Traumatic Brain Injury: Longitudinal Study of Cognition, Functional Status, and Post-Traumatic Symptoms (*Journal of Neurotrauma*)
102. Article, Outcome from Complicated versus Uncomplicated Mild Traumatic Brain Injury
103. Article, Mild Head Injury Classification.

Defendant reserves the right to supplement this list of documents as discovery continues, and hereby incorporates the documents identified by any other party to this matter solely for the purpose of identifying documents potentially relevant to this action. The inclusion of a document herein is not a concession that the document is admissible, relevant, or authentic. The documents disclosed herein are listed solely for the purpose of identifying documents potentially relevant to this action.

INSURANCE INFORMATION AS REQUIRED BY NRCP 16.1

The Restaurant Group et al has a policy of insurance issued by Aspen Specialty Insurance Company, 888 7th Avenue, 34th Floor, New York, New York 10106, attached hereto as Bates Stamped Nos. MORA 00048 – 00165, Policy CRA8XYD11 (the "Roof Deck Primary Policy"). This primary policy covers Roof Deck Entertainment, LLC and also covers Nevada Property 1, LLC as an additional insured.

The Restaurant Group et al has a policy of insurance issued by issued by National Union Fire Insurance Company of Pittsburgh, Pa. ~~CHARTIS~~, 175 Water Street, New York, NY 10038, attached hereto as Bates Stamped Nos. MORA 01394 – 01448, Policy BE 25414413 (the "Roof Deck Excess Policy"). This Commercial Umbrella Liability Policy provides excess coverage to Roof Deck Entertainment, LLC and also covers Nevada Property 1, LLC as an additional insured.

Policy PRA 9829242-01, attached hereto as Bates Stamped Nos. MORA 5369-5528, was issued by Zurich American Insurance Company to Nevada Property 1, LLC. (the "NP1 Primary Policy"). This primary policy covers Nevada Property 1, LLC as a named insured.

Nevada Property 1, LLC obtained umbrella/excess coverage in the relevant time period through a Risk Purchasing Group (RPG) in the total amount of $300 million in excess coverage (the "NP1 Excess Tower"). An Excel Spreadsheet evidencing each excess carrier, their

participation (limits), and policy numbers is attached hereto as Bates Stamped Nos. MORA 5529 . The RPG did not issue separate policies for each participating carrier in the excess placement, but all excess coverage is follow form to the "NP1 Primary Policy".

National Specialty Underwriters, Inc., issued Certificate No. 2149 to Nevada Property 1, LLC, attached hereto as Bates Stamped Nos. MORA 5530-5533, evidencing coverage under Policy QK06503290, the first $25,000,000 layer in the "NP1 Excess Tower." Certificate No. 2149 and the Excel Spreadsheet is all that Nevada Property 1, LLC has received from the RPG evidencing coverage under the "NP1 Excess Tower," and no other information regarding the excess policies is in our possession.

On August 5, 2014, Nevada Property 1, LLC, received a Reservation of Rights under the "Roof Deck Primary Policy", attached hereto as Bates Stamped Nos. MORA 5534-5540. The "Roof Deck Primary Policy" issued a substantially similar Reservation of Rights to Roof Deck Entertainment, LLC at the same time. A copy of that Reservation of Rights is attached hereto as Bates Stamped Nos. MORA 5541-5546.

Neither Nevada Property 1, LLC or Roof Deck Entertainment, LLC has received written notice of Reservation of Rights from the "Roof Deck Excess Policy," but the carrier has orally informed counsel for the Defendants that the exclusions in the "Roof Deck Excess Policy" are substantially the same as in the "Roof Deck Primary Policy" and that a similar of Reservation of Rights will be issued.

///

///

///

///

///

///

///

///

As of the date of this disclosure, Nevada Property 1, LLC has not received a Reservation of Rights or a confirmation of coverage from the "NP1 Primary Policy," or any insurer in the "NP1 Excess Tower."

Dated this 17th day of February, 2017.

/s/ *D. Lee Roberts, Jr., Esq.*
D. Lee Roberts, Jr., Esq.
David A. Dial, Esq.
Jeremy R. Alberts, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Josh Cole Aicklen, Esq.
David B. Avakian, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2017, a true and correct copy of the foregoing **DEFENDANTS' TWENTY-NITHTH SUPPLEMENT TO LIST OF WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

Ruth L. Cohen, Esq.
Paul S. Padda, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Road, Suite 200
Las Vegas, NV 89103

Rahul Ravipudi, Esq.
Matthew J. Stumpf, Esq.
Brian Poulter, Esq.
Panish Shea & Boyle LLP
11111 Santa Monica Blvd., Ste. 700
Los Angeles, CA 90025

Attorneys for Plaintiff

Josh Cole Aicklen, Esq.
David B. Avakian, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118

Attorneys for Defendants,
ROOF DECK ENTERTAINMENT, LLC
dba Marquee Nightclub and
NEVADA PROPERTY 1, LLC, dba
The Cosmopolitan of Las Vegas

/s/ Audra R. Bonney
An employee of WEINBERG, WHEELER,
HUDGINS GUNN & DIAL, LLC

CERTIFICATE OF SERVICE

I hereby certify that the **REQUEST FOR JUDICIAL NOTICE 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 FIRST AMENDED COMPLAINT** was submitted electronically for filing and/or service with the Eighth Judicial District Court's Odyssey E-File and Serve System on **June 25, 2018**. Electronic service of the foregoing document shall be made in accordance with the E-Service List[1] as follows:

COUNSEL OF RECORD	EMAIL ADDRESS(ES)	PARTY
Ramiro Morales, Esq. William C. Reeves, Esq. MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	rmorales@mfrlegal.com wreeves@mfrlegal.com mderewetzky@mfrlegal.com	PLAINTIFF
Michael M. Edwards, Esq. MESSNER REEVES LLP 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	medwards@messner.com nforsyth@messner.com lmaile@messner.com efile@messner.com	ASPEN SPECIALTY INSURANCE COMPANY

JuRee A. Bloedel
Employee of HEROLD & SAGER

[1] Pursuant to EDCR 8.05(a), each party who submits an E-filed document through the E-Filing System consents to electronic service pursuant to NRCP 5(b)(2)(D).

OMD

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, 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 ST. PAUL'S OPPOSITION TO MARQUEE'S MOTION TO DISMISS FIRST AMENDED COMPLAINT Date: October 30, 2018 Time: 9:00 a.m. Dept.: XXVI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

V. <u>Other State Court Decisions</u>

VI. Rules/Statutes

VII. Articles/Publications

I. INTRODUCTION

Defendant Roof Deck Entertainment LLC dba Marquee Nightclub's ("Marquee") has express contractual obligations to indemnify, hold harmless and defend Nevada Property 1, LLC d/b/a "The Cosmopolitan of Las Vegas" ("Cosmopolitan"). St. Paul Fire & Marine Insurance Company ("St. Paul"), as subrogee of Cosmopolitan, is entitled to enforce those obligations. St. Paul is also entitled to statutory contribution from Marquee, pursuant to NRS §17.225. Try as it might to distract or confuse the Court with documents that are not properly before it, strained contract interpretation, and misreading and misapplication of statutes, Marquee's motion falls well short of the required standards and should be denied.

Marquee contends that the "waiver of subrogation" provision in Section 12.2.6 of the Nightclub Management Agreement ("NMA") bars St. Paul's claims against it. Marquee apparently does not appreciate that Cosmopolitan was a signatory to only a limited number of provisions of the NMA, *not including Section 12.2.6.* Cosmopolitan is not bound by the NMA's waiver of subrogation language and, therefore, that provision does not apply to Cosmopolitan, or its subrogee, St. Paul. Nor is there anything in the St. Paul policy itself, despite Marquee's rank speculation, that bars St. Paul from pursuing its claims against Marquee.

The NMA provides that Marquee will indemnify Cosmopolitan for certain Losses "not otherwise covered by *the insurance required to be maintained hereunder."* Marquee argues that it is not obligated to indemnify Cosmopolitan because the "loss" is covered by the St. Paul policy. But as with the purported waiver of subrogation provision, Cosmopolitan is not a signatory to the NMA's insurance provision and, therefore, the St. Paul coverage for Cosmopolitan is not insurance that was required to be maintained under the NMA.

Even so, Marquee argues, unreasonably, that the NMA provides that indemnity does not apply to losses "reimbursed" by insurance. But this interpretation would improperly render the indemnity language a nullity. The St. Paul policy provides that St. Paul "pays on behalf" its insured, Cosmopolitan. Indeed, it is undisputed that Cosmopolitan never paid anything and therefore, was never "reimbursed" by the St. Paul policy, so the exception in the indemnity provision does not apply. At best (for Marquee), these provisions are subject to at least two

reasonable interpretation and such ambiguity must be interpreted against Marquee.

As to St. Paul's NRS 17.225 contribution claim, Marquee misrepresents and misconstrues the terms of NRS 17.265, which provides that statutory contribution is not available to a party entitled to indemnity or who committed wrongful intentional acts. Marquee ignores the fact that St. Paul's indemnity claim is pled in the alternative such that the contribution argument only come in to play if the court finds that St. Paul is not entitled to pursue Cosmopolitan's indemnity claim. Also, Marquee's assertion that the contribution claim is barred by Cosmopolitan's intentional conduct is contrary to St. Paul's allegations that must be presumed true, as well as the Court's finding that Cosmopolitan was only vicariously liable for Marquee's egregious conduct. Neither this nor any of Marquee's arguments have merit.

Finally, Marquee's request for attorneys' fees fails because (1) it is not the prevailing party, and will not be; (2) Cosmopolitan is not a party to the prevailing party attorneys' fees provision in the NMA; and (3) even it Marquee did prevail the FAC is based on reasonable and good faith arguments abundantly supported by controlling authority and not brought for any improper purpose.

For all of these reasons, Marquee's motion to dismiss should be denied.

II. STATEMENT OF FACTS

To avoid confusion, St. Paul provides a brief recitation of the relevant facts as alleged in its First Amended Complaint ("FAC").

This matter arises out of an incident in which David Moradi was severely beaten by employees of Marquee Nightclub, which is located inside the Cosmopolitan Hotel in Las Vegas. Moradi's injuries and damages were not caused by any affirmative acts or unreasonable conduct on the part of Cosmopolitan. Rather, per court order, Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages. FAC ¶ 118. Moradi sued Marquee and Cosmopolitan and obtained a judgment against them, jointly and severally, in the amount of $160,500,000. FAC ¶ 60.

Following the verdict, St. Paul was forced to contribute confidential/redacted amounts to a post-verdict settlement in excess of the underlying National Union coverage and became

subrogated to Cosmopolitan's rights of recovery against Marquee. St. Paul filed a complaint seeking statutory contribution (NRS 17.225) and express indemnity under the Management Agreement between Marquee and Cosmopolitan as Cosmopolitan's subrogee. Marquee and its insurers, Aspen and National Union then filed motions to dismiss. After the Court ruled on the motions, St. Paul filed the instant First Amended Complaint, alleging the same causes of action against Marquee.

III. LEGAL STANDARDS

A. Notice Pleading/Motion to Dismiss

Nevada is a notice pleading jurisdiction; courts construe pleadings liberally to place into issue matters that are fairly noticed to an adverse party. *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond a doubt that plaintiff is entitled to no relief under any set of facts that could be proved to support the claim. *See Buzz Stew LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). All facts alleged in the complaint are presumed true and all inferences are drawn in favor of the complainant. *Id*. Dismissal is not proper where the allegations of the complaint are sufficient to establish the elements of a claim for relief. *Stockmeir v. Nevada Dep't of Corr*., 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). A complaint need accomplish no more than to "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); see also *Nevada Civil Practice Manual*, Matthew Bender & Company, Answers and Responsive Motions, section 9.08[6][a] (Sixth Edition, 2016).

In ruling on a motion to dismiss, the court is generally limited to considering the allegations of the complaint and the materials that are submitted with and attached to the complaint. In addition, a court may consider unattached evidence on which the complaint necessarily relies, but only if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document. *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927 (2015). Moreover, where there is a dispute

regarding the relevance of the document, and other documents are necessary to "fill in the gaps," it is improper to consider the document for purposes of the pleading motion. *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006).

Marquee cites cases for the proposition that more is required at the initial pleading stage than labels, conclusions and a formulaic recitation of the elements of a cause of action. But Marquee's opposition does not identify a single improper, conclusory allegation – because there are none. Instead, Marquee focuses on the fact that the 150-page Nightclub Management Agreement ("NMA") was not attached as an exhibit or quoted verbatim. Marquee seeks to cure this supposed deficiency by attaching the Management Agreement to the motion, and quoting copious portions of it. Yet, remarkably, Marquee fails to address that the critical language it quotes because it either supports St. Paul's position or is in direct conflict with other language that Marquee contends supports its position.

Marquee has not and cannot meet its burden on a motion to dismiss. The motion should be denied.

B. Contract Interpretation

The rules of contract interpretation that are essential to disposing of the arguments in this motion were recently summarized as follows in ***Cleverley v. Ballantyne***, 2013 WL 1338205, *11 (2013):

> In Nevada, the general rules of contractual construction apply, where "[e]very word must be given effect if at all possible," "[i]f clauses in a contract appear to be repugnant to each other, they must be given such an interpretation and construction as will reconcile them if possible," and "[i]t is only where clauses are totally irreconcilable that a choice may be made between them." *Royal Indem. Co. v. Special Supply Co.*, 82 Nev. 148, 413 P.2d 500, 502 (Nev.1966) (internal citations and quotation marks omitted); *see also Quirrion v. Sherman*,109 Nev. 62, 846 P.2d [1051] at 1053 [(Nev. 1993)]. ("Where two interpretations of a contract provision are possible, a court will prefer the interpretation which gives meaning to both provisions rather than an interpretation which renders one of the provisions meaningless.")

"Every word [in a contract] must be given effect if at all possible." *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966); *Ellison v. C.S.A.A.*, 106 Nev. 601, 603,

797 P.2d 975, 977 (1990) ("Absent some countervailing reason, contracts will be construed from the written language and enforced as written.")

Marquee's arguments fail to give effect to the full NMA and, in fact, simply ignore language that supports St. Paul's claims. The motion should be denied.

IV. ARGUMENT

A. Section 12.2.6 of the Proffered Management Agreement Does Not Apply

1. Section 12.2.6 of the Management Agreement Does Not Apply To Cosmopolitan Because It Did Not Agree To It, and Therefore Does Not Bind St. Paul in Subrogation

Marquee argues that St. Paul may not subrogate against it because Cosmopolitan waived its right of subrogation, citing NMA Section 12.2.6. Marquee is simply wrong. Even a cursory review of the NMA reveals that Cosmopolitan never agreed to be bound by a waiver of subrogation. Therefore, no waiver of subrogation restricts St. Paul's action against Marquee.

It is fundamental contract law that for a contact to bind a party, that party must agree to it. *See generally, May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration."). Likewise, a waiver of subrogation only applies to a party who agreed to it. 73 Am. Jur. 2d Subrogation § 73 ("Such [subrogation] waivers only apply to parties who had agreed to such a waiver, and a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears."); *see, e.g., Willis Realty Assocs. v. Cimino Const. Co.*, 623 A.2d 1287, 1289 (Me. 1993): *Gulf Ins. Co. v. Quality Bldg. Contractor, Inc.*, 58 A.D.3d 595, 597, 871 N.Y.S.2d 366, 368 (2009); *St. Paul Fire & Marine Ins. Co. v. FD Sprinkler Inc.*, 76 A.D.3d 931, 932, 908 N.Y.S.2d 637, 639 (2010) ("The subcontractors, who are neither signatories nor parties to the main contract between the owner and the general contractor, cannot avail themselves of the waiver-of-subrogation clause contained therein."); *Fortin v. Nebel Heating Corp.*, 12 Mass. App. Ct. 1006, 1007, 429 N.E.2d 363, 364 (1981) (waiver of subrogation in contract between owner and general contractor did not extend to subcontractor who was not a party to that agreement).

Thus, for example, in *Willis Realty Assocs. v. Cimino, supra,* a building was owned by

Willis Realty and leased to Maine Printing; Robert Willis was the managing partner of Willis Realty and the president of Maine Printing. Willis Realty contracted Cimino to build an addition. The construction contract included a clause waiving all claims for damages to the extent covered by insurance, which the court held constituted a waiver of subrogation provision.[1] Both Willis Realty and Maine Printing were insured by Globe. When the addition collapsed, Globe paid Willis Realty and Maine Printing for the damage and sought to subrogate against Cimino. The court held that while the waiver provision applied to claims that ran through Willis Reality, it did not apply to those that ran through Maine Printing, because it was not a party to the work contract. This was the case even though both entities were related through Robert Willis and he had signed the agreement on behalf of Willis Reality.

Here, Cosmopolitan did not agree to be bound by the purported waiver of subrogation provision. The signature line where Cosmopolitan executed the NMA as Nevada Property 1, LLC specifically states:

> Acknowledged and agreed to be bound *solely* with respect to the provisions of Sections 3.3, 3.4, 3.5.3, 3.8, 4.1, 4.6, 6.1, 8.6, 8.8.1, 9.10, 10.2, 13.2, 14.1.7, 14.1.8, 14.2.3, 15.2, 35, 39.1 and 39.2 (emphasis added)

See Declaration of Marc J. Derewetzky in Support of St. Paul's Opposition to Marquee's Motion to Dismiss (Derewetzky Marquee Decl.), ¶ 2, Exh. 1.

The waiver of subrogation provision appears in section 12.2.6 of the NMA, which is *not* one of the sections Cosmopolitan agreed to be bound by. Therefore, Cosmopolitan did not agree to be bound by the waiver of subrogation provision (section 12.2.6) and is *not bound* by it. As Cosmopolitan went to the trouble of specifying which provisions it would be bound by in the NMA itself, there can be no reasonable dispute that none of the parties intended Cosmopolitan to enter into a waiver of subrogation provision. Rather, that provision applies only to the Restaurant and Marquee, who are the only parties to the every provision of the NMA.

Marquee no doubt wishes that the Restaurant and Cosmopolitan were the same entity, but they are not. Indeed, this was made clear in Marquee's motion itself, where Marquee avers:

---

[1] This is because if the insured has been compensated for the damage by insurance, it would have no right of recovery against an indemnitor. Therefore, the only way in which the clause operates is by obviating a right of subrogation.

"Cosmopolitan leased the premises to its related entity, NRV1. (FAC ¶ 10.) In turn, NRV1 entered into the NMA in which Marquee agreed to manage and operate the Marquee Nightclub in the Cosmopolitan hotel. (NMA, ps. 1, 24-32, Appendix, Ex. A; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.)" Marquee Motion, 5:9-12. It does not matter that one entity is "related to" the other or that officers or members of both entities are identical. NRV1 and Nevada Property 1 ("NP1") dba Cosmopolitan are different legal entities and, frankly, this kind of allocation of rights and responsibilities is why separate legal entities exist.

The plain language of the NMA does not legally obligate Cosmopolitan to waive any subrogation rights. Accordingly, St. Paul has the right to subrogate to Cosmopolitan's rights against Marquee.

2. The St. Paul Policy Does not Include an Operative "Waiver of Subrogation" Provision

The fact that Cosmopolitan did not agree to be bound by Section 12.2.6 of the NMA, which purports to require that certain policies contain a "waiver of subrogation" is consistent with, and explains why, the St. Paul policy does not contain a waiver of subrogation provision. The existence of a waiver of subrogation in the St. Paul policy would be completely inconsistent with Cosmopolitan's intent not to waive subrogation, as expressed in its election not to be bound by Section 12.2.6 of the NMA.

To be completely clear, as well as totally transparent, the St. Paul policy does contain an endorsement entitled "Waiver of Right of Recovery Endorsement," which states: "If, prior to an Occurrence, covered by this policy, *you [Cosmopolitan] have agreed in a written contract*, to waive your rights to recovery of payments for damages for Bodily Injury, Property Damage, Personal or Advertising Injury cause by that Occurrence, then we agree to waive our right of recovery for such a payment." (Emphasis supplied.) Of course, this is not in and of itself a "waiver of subrogation" provision, but rather an agreement to waive subrogation *if* the insured has agreed to waive certain rights of recovery in a written contract.

And so, we have come full circle back to the fact that Cosmopolitan *did not agree* in the NMA or in any other written contract to waive its rights to recovery. Absent such an agreement,

the Waiver of Right to Recovery Endorsement does not come into operation and there is no legitimate argument that St. Paul waived subrogation and cannot pursue subrogated claim against Marquee. Marquees motion in this regard should be denied.

3. Marquee Cannot Rely on Section 12.2.6 of the Management Agreement to Exculpate Itself from Its Own Gross Misconduct

Even if Section 12.2.6 applied, it would not bar St. Paul's claims against Marquee. In general, courts, on public policy grounds, refuse to enforce exculpatory contractual clauses, such as "waiver of subrogation" provisions, which exonerate a person for willful, wanton, reckless or intentional misconduct. *Rhino Fund, LLP v. Hutchins*, 215 P.3d 1186, 1193 (Colo. App. 2008), *as modified on denial of reh'g* (Dec. 24, 2008) (exculpatory provision which sought to waive liability for intentional misconduct unenforceable) (*citing Wright v. Sony Pictures Entm't, Inc.*, 394 F.Supp.2d 27, 33 (D.D.C.2005) (waivers do not exempt a party that recklessly or intentionally causes harm); *see also Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 158 P.3d 232, 240 (App.2007) (concluding a party may contract to limit liability for nonperformance of promises, but not where the party acts fraudulently or in bad faith); *Finch v. Southside Lincoln–Mercury, Inc.*, 274 Wis.2d 719, 685 N.W.2d 154, 160, 163–64 (App.2004) (exculpatory clauses in lease agreements were unenforceable based on public policy, where the alleged harm is caused intentionally or recklessly); *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952, 956–57 (Wyo.1999) (limitation of remedies provision could not exempt party from liability for intentional torts).

Here, Marquee is attempting to assert Section 12.2.6 of the Management Agreement as a means to side step its indemnity obligation to Cosmopolitan arising from the misconduct of Marquee's employees. Not only did Cosmopolitan not agree to be bound by Section 12.2.6, Marquee's assertion of this provision is particularly egregious because Marquee accepted Cosmopolitan's tender of defense and indemnity, recognizing that it was responsible for the *Moradi* claim. Marquee defended Cosmopolitan in the *Moradi* action through it insurers, which provided joint counsel for Marquee and Cosmopolitan. FAC ¶¶ 25, 27, 35. The appointment of joint counsel prejudiced Cosmopolitan's interests in the litigation as, among other things, it insulated Marquee from any assessment of Marquee's liability vis-à-vis Cosmopolitan.

When Marquee accepted Cosmopolitan's tender of defense and indemnity, and appointed joint counsel to defend Marquee and Cosmopolitan under a unified defense, Marquee effectively bought the claim. To find otherwise would allow an indemnitor (Marquee) to accept a tender, defend, manipulate the proceedings to the detriment of the indemnitee (Cosmopolitan), and then when the indemnitee gets hit with an astronomical judgment, deny the very indemnity obligation that allowed it to manipulate the defense to its advantage. The fundamental unfairness of such gamesmanship is patent, and alone compels the conclusion that Marquee waived any "waiver of subrogation" provision when it accepted Cosmopolitan's tender. This Court should not permit Marquee to rely on Section 12.2.6 to shield it from its own gross misconduct.

B. Marquee's Indemnity Obligation is Not Extinguished When Cosmopolitan's Insurance Pays A Loss Incurred Because of the Misconduct of Marquee's Employees

Section 13 of the NMA provides that Marquee shall indemnify the Restaurant and its parents and members against any and all losses incurred as a result of Marquee's breach or Marquee' or its employees' or staff's negligence or willful misconduct. Derewetzky Marquee Dec., ¶ 3, Exh. 2. The FAC alleges that Cosmopolitan is covered by this indemnity provision (FAC ¶ 25) and, because Marquee does not dispute this allegation, it is presumed to be true. In fact, Cosmopolitan is the parent of the Restaurant, bringing it within the indemnity provision.

As Marquee points out in it motion, there is an exception to Marquee's indemnity obligation for losses covered by insurance required by the Management Agreement. The insurance requirements under the Management Agreement are found in Section 12, Insurance. Section 12.1 sets forth the insurance Restaurant is obligated to provide and Section 12.2 identifies the insurance Marquee is required to provide. There is no requirement for Cosmopolitan to provide insurance. Derewetzky Marquee Dec., ¶ 4, Exh. 3. In addition, as with section 12.2.6, Cosmopolitan did not agree to be bound by any of the other provision of Section 12 of the NMA. In other words, Cosmopolitan's insurance, specifically the St. Paul policy, was not insurance "required under the Management Agreement" and therefore because this claim arose out of the negligent or willful acts of Marquee's employees**,** Marquee remains obligated under the indemnity provisions of Section 13 for the sums paid by St. Paul under it policy for Cosmopolitan.

St. Paul expects Marquee will argue that the definition of "losses" in the Management Agreement, which is defined to not include sums "reimbursed" by insurance, obviates the language of the indemnity agreement that indemnity applies except when covered by insurance required of Marquee or the Restaurant. That is not a reasonable interpretation because it makes the insurance language of the indemnity provision meaningless. *See Cleverley v. Ballantyne*, 2013 WL 1338205, *11 (2013) (In Nevada, the general rules of contractual construction apply, where "[e]very word must be given effect if at all possible"); accord ***Royal Indem. Co. v. Special Supply Co.,*** 82 Nev. 148, 413 P.2d 500, 502 (Nev.1966) (internal citations and quotation marks omitted).

Indeed, the language in the indemnity clause refers to losses "covered" by insurance, whereas the losses definition refers to sums "reimbursed" by insurance. "Reimbursement" refers to an insurer's obligations under an indemnity-style policy as opposed to a true general liability policy. Under an indemnity policy, an insured must first pay a sum, whether it be damages for its liability or whatever the coverage provides, and then the insurer indemnifies it for that sum by reimbursing it; under a typical general liability policy, the insurer must pay the sum in the first instance to protect the insured. *In re WorldCom, Inc. Sec. Litig*., 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005) ("It is a general principle under insurance law, that the obligation to pay under a liability policy arises as soon as the insured incurs the liability for the loss, in contrast to an indemnity policy where the obligation is to reimburse the insured for a loss that the insured has already satisfied."); *see, e.g., MBIA Inc. v. Certain Underwriters at Lloyd's, London*, 33 F. Supp. 3d 344, 356 (S.D.N.Y. 2014) (duty to reimburse defense costs did not require insurer to defend but only to reimburse defense cost actually incurred by insured at end of suit); *Cont'l Cas. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 940 F. Supp. 2d 898, 916(D. Minn. 2013) (distinguishing duty to defend from policy which required defense cost reimbursement, which was triggered only after insured actually paid costs of defense); *Gabarick v. Laurin Mar. (Am.), Inc*., 650 F.3d 545, 552 (5th Cir. 2011) (indemnity policy is not a liability policy, such that defense costs need only be reimbursed based on cost paid when indemnity paid).

In the context of the liability policies and the settlement on behalf of Cosmopolitan at issue here, no sum was reimbursed because Cosmopolitan did not pay anything in the first instance,

making the insurance language of the losses definition inapplicable in this case. Rather, only the insurance provision of the indemnity section is relevant, and it does not apply given St. Paul's coverage was not required. S*ee Quirrion v. Sherman*, 109 Nev. 62, 846 P.2d [1051] at 1053 [(Nev. 1993)]. ("Where two interpretations of a contract provision are possible, a court will prefer the interpretation which gives meaning to both provisions rather than an interpretation which renders one of the provisions meaningless.")

C. Neither NRS 17.255 nor NRS 17.265 Precludes St. Paul from Asserting a Statutory Subrogation Claim for Contribution Under NRS 17.225

Marquee argues that St. Paul's statutory contribution claim fails as a matter of law because (1) Cosmopolitan intentionally contributed to Mr. Moradi's injuries; and (2) Cosmopolitan has a right to indemnity from Marquee, and that right to indemnity precludes a right to contribution under the Uniform Contribution Act.[2] While St. Paul agrees with Marquee that Cosmopolitan has a right to indemnity from Marquee, to which St. Paul is subrogated, Marquee's attack is otherwise baseless, misstating both the underlying facts and Nevada law on statutory contribution.

First, as alleged in the first amended complaint, Mr. Moradi's injuries and damages were cause solely by Marquee's actions and unreasonable conduct. Mr. Moradi's injuries and damages were not caused by any affirmative acts or unreasonable conduct on the part of Cosmopolitan. Rather, per court order, Cosmopolitan was held merely vicariously liable for Marquee's actions and Mr. Moradi's resulting damages. (FAC ¶¶ 117 and 118.) St. Paul's factual allegations are presumed true on a motion to dismiss, and all inferences are drawn in favor of St. Paul. *See Buzz Stew LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (All facts alleged in the complaint are presumed true and all inferences are drawn in favor of the complainant). Contrary to Marquee's assertions, the Special Verdict form attached as Exhibit C to the first amended complaint does not find Cosmopolitan intentionally caused or contributed to Mr. Moradi's injuries.[3]

---

[2] Marquee also argues that the contribution claim is precluded by the Management Agreement's "waiver of subrogation" provision. This argument is disposed of above in section B.

[3] The theory of liability asserted against Cosmopolitan was that as landowner it had a non-delegable duty to provide responsible security and personnel on its property. *See Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916, 930

Regardless, the verdict was never reduced to a judgement because the parties ultimately settled the *Moradi* action. It is its settlement payment for which St. Paul seeks contribution. Pursuant to the settlement agreement, the parties expressly agreed that the parties are compromising disputed claims, that defendants Marquee and Cosmopolitan admitted no fault, and that no part of the settlement was for punitive damages.[4] *See Terrell v. Cent. Washington Asphalt, Inc.*, No. 211CV00142APGVCF, 2016 WL 8738266, at *3 (D. Nev. Mar. 4, 2016) (where complaint alleges both negligent and intentional claims, settlement whereby defendants do not admit liability, and which expressly states no payment for punitive damages, is insufficient to support finding that defendants intentionally caused or contributed to the injury such as to preclude contribution claim under NRS 17.255).

As Marquee is well aware, having been a party to the *Moradi* action, Cosmopolitan's liability was hotly contested by both Cosmopolitan and Marquee, with both defendants arguing to the *Moradi* court, on multiple motions, that Cosmopolitan had no liability for the acts of Marquee and its employees. If the parties had not come to a settlement, Cosmopolitan would have necessarily appealed any judgment entered against it as Cosmopolitan continues to assert a position of no-liability. As such, St. Paul contributed to the settlement on behalf of Cosmopolitan to resolve the potentially covered claims against Cosmopolitan. Joint tortfeasors are entitled to seek contribution on claims of negligence. *Hanson v. Johnson*, No. 2:10-CV-1649-GMN-LRL, 2011 WL 3847203, at *4 (D. Nev. Aug. 30, 2011) (defendants jointly and severally liable for negligence claim entitled to seek contribution under NRS 17.255).

Second, Marquee fundamentally misapplies NRS section 17.265, which operates only to preclude an indemnitor from attempting to end-run its indemnity obligation by seeking contribution from the very party it agreed to indemnify. It does not, as Marquee contends,

---

(Alaska 1977) (employer vicariously liable for acts of employee "is not technically a 'tort-feasor,' but it is 'one of two or more liable in tort for the same injury.'"; see also *Hertz Corp. v. Hellens*, 140 So. 2d 73 (Fla. Dist. Ct. App. 1962) (though he has himself committed no tortious act, owner of auto is by law charged as a tort-feasor and vicariously liable for the negligence of driver operating auto with his consent).

[4] It is worth noting that Cosmopolitan was not included in the punitive damages portion of the *Moradi* trial, which proceeded against Marquee only, suggesting that it was Marquee's outrageous conduct and not anything Cosmopolitan did that allegedly gave rise to punitive damages exposure.

preclude a party with a right to indemnity under an express indemnity agreement from seeking, in the alternative, equitable contribution.

Section 17.265 provides:

> Except as otherwise provided in NRS 17.245, the provisions of NRS 17.225 to 17.305, inclusive, do not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation.

Nev. Rev. Stat. Ann. § 17.265 (West).

St. Paul concedes that its claim for contribution is pled in the alternative to its claim for express indemnity. As set forth in its first amended complaint and as argued above, St. Paul contends Marquee owes express indemnity to Cosmopolitan, and thus St. Paul, for the entire amount of St. Paul's settlement payment in *Moradi*. However, should the Court determine that no indemnity obligation exists, as Marquee argues at length, then St. Paul is entitled to pursue in the alternative a claim for contribution against Marquee for the amount of St. Paul's settlement payment that exceed Cosmopolitan's fair share. *Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524, 529, 706 P.2d 845, 848 (1985) (Holding NRS 17.265 "merely provides that no contribution exists where indemnity exists.")

Contrary to Marquee's assertions, Section 17.265 does not preclude St. Paul's claim for contribution. Instead, Section 17.265 merely provides that where St. Paul succeeds on its indemnity claim, it is precluded from also seeking contribution ("[w]here one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution" (emphasis added)). This of course makes sense because otherwise St Paul could obtain an impermissible excess recovery.

Section 17.265 goes on to say, in a clause later added by the legislature for clarification, that one who owes indemnity, may not pay its indemnity obligation and then turn around and sue the very party it paid indemnity for contribution in connection with the amounts it was required to pay that party in indemnity ("indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation.") In other words, if St. Paul succeeds on its

express indemnity claim and Marquee is ordered to pay St. Paul, as Cosmopolitan's subrogee, the amount of St. Paul's settlement contribution, Marquee may not then pursue Cosmopolitan/St. Paul for contribution on the amount of the settlement payment indemnified by Marquee. Obviously, the legislature added this last clause to preclude parties from improperly using the Uniform Contribution Act as a loophole to ameliorate their indemnity obligations. *See Id*. at 528.

D. Marquee Has No Right to Attorney's Fees

1. Marquee has no Right to Attorneys' Fees Under the Proffered Management Agreement

Marquee relies on Section 28 of the NMA for the proposition that Marquee is entitled to attorneys' fees in connection with its motion to dismiss. NMA, Section 28, Attorneys' Fees provides:

> In the event of a dispute between the Parties concerning the enforcement or interpretation of this Agreement, the prevailing party in such dispute, whether by legal proceedings or otherwise, shall be reimbursed immediately by the other party to such dispute for reasonably incurred attorneys' fees and other costs and expenses.[5]

As explained above, Cosmopolitan is a limited signatory to the NMA. While many provisions run in its favor, Cosmopolitan agreed to be bound by only limited obligations under the NMA. Section 28 is *not* one of those provisions. Further, St. Paul is proceeding against Marquee based on rights it acquired from Cosmopolitan. Therefore, the fact that Cosmopolitan is not a party to the NMA's attorneys' fees provision means that is does not apply to St. Paul either.

Unlike Cosmopolitan, Marquee is bound by Section 28 NMA. So, like many other provisions in the agreement, such as the insurance and indemnity provisions discussed above, Marquee would owe prevailing party attorneys' fee to Cosmopolitan/St. Paul under Section 28, but Cosmopolitan/St. Paul would not have a reciprocal obligation.

[5] The proffered NMA includes Cosmopolitan in its definition of "Owner Party," which is defined as "Owner, Project Owner, and/or their affiliates." "Project Owner" is defined in the agreement as "Nevada Property 1 LLC", i.e. Cosmopolitan. See Derewetzky Marquee Decl.), ¶ 5, Exh. 4.

Marquee correctly notes that St. Paul alleges an entitlement to prevailing party attorneys' fees "per the terms of the written agreement," i.e., Section 28 of the NMA. FAC ¶ 129. This creates a paradox whereby may Marquee owes attorneys' fees while Cosmopolitan, and by extension its insurer, cannot. Nevada recognizes and enforces such "unilateral" prevailing party attorneys' fees provisions. *See Morales v. Aria Resort & Casino, LLC*, No. 2:11-CV-02102-LRH, 2014 WL 1814278, at *1 (D. Nev. May 7, 2014) (*citing Rowland v. Lepire*, 99 Nev. 308, 315–16, 662 P.2d 1332 (1983) (refusing to award attorneys' fees to plaintiff as the prevailing party where contract provided only for defendant's recovery of attorneys' fees in the event defendant was forced to retain counsel to enforce the contract); *Trustees of Carpenters for S. Nev. Health & Welfare Trust v. Better Building Co.*, 101 Nev. 742, 747, 710 P.2d 1379 (1985) (refusing to construe the unilateral fee provision set forth in the parties' contract, which entitled plaintiffs to attorneys' fees if they prevailed, as a reciprocal provision and holding that defendants were properly refused attorneys' fees); *Pandelis Const. Co. v. Jones-Viking Associates*,103 Nev. 129, 132 n.3, 734 P.2d 1236 (1987) (finding that, because it was the contractor who sued to enforce the contract, the contractual fee provision, which applied only if the property owner sued to enforce the contract, did not govern any award of attorneys' fees)). Thus, under no set of facts is St. Paul liable to Marquee for attorneys' fees under the NMA

2. Marquee Has No Right to Attorneys' Fees Under NRS 18.010(2)(b)

Marquee also argues that the Court may award prevailing party attorneys' fees under NRS 18.010(2)(b). Section 18.010(2)(b) allows a court to award prevailing party attorneys' fees "when the court finds that a claim of the opposing party was brought or maintained without reasonable grounds or to harass the prevailing party." Nev. Rev. Stat. Ann. § 18.010 (West).[6] Here, Marquee insists that "St. Paul's claims against Marquee are clearly baseless and made without (or despite) competent inquiry, and not supported by any credible evidence." As St. Paul's opposition to

[6] *See Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998)("[a] claim is groundless if 'the allegations in the complaint ... are not supported by any credible evidence at trial.'(citations omitted)"); *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 493, 215 P.3d 709, 726 (2009) (an award of attorney's fees under section 18.010(2)(b) requires evidence that the claim is unreasonable or brought to harass); *Frantz v. Johnson*, 116 Nev. 455, 472, 999 P.2d 351, 362 (2000)(holding a claim cannot be frivolous as a matter of law when the party asserting the claim actually prevails on it).

Marquee's motion makes clear, Marquee's assertions are just flat wrong. More importantly, NRS 18.010(4) specifically provides that "Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorneys' fees." In other words, Marquee cannot invoke 18.010(2)(b) to circumvent the unilateral prevailing party attorneys' fees provision, Section 28, in its proffered Management Agreement.

E. In The Alternative, St. Paul Requests Leave to Amend

As discussed above, St. Paul asserts that is has properly pled its fifth and sixth causes of action for statutory contribution (NRS 17.225) and express indemnity, respectively. However, if this Court disagrees as to one or both of those causes of action, St. Paul requests that this Court grant St. Paul leave to amend the Complaint in order to correct any perceived defects therein. Under NRCP 15(a), leave to amend a complaint shall be "freely given when justice so requires." Here, Marquee moved to dismiss St. Paul's first amended complaint. To the extent that this Court concludes that Marquee has established that St. Paul failed to state facts sufficient to support its fifth and sixth causes of action, St. Paul requests that the Court grant leave to amend the same.

Dated: August 15, 2018

MORALES FIERRO & REEVES

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

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

CERTIFICATE OF SERVICE

I, Noemi Gonzalez, declare that:

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

On the date specified below, I served the following document:

- ST. PAUL'S OPPOSITION TO MARQUEE'S MOTION TO DISMISS FIRST AMENDED COMPLAINT;
- DECLARATION OF MARC J. DEREWETZKY IN SUPPORT OF ST. PAUL'S OPPOSITION TO MARQUEE'S MOTION TO DISMISS FIRST AMENDED COMPLAINT.

Service as effectuated in the following manner:

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

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

Dated: August 15, 2018

Noemi Gonzalez

DECL

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, 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 DECLARATION OF MARC J. DEREWETZKY IN SUPPORT OF ST. PAUL'S OPPOSITION TO AIG'S MOTION TO DISMISS FIRST AMENDED COMPLAINT Date: October 30, 2018 Time: 9:00 a.m. Dept.: XXVI

I, Marc J. Derewetzky, declare:

1. I am an attorney duly licensed to practice before the Courts of the State of Nevada and am an associate with Morales, Fierro & Reeves, counsel of record for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul") herein. I have personal knowledge of all facts contained in this Declaration and if call as a witness in this matter, I could and would competently testify thereto. I make this Declaration in support of St. Paul's Opposition to Defendant National Union Fire Insurance Company of Pittsburgh, Pa's ("AIG") Motion to Dismiss St. Paul's First Amended

Complaint herein.

2. Attached hereto as **Exhibit 5** is a true and correct copy of pages 61 - 63 of the NMA, which contain the language of Section 12. Insurance.

3. Attached hereto as **Exhibit 6** is a true and correct copy of pages 63 and 64 of the NMA, which contain the language of Section 13. Indemnity.

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

Executed this 15th day of August, 2018 at Concord, CA.

Marc J. Derewetzky

EXHIBIT 5

contrary contained herein, in no event shall Owner be obligated to fund any amounts (a) required to pay any portion of the Management Fee or Base Rent, that are not consistent with the then applicable Annual Operations Budget (or the permitted deviations therefrom pursuant to Section 6.4) or (b) at any time Operator is in default under this Agreement beyond applicable notice and grace periods. In no event shall Owner be obligated to fund during the Term of this Agreement an aggregate amount in excess of Seven Hundred Fifty Thousand Dollars ($750,000.00) outstanding at any time (the "**Maximum Additional Funding Amount**"). Except as aforesaid, Owner shall provide and make the requested funds available for the use specified in the Funding Notice within the forty-five (45) day time period (each such funding event is referred to herein as an "**Additional Funding Installment**"). As used herein, "**Additional Funding Total**" shall mean the total amount of funds funded by Owner in connection with the Nightclub Venues Operations pursuant to this paragraph from and after the Opening Date and outstanding from time to time. The outstanding balance of the Additional Funding Total shall be treated as a loan made as of the date of each such Additional Funding Installment during the Fiscal Year in which the funding of such Additional Funding Installment is made, and shall accrue a preferred return of the Base Rate. The aggregate outstanding amount of the Additional Funding Total, together with all outstanding accrued preferred return thereon, shall be referred to herein as the "**Additional Funding Total Balance.**" The Additional Funding Total Balance shall be repaid to Owner pursuant to Section 4.2 above.

10.3 Cash Drawers. Owner shall provide Operator with cash for cashier drawers in amounts adequate for the initial operation of the Nightclub Venues and all funds so provided shall be deemed to be Pre-Opening Expenses. After the initial opening of the Nightclub Venues, Operator shall be responsible for maintaining adequate cash drawer balances to reflect the needs and operations of the Nightclub Venues.

10.4 Disputed Nightclub Venue Charges. If a guest of the Project complains about or refuses to pay all or any portion of any charge at the Nightclub Venues because of an issue concerning Operator's services or product, Operator shall use commercially reasonable efforts to address such complaints or refusals. If Owner determines that an excessive number of patrons are disputing bills, complaining about quality or service or refusing to pay a portion of their bills attributable to charges at the Nightclub Venues, then Operator shall, upon ten (10) days' prior written notice from Owner, meet with Owner to discuss possible procedures for improving quality and service.

11. No Partnership

Nothing in this Agreement shall constitute or be construed as creating a tenancy, employment, partnership, or joint venture between the Owner and Operator. Operator and Owner agree that Operator will perform its services under this Agreement as an independent contractor. Neither Party nor any of the respective agents will be considered employees or agents of the other Party hereunder or its Affiliates as a result of this Agreement.

12. Insurance

12.1 Owner's Insurance. During the Term of this Agreement, Owner shall provide and maintain the following insurance coverage, at its sole cost and expense (and not as an Operating Expense):

12.1.1 Personal property insurance covering Owner's personal property located on the Premises and all alterations, improvements and betterments existing or added to the Premises;

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

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

12.2 Operator's Insurance.

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

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

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

12.2.1.3 Workers compensation insurance which complies with the applicable workers compensation laws governing the State of Nevada;

12.2.1.4 Employers' liability insurance, with minimum coverages as follows: each accident - $1,000,000; disease (each employee) - $1,000,000; disease (policy limit) - $1,000,000;

12.2.1.5 Automobile liability insurance (any auto or owned, hired and non-owned vehicles), with a minimum coverage of $1,000,000 for combined single limit per accident for bodily injury and property damage;

12.2.1.6 Employee dishonesty insurance, with a minimum coverage of $1,000,000; and

12.2.1.7 Employment practices liability insurance, including third party coverage, with minimum coverages of $2,000,000 for each claim, and $2,000,000 in the aggregate.

12.2.2 Notwithstanding anything to the contrary contained herein, if the types of coverage or the minimum coverages for any or all of the Operator Policies as set forth herein is less than the coverage requirements required by owners or landlords of other high revenue nightclubs in Las Vegas, Nevada or by Owner's reasonable internal insurance requirements, or any lender of the Project, the scope and coverage to be maintained by Operator for each such coverage shall be the greater of the minimum coverage required herein and the minimum coverage so required by Owner or such lender.

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

12.2.4 All Operator Policies shall be issued by a carrier approved in advance by Owner (which approval shall not be unreasonably withheld), provided, that such carrier shall have a current A.M. Best Company rating of at least a-VII and shall be licensed in the State of Nevada. Owner may require Operator to utilize one or more carriers selected by Owner or participate in such pooled insurance programs with Project Owner and/or other operators of retail locations in the Project as Owner may reasonably designate, so long as the coverage and cost is competitive with what Operator could otherwise obtain. Except as prohibited by applicable Laws, the minimum coverages of the various Operator Policies may be adjusted by Owner from time to time as set forth above upon thirty (30) days written notice delivered to Operator notifying Operator of the adjustments required to the coverage amounts.

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

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

12.2.7 Not later than fifteen (15) days before the Effective Date and at least annually thereafter, Operator shall deliver to Owner certificates of insurance evidencing that all of the Operator Policies have been obtained and are in full force and effect and providing that the insurance company will endeavor to provide Owner with not less than thirty (30) days prior written notice of any cancellation or modification of any of the Operator Policies (or ten days in the case of non payment of premiums), including any changes to the coverage amounts. Failure by Operator to provide and maintain all Operator Policies as required herein, or failure to provide the certificates of insurance, shall be considered a default of this Agreement.

13. Indemnity

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

EXHIBIT 6

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

12.2.4 All Operator Policies shall be issued by a carrier approved in advance by Owner (which approval shall not be unreasonably withheld), provided, that such carrier shall have a current A.M. Best Company rating of at least a-VII and shall be licensed in the State of Nevada. Owner may require Operator to utilize one or more carriers selected by Owner or participate in such pooled insurance programs with Project Owner and/or other operators of retail locations in the Project as Owner may reasonably designate, so long as the coverage and cost is competitive with what Operator could otherwise obtain. Except as prohibited by applicable Laws, the minimum coverages of the various Operator Policies may be adjusted by Owner from time to time as set forth above upon thirty (30) days written notice delivered to Operator notifying Operator of the adjustments required to the coverage amounts.

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

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

12.2.7 Not later than fifteen (15) days before the Effective Date and at least annually thereafter, Operator shall deliver to Owner certificates of insurance evidencing that all of the Operator Policies have been obtained and are in full force and effect and providing that the insurance company will endeavor to provide Owner with not less than thirty (30) days prior written notice of any cancellation or modification of any of the Operator Policies (or ten days in the case of non payment of premiums), including any changes to the coverage amounts. Failure by Operator to provide and maintain all Operator Policies as required herein, or failure to provide the certificates of insurance, shall be considered a default of this Agreement.

13. Indemnity

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

effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

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

14. Termination

14.1 By Owner. In addition to other termination rights in this Agreement, Owner shall have the right to terminate this Agreement upon the occurrence of any one or more of the following events:

14.1.1 The default by Operator under this Agreement. In the event of a default, Owner shall be entitled to all rights and remedies available at law or in equity including, without limitation, the right to damages and injunctive relief. The following shall constitute a default by Operator:

(a) Operator becomes the subject of any Bankruptcy;

(b) Operator making a Transfer, or purported Transfer, in violation of Section 16.1 below;

(c) A breach by Operator of Section 36;

(d) Any breach by Operator of any provision of this Agreement which expressly contains a specific cure period where Operator fails to cure such breach within the applicable cure period, including, without limitation, Section 5.2 or Section 8.8;

(e) Without opportunity to cure, conviction of Operator, or any of Operator Principals, of any felony, including without limitation criminal fraud, embezzlement, forgery or bribery, as defined under the laws of the United States, the State of Nevada or any other state, or any other crime that the Gaming Authorities could serve as a basis for loss or suspension of any of Operator's or Owner's licenses or permits as provided in Section 8.8.1 hereof, including but not limited to gaming or liquor licenses unless Operator promptly disassociates itself from such Person;

(f) Without opportunity to cure, in the event of any loss or suspension of any gaming, liquor or other material license of Owner or any loss of any liquor license finding of suitability or other material license or permit required in order for Operator to provide its services hereunder, in each case, by reason of the acts or omission of Operator or its Principals;

DECL

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, 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 DECLARATION OF MARC J. DEREWETZKY IN SUPPORT OF ST. PAUL'S OPPOSITION TO MARQUEE'S MOTION TO DISMISS FIRST AMENDED COMPLAINT Date: October 30, 2018 Time: 9:00 a.m. Dept.: XXVI

I, Marc J. Derewetzky, declare:

1. I am an attorney duly licensed to practice before the Courts of the State of Nevada and am an associate with Morales, Fierro & Reeves, counsel of record for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul") herein. I have personal knowledge of all facts contained in this Declaration and if call as a witness in this matter, I could and would competently testify thereto. I make this Declaration in support of St. Paul's Opposition to Defendant Roof Deck Entertainment, LLC, d/b/a Marquee Nightclub's ("Marquee") Motion to Dismiss St. Paul's First

Amended Complaint herein.

2. Attached hereto as **Exhibit 1** is a true and correct copy of page 89 of the Nightclub Management Agreement ("NMA") between Marquee and Nevada Restaurant Venture 1 LLC ("NRV1") , to which Nevada Property 1 LLC d/b/a Cosmopolitan is a signatory, but agreed to be bound only by the following provisions: Sections 3.3, 3.4, 3.5.3, 3.8, 4.1, 4.6, 6.1, 8.6, 8.8.1, 9.10, 10.2, 13.2, 14.1.7, 14.1.8, 14.2.3, 15.2, 35, 39.1 and 39.2. A true and correct copy of the complete NMA was previously submitted to the Court in this action as an exhibit to the Bonbrest Declarations.

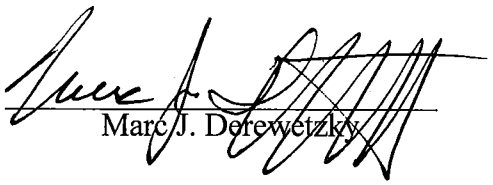
3. Attached hereto as **Exhibit 2** is a true and correct copy of pages 63 and 64 of the NMA, which contain the language of Section 13. Indemnity.

4. Attached hereto as **Exhibit 3** is a true and correct copy of pages 61 - 63 of the NMA, which contain the language of Section 12. Insurance.

5. Attached hereto as **Exhibit 4** is a true and correct copy of pages 1, 17 and 19 of the NMA, which contain the language defining Cosmopolitan as an "Owner Party," which is defined as "Owner, Project Owner, and/or their affiliates." "Project Owner" is defined in these pages as Cosmopolitan.

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

Executed this 15th day of August 2018 at Concord, CA.



Marc J. Derewetzky

EXHIBIT 1

"OWNER"

Nevada Restaurant Venture 1 LLC,
a Delaware limited liability company

By: Nevada Property 1 LLC,
a Delaware limited liability company

Its: Managing Member

By: _____
Name: John Unwin
Title: Chief Executive Officer
4/21/10

By: _____
Name: Jeff Burge
Title: Chief Financial Officer
4/21/10

"PROJECT OWNER"

Acknowledged and agreed to be bound solely with respect to the provisions of Sections 3.3, 3.4, 3.5.3, 3.8, 4.1, 4.5, 4.6, 6.1, 8.6, 8.8.1, 9.10, 10.2, 13.2, 14.1.7, 14.1.8, 14.2.3, 15.2, 35, 39.1 and 39.2

Nevada Property 1 LLC,
a Delaware limited liability company

By: _____
Name: John Unwin
Title: Chief Executive Officer
4/21/10

By: _____
Name: Jeff Burge
Title: Chief Financial Officer
4/21/10

EXHIBIT 2

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

12.2.4 All Operator Policies shall be issued by a carrier approved in advance by Owner (which approval shall not be unreasonably withheld), provided, that such carrier shall have a current A.M. Best Company rating of at least a-VII and shall be licensed in the State of Nevada. Owner may require Operator to utilize one or more carriers selected by Owner or participate in such pooled insurance programs with Project Owner and/or other operators of retail locations in the Project as Owner may reasonably designate, so long as the coverage and cost is competitive with what Operator could otherwise obtain. Except as prohibited by applicable Laws, the minimum coverages of the various Operator Policies may be adjusted by Owner from time to time as set forth above upon thirty (30) days written notice delivered to Operator notifying Operator of the adjustments required to the coverage amounts.

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

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

12.2.7 Not later than fifteen (15) days before the Effective Date and at least annually thereafter, Operator shall deliver to Owner certificates of insurance evidencing that all of the Operator Policies have been obtained and are in full force and effect and providing that the insurance company will endeavor to provide Owner with not less than thirty (30) days prior written notice of any cancellation or modification of any of the Operator Policies (or ten days in the case of non payment of premiums), including any changes to the coverage amounts. Failure by Operator to provide and maintain all Operator Policies as required herein, or failure to provide the certificates of insurance, shall be considered a default of this Agreement.

13. Indemnity

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

effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

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

14. Termination

14.1 By Owner. In addition to other termination rights in this Agreement, Owner shall have the right to terminate this Agreement upon the occurrence of any one or more of the following events:

14.1.1 The default by Operator under this Agreement. In the event of a default, Owner shall be entitled to all rights and remedies available at law or in equity including, without limitation, the right to damages and injunctive relief. The following shall constitute a default by Operator:

(a) Operator becomes the subject of any Bankruptcy;

(b) Operator making a Transfer, or purported Transfer, in violation of Section 16.1 below;

(c) A breach by Operator of Section 36;

(d) Any breach by Operator of any provision of this Agreement which expressly contains a specific cure period where Operator fails to cure such breach within the applicable cure period, including, without limitation, Section 5.2 or Section 8.8;

(e) Without opportunity to cure, conviction of Operator, or any of Operator Principals, of any felony, including without limitation criminal fraud, embezzlement, forgery or bribery, as defined under the laws of the United States, the State of Nevada or any other state, or any other crime that the Gaming Authorities could serve as a basis for loss or suspension of any of Operator's or Owner's licenses or permits as provided in Section 8.8.1 hereof, including but not limited to gaming or liquor licenses unless Operator promptly disassociates itself from such Person;

(f) Without opportunity to cure, in the event of any loss or suspension of any gaming, liquor or other material license of Owner or any loss of any liquor license finding of suitability or other material license or permit required in order for Operator to provide its services hereunder, in each case, by reason of the acts or omission of Operator or its Principals;

EXHIBIT 3

contrary contained herein, in no event shall Owner be obligated to fund any amounts (a) required to pay any portion of the Management Fee or Base Rent, that are not consistent with the then applicable Annual Operations Budget (or the permitted deviations therefrom pursuant to Section 6.4) or (b) at any time Operator is in default under this Agreement beyond applicable notice and grace periods. In no event shall Owner be obligated to fund during the Term of this Agreement an aggregate amount in excess of Seven Hundred Fifty Thousand Dollars ($750,000.00) outstanding at any time (the "**Maximum Additional Funding Amount**"). Except as aforesaid, Owner shall provide and make the requested funds available for the use specified in the Funding Notice within the forty-five (45) day time period (each such funding event is referred to herein as an "**Additional Funding Installment**"). As used herein, "**Additional Funding Total**" shall mean the total amount of funds funded by Owner in connection with the Nightclub Venues Operations pursuant to this paragraph from and after the Opening Date and outstanding from time to time. The outstanding balance of the Additional Funding Total shall be treated as a loan made as of the date of each such Additional Funding Installment during the Fiscal Year in which the funding of such Additional Funding Installment is made, and shall accrue a preferred return of the Base Rate. The aggregate outstanding amount of the Additional Funding Total, together with all outstanding accrued preferred return thereon, shall be referred to herein as the "**Additional Funding Total Balance.**" The Additional Funding Total Balance shall be repaid to Owner pursuant to Section 4.2 above.

10.3 Cash Drawers. Owner shall provide Operator with cash for cashier drawers in amounts adequate for the initial operation of the Nightclub Venues and all funds so provided shall be deemed to be Pre-Opening Expenses. After the initial opening of the Nightclub Venues, Operator shall be responsible for maintaining adequate cash drawer balances to reflect the needs and operations of the Nightclub Venues.

10.4 Disputed Nightclub Venue Charges. If a guest of the Project complains about or refuses to pay all or any portion of any charge at the Nightclub Venues because of an issue concerning Operator's services or product, Operator shall use commercially reasonable efforts to address such complaints or refusals. If Owner determines that an excessive number of patrons are disputing bills, complaining about quality or service or refusing to pay a portion of their bills attributable to charges at the Nightclub Venues, then Operator shall, upon ten (10) days' prior written notice from Owner, meet with Owner to discuss possible procedures for improving quality and service.

11. No Partnership

Nothing in this Agreement shall constitute or be construed as creating a tenancy, employment, partnership, or joint venture between the Owner and Operator. Operator and Owner agree that Operator will perform its services under this Agreement as an independent contractor. Neither Party nor any of the respective agents will be considered employees or agents of the other Party hereunder or its Affiliates as a result of this Agreement.

12. Insurance

12.1 Owner's Insurance. During the Term of this Agreement, Owner shall provide and maintain the following insurance coverage, at its sole cost and expense (and not as an Operating Expense):

12.1.1 Personal property insurance covering Owner's personal property located on the Premises and all alterations, improvements and betterments existing or added to the Premises;

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

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

12.2 Operator's Insurance.

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

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

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

12.2.1.3 Workers compensation insurance which complies with the applicable workers compensation laws governing the State of Nevada;

12.2.1.4 Employers' liability insurance, with minimum coverages as follows: each accident - $1,000,000; disease (each employee) - $1,000,000; disease (policy limit) - $1,000,000;

12.2.1.5 Automobile liability insurance (any auto or owned, hired and non-owned vehicles), with a minimum coverage of $1,000,000 for combined single limit per accident for bodily injury and property damage;

12.2.1.6 Employee dishonesty insurance, with a minimum coverage of $1,000,000; and

12.2.1.7 Employment practices liability insurance, including third party coverage, with minimum coverages of $2,000,000 for each claim, and $2,000,000 in the aggregate.

12.2.2 Notwithstanding anything to the contrary contained herein, if the types of coverage or the minimum coverages for any or all of the Operator Policies as set forth herein is less than the coverage requirements required by owners or landlords of other high revenue nightclubs in Las Vegas, Nevada or by Owner's reasonable internal insurance requirements, or any lender of the Project, the scope and coverage to be maintained by Operator for each such coverage shall be the greater of the minimum coverage required herein and the minimum coverage so required by Owner or such lender.

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

12.2.4 All Operator Policies shall be issued by a carrier approved in advance by Owner (which approval shall not be unreasonably withheld), provided, that such carrier shall have a current A.M. Best Company rating of at least a-VII and shall be licensed in the State of Nevada. Owner may require Operator to utilize one or more carriers selected by Owner or participate in such pooled insurance programs with Project Owner and/or other operators of retail locations in the Project as Owner may reasonably designate, so long as the coverage and cost is competitive with what Operator could otherwise obtain. Except as prohibited by applicable Laws, the minimum coverages of the various Operator Policies may be adjusted by Owner from time to time as set forth above upon thirty (30) days written notice delivered to Operator notifying Operator of the adjustments required to the coverage amounts.

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

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

12.2.7 Not later than fifteen (15) days before the Effective Date and at least annually thereafter, Operator shall deliver to Owner certificates of insurance evidencing that all of the Operator Policies have been obtained and are in full force and effect and providing that the insurance company will endeavor to provide Owner with not less than thirty (30) days prior written notice of any cancellation or modification of any of the Operator Policies (or ten days in the case of non payment of premiums), including any changes to the coverage amounts. Failure by Operator to provide and maintain all Operator Policies as required herein, or failure to provide the certificates of insurance, shall be considered a default of this Agreement.

13. Indemnity

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

EXHIBIT 4

NIGHTCLUB MANAGEMENT AGREEMENT

THIS NIGHTCLUB MANAGEMENT AGREEMENT is made and entered into effective as of the 21st day of April, 2010, between **Nevada Restaurant Venture 1 LLC, a Delaware limited liability company** ("**Owner**"), and **Roof Deck Entertainment LLC, a Delaware limited liability company** ("**Operator**").

RECITALS

A. Nevada Property 1 LLC, a Delaware limited liability company (the "**Project Owner**") is the owner of that certain real property located in Las Vegas, Nevada, legally described on Exhibit "A" attached hereto (the "**Property**") upon which Project Owner is developing a multi use, multi-tower resort and casino development project consisting of some or all of, among other things, hotel operations, condominium components, condo-hotel units, fractionalized ownership units, time-share units, gaming operations, multiple food and beverage outlets, nightclub, spa/fitness center and other ancillary uses (the "**Project**").

B. Project Owner intends to include certain Nightclub Venues (as defined in Section 1 below) as part of the Project, to be located in various locations of the Project as more generally depicted on the site plans attached hereto as Exhibit "B" (collectively, the "**Premises**"). The Project will further include certain Bungalows and Bungalow Cabanas (as defined below) and other facilities.

C. Prior to (or concurrently with) the execution of this Agreement, Project Owner or its Affiliate, as landlord, and Owner, as tenant, has (or will) will enter into a certain lease agreement in the form attached hereto as Exhibit "D" whereby Owner will lease the Premises from Project Owner (the "**Lease**").

D. Operator, through its principals and employees, is experienced in the management and operation of nightclubs, bars, lounges, pool deck areas, cabanas, and associated facilities and operations and desires to manage and operate the Nightclub Venues on the terms and conditions hereinafter set forth.

E. Owner desires to retain Operator to manage and operate the Nightclub Venues on behalf of Owner on terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the promises and the mutual agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Owner and Operator agree as follows:

1. Definitions

For the purposes of this Agreement, the following terms shall have the following meanings:

"**Additional Development Fee**" shall have the meaning given to such term in Section 4.6.1;

"**Additional Funding Installment**" shall have the meaning given to such term in Section 10.2.3;

future item that Owner desires to include within Owner Mandatory Services, if Operator does not require such item, such item shall be included as part of Owner Optional Services rather than Owner Mandatory Services). The Parties acknowledge and agree that (i) Operator shall be required to utilize all of the Owner Mandatory Services provided by an Owner Party, (ii) Operator shall not obtain any item and/or service included within Owner Mandatory Services from any third Person, (iii) the Owner Party shall charge Operator the actual cost incurred by the Owner Party in providing such item and/or service, and (iv) the charge to Operator for such item and/or service shall be treated as an Operating Expense. Owner Mandatory Services shall initially be:

(1) usage by Nightclub Venues of technology services offered by an Owner Party and the maintenance thereof, including, without limitation, computer records control, maintenance, service or repair of any technology equipment or system (including, without limitation, computers, POS systems, and ethernet/wi-fi equipment), and any tech support in excess of the First Line Tech Support;

(2) laundry and similar cleaning services for linens, uniforms and similar items;

(3) PBX and telephone services; and

(4) cable television services.

"**Owner Net Profits**" shall mean, for any period, the Net Profits less the Incentive Fee;

"**Owner Optional Services**" shall mean any of the items and/or services which, at Owner's election and without any obligation to do so, may be offered by an Owner Party to Operator as set forth below. The Parties acknowledge and agree that (i) Operator has the right, at its option, to utilize any one or more of the Owner Optional Services, (ii) in lieu of Operator utilizing any of the Owner Optional Services offered by an Owner Party, Operator may, at its option, obtain such item and/or service from a third Person other than an Owner Party (provided that the same are in compliance with the CP System and any requirements of the Gaming Authorities), (iii) to the extent Operator elects to use any of the Owner Optional Services provided by an Owner Party, Operator shall be charged a rate or fee to be determined by the Owner Party from time to time for such particular Owner Optional Service, provided that such rate or fee shall be consistent with the rate or fee charged to the operators of food and beverage facilities located on Level P3 of the Project, and (iv) the charge to Operator for such item and/or service which Operator elects to utilize shall be treated as an Operating Expense. Owner Optional Services shall include:

(1) accounting, bookkeeping and other financial processing procedures provided to the Nightclub Venues;

(2) accounts payable, Project audit, accounts receivable, financial analysis and collection activities;

(3) cleaning of public and/or back of house areas.

"**Owner Party**" shall mean Owner, Project Owner and/or their Affiliates;

"**Owner Policies**" shall have the meaning given to such term in Section 12.2.5;

"**Owner's IP**" shall have the meaning given to such term in Section 15.3.5;

"**Project**" shall have the meaning given to such term in Paragraph A of the Recitals to this Agreement. The description of the various components of the Project set forth in Paragraph A of the Recitals are approximate and are subject to change at any time and in any manner as Project Owner may elect in its sole discretion in accordance with Section 9.7 hereof;

"**Project Coordinator**" shall have the meaning given to such term in Section 17;

"**Project Opening Date**" shall have the meaning given to such term in Section 5.1.3;

"**Project Owner**" shall have the meaning given to such term in Paragraph A of the Recitals to this Agreement;

"**Project Owner Operating Standards**" shall have the meaning given to such term in Section 17.2;

"**Property**" shall have the meaning given to such term in Paragraph A of the Recitals of this agreement;

"**Public Relations Campaign**" shall have the meaning given such term in Section 15.2.2;

"**Quarterly Statement**" shall have the meaning given to such term in Section 4.4.4;

"**Queuing Bar**" shall have the meaning given to such term in Section 3.4;

"**Queuing Bar Fee**" shall have the meaning given to such term in Section 3.4;

"**Rating**" shall have the meaning given to such term in Section 3.2;

"**Reimbursable Expenses**" shall mean the actual reasonable out-of-pocket costs incurred by Operator from and after the Effective Date for travel to Las Vegas (and other locations at the request or with the consent of Owner) and lodging expenses in Las Vegas (and such other places) incurred by Operator in connection with the ongoing operation of the Nightclub Venues to the extent permitted, and subject to, the Owner's (or Owner's Affiliates') company travel policy attached hereto as Exhibit "C;" provided that such travel policy shall only apply for travel (i) for Persons other than Operator's Principals or (ii) which is not otherwise included in the Operator G&A Allocation. Any travel or lodging expenses incurred by Operator for trips to Las Vegas for purposes other than primarily for the Nightclub Venues shall be reasonably allocated by Owner and Operator among the Nightclub Venues and the other nightclub, bar, lounge, restaurant or other facilities owned, operated, licensed or managed by Operator, Operator's Principals or their respective Affiliates in Las Vegas, with the Nightclub Venues benefiting from such trips. Reimbursable Expenses shall not include any matters or charges included in Operator Pre-Opening Expenses;

"**Required Investment Amount**" shall mean the aggregate amount of all costs, charges and expenses incurred by Owner in accordance with the Construction Budget and the Pre-Opening Budget (and deviations therefrom as may be expressly permitted hereunder) prior to the Opening Date in constructing, installing, fixturing, equipping, finishing, marketing, permitting, promoting and otherwise preparing to open for business at the Nightclub Venues, including without limitation the Premises Work, the Construction Costs, the FF&E Costs, inventory, initial Working Capital and the Pre-Opening Expenses;

"**Required Opening Date**" shall have the meaning given to such term in Section 5.2;

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

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

ST. PAUL'S OPPOSITION TO ASPEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: October 30, 2018
Time: 9:00 a.m.
Dept.: XXVI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

/ / /

VI. Nevada State Court Decisions

VII. Other State Court Decisions

VIII. Articles/Publications

I. INTRODUCTION

This matter arises from an underlying bodily injury action in which Defendants Aspen Specialty ins. Co. ("Aspen") and National Union Fire Insurance Company of Pittsburgh, Pa ("National Union") voluntarily elected to reject multiple reasonable settlement demands, choosing instead gamble and take their chances at trial. When their gamble lost resulting in a massive verdict substantially in excess of every pretrial settlement demand, the Insurers proceeded to ignore the gamble they took by refusing to fully indemnify their insureds. St. Paul now seeks to hold Aspen and National Union (collectively "Insurers") accountable for the gamble they took not accepting one of several reasonable settlement demands.

The Insurers have each filed separate pre-answer motions to dismiss St. Paul's First Amended Complaint ("FAC") by raising a variety of arguments. In a separate Opposition directed to National Union's brief, St. Paul responds to National Union's argument that it cannot be held liable under the legal theories of subrogation and contribution. As set forth in that brief, courts nationwide have held that equitable subrogation is available to an excess insurer to require the other insurer to pay the full verdict amount when it declines reasonable settlement demands in order to gamble in an effort to do better at trial. See Z*urich Amer. Ins. Co. v. Southern-Owners Ins. Co.*, 2018 WL 2299043 (U.S.D.C., D.C. Fl. 2018); *Preferred Professional Ins. Co. v. The Doctors Co.*, 419 P.3d 1020 (Colo. 2018); *Continental Cas. Co. v. Nationwide Mutual Ins. Co.*, 2015 WL 12832046 (C.D. Cal. 2015); *St. Paul Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 135 Hawaii 449 (Haw. 2015); A*CE American Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal.App.5th 159 (Cal. 2016). As Aspen makes the same argument in its motion, St. Paul incorporates herein the arguments made in response to National Union's motion rather than repeating each of them.

Aspen makes one additional argument in its motion - namely that it is not liable for the excess verdict because no settlement demand was ever made within the limits of its policy. Aspen's position is misplaced.

The Aspen policy is written with a $2,000,000 limit. See Declaration of G. Irons, Ex. A. In connection with the underlying case, Aspen rejected a settlement demand of $1,500,000. FAC ¶ 48. Aspen, therefore, received a demand within limits. End of story.

In arguing that its policy only affords $1,000,000 in coverage, Aspen cites to an endorsement to its policy which provides that the limits of each Coverage Part shall not exceed the highest limits of insurance under any one Coverage Part. This endorsement, however, is of no legal import since the policy is written with a limit of $2,000,000. Thus, the highest limit is $2 million. Given this, the FAC directly alleges a claim against Aspen for bad faith failure to settle.

Even assuming that the Aspen policy was only written with a $1,000,000 limit (which it is not), its failure to meaningfully investigate and evaluate the $1,500,000 demand exposes it to the full amount of the excess verdict. All insurance contracts include a duty to meaningfully investigate and evaluate all settlement demands. *Volungis v. Liberty Mutual Fire Insurance Company*, 2018 WL 3543030 (D. Nev. 2018); see also *USF Ins. Co. v. Smith's Food and Drug Center, Inc.*, 921 F.Supp.2d 1082 (D. Nev. 2013); *Striegel v. American Family Mut. Ins. Co.*, 2015 WL 4113178 (D. Nev. 2015), noting that an insurer's control of settlement discussions creates an inherent conflict requiring the insurer to act in good faith. Damages arising from an insurer's bad faith conduct present a question of fact. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009), citing *Allen v. Allstate Ins. Co.*, 656 F.2d 487, 489 (9th Cir.1981).

In this case, even assuming the Aspen policy only affords $1,000,000 in coverage, it is nonetheless liable and responsible for the excess verdict by failing to act in good faith by, inter alia, analyzing the demand, tendering its limit, advising AIG that it was willing to settle and communicating the demand to all interested parties in a timely and thorough fashion. FAC ¶¶ 72-83. Given these allegations, Aspen's argument fails.

Accordingly, for the reasons discussed herein, it is respectfully submitted that Aspen's motion is properly denied.

II. BACKGROUND FACTS[1]

This dispute arises out of a $160,500,000 verdict entered against both Cosmopolitan and Marquee in connection with the underlying Moradi matter. FAC ¶ 6. In the underlying matter, Moradi claimed he was brutally attacked and injured at the Marquee Nightclub so as to sustain

[1] As all pled facts are assumed true for purposes of a pre-answer motion to dismiss, St. Paul offers the following statement of facts as alleged in the First Amended Complaint.

lost income in excess of $100,000,000. FAC ¶ 12. In awarding in excess of $160,000,000, the jury agreed.

At all times relevant herein, Marquee managed and operated the Nightclub for the benefit of Cosmopolitan. FAC ¶ 25. Pursuant to a written contract, Marquee agreed to defend and indemnify Cosmopolitan for any and all claims while also agreeing that Cosmopolitan would be named as an additional insured under any liability policies Marquee procured. FAC ¶¶ 25, 44.

Aspen and National Union issued liability policies to Marquee pursuant to which Cosmopolitan qualified as an additional insured. FAC ¶¶ 16, 30, 31, 44. In response to a tender, Aspen agreed to provide a joint defense to both Marquee and Cosmopolitan while AIG, based on the large exposure, agreed to do the same. FAC ¶¶ 26-27, 35-37.

In providing a single attorney to represent both Cosmopolitan and Marquee in contravention of the substantial conflicts that existed between the parties, the Aspen necessarily agreed to fully and completely indemnify the parties given. FAC ¶¶ 27, 35. In joining the defense to save costs, the Aspen waived any right to assert any coverage issues and are estopped from doing so. FAC ¶¶ 130-135.

During the pendency of the case, several demands were made within the limits of the Aspen and National Union policies (collectively $26,000,000) that were reasonable in light of the damages alleged. FAC ¶¶ 48-53. One demand, a statutory Offer of Judgment conveyed during the underlying case, was for $1,500,000. FAC ¶ 48. Aspen, who issued a policy with a $2,000,000 limit, failed to accept this demand. FAC ¶ 48. In so doing, Aspen breached its obligations to Cosmopolitan (and Marquee) by, properly analyzing the demand, tendering its limit, advising AIG that it was willing to settle and communicating the demand to all interested parties in a timely and thorough fashion. FAC ¶¶ 72-83, 131-135.

Having lost their gamble after agreeing to waive rights by virtue of providing a joint defense, Aspen took the position that its exposure was capped at $1,000,000 while AIG was capped $25,000,000 So as to take its insured (Cosmopolitan) out of harm's way, St. Paul proceeded to fund the settlement . FAC ¶¶ 70-71. St. Paul now seeks reimbursement from Aspen, National Union and Marquee for the sums incurred and paid.

III. LEGAL STANDARDS

Nevada is a notice pleading jurisdiction; courts construe pleadings liberally to place into issue matters that are fairly noticed to an adverse party. *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). A motion to dismiss for failure to state a claim shall be denied unless it is established beyond a doubt that plaintiff is entitled to no relief under any set of facts that could be proved in support of the clam. *See Buzz Stew LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). All facts alleged in the complaint are presumed true and all inferences drawn in favor of the complainant. *Id*. Dismissal is not proper where the allegations of the complaint are sufficient to establish the elements of a claim for relief. *Stockmeir v. Nevada Dep't of Corr*., 124 Nev. 313, 316, 183 P.3d 133, 135 (2008).

In Nevada, a complaint need accomplish no more than to "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); *see also Nevada Civil Practice Manual*, Matthew Bender & Company, Answers and Responsive Motions, section 9.08[6][a] (Sixth Edition, 2016).

Further, where the action raises an issue of law that is one of first impression, as Aspen suggests St. Paul has done, motions to dismiss are highly disfavored. *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) (dismissals for failure to state a claim "'are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development,'") *quoting Baker v. Cuomo*, 58 F.3d 814, 818–19 (2d Cir.), *cert. denied sub nom., Pataki v. Baker*, 516 U.S. 980, 116 S.Ct. 488, 133 L.Ed.2d 415 (1995), *vacated in part on other grounds*, 85 F.3d 919 (2d Cir.1996) (en banc)); *Elec. Constr. & Maint. Co., Inc. v. Maeda Pac. Corp.*, 764 F.2d 619, 623 (9th Cir.1985)("'[t]he court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.'") (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil § 1357, at 601–03 (1969)); *Wright v. State of North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) ("to the extent plaintiffs' claims do not fall within 'the four corners of our prior

case law' dismissal not justified").

As discussed in greater detail below, all of the causes of action in the FAC are adequately pled, leaving Aspen little more to do that improperly argue the merits of the claims. Accordingly, the motion to dismiss should be denied.

IV. ARGUMENT

A. ASPEN'S ATTACK OF THE SUBROGATION AND CONTRIBUTION COUNTS IS MISPLACED

In its separately filed motion to dismiss, AIG provides a full-frontal assault on the doctrine of subrogation arguing both that subrogation is not available under Nevada law and, even if it is, that St. Paul does not qualify as Cosmopolitan's subrogee. These arguments evidence either an astonishing lack of understanding of subrogation or, more likely, a cynical attempt consciously to lead the court astray.

In this motion, Aspen makes many of the same arguments, including that subrogation is unavailable because there is no contract between St. Paul and Aspen, and that because St. Paul settled on Cosmopolitan's behalf, subrogation is inappropriate because Cosmopolitan suffered no damage. St. Paul addressed each of the issues raised in its motion in its opposition to AIG's motion. For the purposes of brevity and to conserve judicial resources, St. Paul does not address these issues here, but instead incorporates by reference herein each and every one of its subrogation arguments from its concurrently filed opposition to National Union's motion to dismiss.

B. ST. PAUL PROPERLY ALLEGES A CLAIM AGAINST ASPEN FOR BAD FAITH FAILURE TO SETTLE

For the reasons discussed at length in the accompanying opposition to National Union's motion to dismiss, equitable and contractual subrogation are appropriate claims under Nevada. Thus, the only issue in the motions to dismiss is whether the claims are properly pled.

Aspen's motion does not contend that there is no such thing under Nevada law as a bad faith breach of the duty to settle. Rather, Aspen's motion assumes this is a viable claim if properly pled. Aspen argues that St. Paul did not properly plead breach of the duty to settle

because the St. Paul's allegations are contrary to the plain language of Aspen's insurance policy. St. Paul pled that had Aspen had limits of $2 million available to settle the *Moradi* action, and that an Offer of Judgment on December 10, 2015 for $1.5 million was, therefore, within the Aspen limits. But Aspen insists, incorrectly, that its policy provided limits of only $1 million.

According to Aspen, its policy contains an endorsement stating that if the policy contains two or more "Coverage Parts" that provide coverage for the same "occurrence" or offense, the maximum limit of insurance under all Coverage Parts shall not exceed the highest limit under any one Coverage Part. Oddly, Aspen then proceeds to completely misinterpret the plain language of the endorsement. In fact, the Commercial Generally Liability ("CGL") Coverage Part itself provides both bodily injury/property damage coverage, and personal and advertising injury coverage, each with a limit of $1 million, for a total available limit of $2 million. The claims in the *Moradi* action trigger coverage under both coverages of the CGL Coverage Part. Therefore, $2 million was available to settle claims against Aspen's insureds (including Cosmopolitan), the $1.5 million settlement demand was within the limits, and Aspen unreasonably rejected the settlement offer.

1. Coverages A and B of the Commercial General Liability Coverage Part Are Not Themselves "Coverage Parts" But Rather One Coverage Part

Aspen includes a specious argument in its brief that it cannot owe a $1 million limit each under both Coverage A (bodily injury and property damage coverage) and Coverage B (personal and advertising injury limit) of the CGL Coverage Part. Aspen Motion, 17:19-20:2. But Aspen simply misrepresents or misconstrues its own policy. The section Aspen quotes does not apply to the separate and distinct Coverages A and B of the CGL Coverage Part, but rather to all of the Coverage Parts that comprise the policy such as liquor liability, and which are specifically referred to as "Coverage Parts" throughout the policy. The simple distinction here is between "Coverage Parts" and the distinct *coverages* within them. According to the plain language of the Aspen policy, Aspen owed both its bodily injury/property damage *and* personal and advertising injury limits for a total of $2 million, which in turn means that it could have and should have settled this

case itself when the claimant made his $1.5 million demand.

The provision Aspen relies on, found in endorsement entitled “Amendment – Common Policy Conditions” states: "If this policy contains two or more Coverage Parts providing coverage for the same 'occurrence,' 'accident,' 'cause of loss,' 'loss' or offense, the maximum limit of insurance under all Coverage Parts shall not exceed the highest limit of insurance under any one Coverage Part." Aspen Motion, 19:4-6.

As a preliminary matter, by it plain terms, Aspen’s endorsement modifies the policy’s “Common Policy Conditions,” an independent single-page form that has nothing at all to do with “Coverage Parts” or limits. Aspen’s argument fails simply because the Endorsement does not do what Aspen says it does.

Aspen never addresses the fact that the highest limit is $2 million or that there are separate and distinct occurrences (the bodily injury) and offenses (the false imprisonment). Thus, its motion fails to address the elements of the very policy language it cites.

Regarding the single “Coverage Part,” while capitalized, it is not specifically defined. However, even a cursory review of the first page of Aspen's policy's declarations reveals the following:

> THIS POLICY CONSISTS OF THE FOLLOWING ***COVERAGE PARTS*** FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT PREMIUM
>
> | | |
> |---|---|
> | COMMERCIAL GENERAL LIABILITY ***COVERAGE PART*** | $525,000 |
> | COMMERCIAL PROPERTY ***COVERAGE PART*** | $N/A |
> | LIQUOR LIABILITY ***COVERAGE PART*** | $INCLUDED |
> | TERRORISM PREMIUM | $N/A |
>
> . . .
>
> FORMS APPLICABLE TO ALL ***COVERAGE PARTS***; AS PER SCHEDULE OF APPLICABLE FORMS
>
> (Emphasis added).

This language makes it blatantly obvious that the Coverage Parts referred to in the endorsement are the Commercial General Liability Coverage Part, the Commercial Property Coverage Part, the Liquor Liability Coverage Part, etc. It does not refer to separate *coverages* within a particular Coverage Part, such as the bodily injury/property damage coverage and personal and advertising injury coverage that are both within the CGL Coverage Part. Nothing in the endorsement or anywhere else in the Aspen policy indicates that the two coverages cannot both respond to an appropriate claim where, as here, the underlying action alleges both bodily injury cause by an accident (Marquee employees' negligence) and personal injury arising from an offense (Marquee employees' false imprisonment of Moradi). Aspen's argument fails because the endorsement on which it relies does not apply as it contends.

In addition, the Commercial General Liability Declarations provide:

LIMITS OF INSURANCE

EACH OCCURRENCE LIMIT	$1,000,000	
DAMAGES TO PREMISES RENTED TO YOU LIMIT	$100,000	Any one premises
MEDICAL EXPENSE LIMIT	$N/A	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	$1,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT		$2,000,000
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT		$2,000,000

It is plain from this language that there is an "each occurrence" limit of $1,000,000, applicable to "bodily injury" and property damage claims that arise from an "occurrence," as specified in Coverage A, and a *separate* "personal & advertising injury limit" of $1,000,000 limit applicable to an offense committed by "any one person or organization," as specified in Coverage B. The fact that these two $1,000,000 limits may be applied separately and independently is further supported the "general aggregate limit," which is $2,000,000.

Further, the other insurance section of the Aspen policy on form CG0001 at section IV(4) provides:

> 4. Other Insurance
>
> If other valid and collectible insurance is available to the insured for a loss we cover ***under Coverages A and B of this Coverage Part***, our obligations are limited as follows . . .
>
> (Emphasis added).

The other insurance clause specifically states that Coverages A and B both fall under a single Coverage Part, the CGL Coverage Part. There is no other way to interpret the provision than that Coverages A and B are not separate Coverage Parts as that term is used in the Aspen endorsement but separate *coverages*.

Other sections of the CG0001 form which refer to "this Coverage Part" include Section II(2)(d) (regarding the rights and duties of legal representatives under this Coverage Part), the last paragraph of Section III Limits of Insurance (regarding applicability of the limits within this Coverage Part annually), Section IV(1) (regarding bankruptcy not relieving Aspen of its obligations under this Coverage Part), Section IV(3) (regarding legal action against Aspen under this Coverage Part), Section IV(5) (regarding the premium shown for this Coverage Part), the final paragraph of Section IV(4) (stating that Aspen does not share with policies excess to the limits of this Coverage Part), Section IV(7) (regarding duties assigned the first named insured in this Coverage Part), Section IV(8) (regarding Aspen's right of subrogation for payments made under this Coverage Part), and Section IV(9), (regarding when Aspen decides not to renew this coverage part). Each of these sections is also drafted in such a way that they indicate it is the commercial general liability coverage as a whole which is the relevant Coverage Part, not Coverages A and B within it. The liquor liability Coverage Part also includes analogous references on form CG 00 33 12 14, such as the other insurance provision at section IV(4) of that form. NU003059 ("If other valid and collective insurance is available to the insured for a loss we cover under this Coverage Part . . .").

Likewise, the Calculation of Premium endorsement on form IL 00 03 07 02 lists the following coverage parts to which it is potentially applicable: Boiler and Machinery Coverage Part, Capital Assets Program (output policy) Coverage Part, Commercial Automobile Coverage

Part, ***Commercial General Liability Coverage Part***, Commercial Inland Marine Coverage Part, Commercial Property Coverage Part, Crime and Fidelity Coverage Part, Employment-Related Practices Liability Coverage Part, Farm Coverage Part, Liquor Liability Coverage Part, Owners and Contractors Protective Liability Coverage Part, Pollution Liability Coverage Part, Products/Competed Operations Liability Coverage Part, Professional Liability Coverage Part, and Railroad Protective Liability Coverage Part. This also unambiguously indicates that Coverages A and B within the CGL Coverage Part are not themselves "Coverage Parts" for the purposes of the Aspen endorsement or for any other purpose.

The policy changes endorsements (at NU00310-11) each refer to "Coverage Parts Affected" specifying they apply to the "Commercial General Liability Coverage Part." Numerous endorsements, including the Total Lead Exclusion, Silica Exclusion, contractual liability - amendments, hired auto and non-owned auto liability, and even the endorsement Aspen relies on itself, modify only the "Commercial General Liability Coverage Part." This confirms that the Coverage Part is the whole General Liability Coverage Part, not those coverages within it.

Reading the policy as a whole, a "Coverage Part" therefore unambiguously does not refer separately to Coverage A and Coverage B within the CGL Coverage Part. Rather, it can only refer to those Coverage Parts specified in the Declarations. Even if Aspen's policy were ambiguous in this regard, which it is not, that ambiguity would be construed against Aspen and in favor of the insured, to which St. Paul is subrogate, under Nevada law. *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 684, 99 P.3d 1153, 1156 (2004) ("[A]ny ambiguity or uncertainty in an insurance policy must be construed against the insurer and in favor of the insured."). Accordingly, the Coverage Part language in Aspen's endorsement does not eliminate its insured's right to separate coverage and separate limits under both the bodily injury/property damage *and* personal and advertising injury coverages in the CGL Coverage Part. This means, assuming both coverages were triggered by the *Moradi* action (see discussion below), that Aspen had $2 million in limits available to settle the claims when it received a demand to settle globally for $1.5 million. As it breached the duty to settle, it is in bad faith and liable for the entirety of the excess judgment.

/ / /

2. Both the Bodily Injury/Property Damage Coverage and the Personal and Advertising Injury Coverage Were Triggered by the *Moradi* Action

Cosmopolitan tendered the *Moradi* action to Aspen for coverage under the Aspen policy. FAC ¶ 26. Aspen acknowledged coverage for Cosmopolitan (FAC ¶ 27) by reservation of rights letter dated August 5, 2014 (the "ROR"). The ROR summarizes the *Moradi* action, stating that it asserts the following causes of action against Cosmopolitan: *"Assault & Battery, Negligence, Intentional Infliction of Emotional Distress,* and *False Imprisonment."* Cite. The ROR then quotes the insuring agreements for *both* Coverage A and Coverage B, as well as the definitions of "bodily injury," "occurrence" and "personal and advertising injury." Notably, the definition of "personal and advertising injury" includes "false arrest, detention or imprisonment."

Under "Aspen's Coverage Position," the ROR states: *"Aspen will agree to provide a complete defense to Nevada Property 1 LLC*[2] *subject to a complete reservation of rights of outlined below:"* The ROR then discusses the bodily injury coverage (Coverage A) and with respect to Coverage B states: "Aspen also reserve the right to disclaim coverage for claims of personal injury caused by or at the direct of Nevada Property 1, LLC with the knowledge that the act would violate the rights of another and would inflict personal injury." Plainly, if Aspen reserved the right to disclaim coverage under Coverage B, it is because Aspen concluded that the allegations of the *Moradi* action triggered Coverage B. If such were not the case, Aspen would not have to reserve the right to disclaim coverage under Coverage B.

Even so, the ROR does not state that only a single $1 million limit is available for both Coverage A and Coverage B when both are triggered.[3] Although the ROR states that Aspen reserves the right to supplement, amend and/or modify its coverage position, it never did so.

On or about December 10, 2015, Moradi served an Offer of Judgment for $1,500,000 pursuant to Nevada Rule of Civil Procedure 68 and Nevada Revised Statute 17.115 (FAC ¶ 48) while the ROR was in effect. The ROR demonstrates conclusively that both Coverage A and

---

[2] Cosmopolitan is a dba of Nevada Property 1 LLC.

[3] The ROR does state that the Aspen Policy had policy limits of $1 million *each occurrence* and $2 million in the aggregate. But as reflected in the Coverage A insuring agreement, "occurrence" applies to "bodily injury" coverage. Coverage B has a separate $1 million limit for "personal injury" caused by an "offense".

Coverage B had been triggered at the time of the Offer of Judgment and, therefore, $2 million was available to Aspen to settle the entire case and thus eliminate Cosmopolitan's massive exposure. Nevertheless, Aspen, which had the ability itself to settle the case, instead allowed the Offer of Judgment to lapse without even offering a single $1 million limit. FAC ¶¶ 48, 49. Thus, contrary to Aspen's misleading argument, St. Paul has in fact sufficiently alleged a cause of action against Aspen for bad faith breach of the duty to settle.

C. ST. PAUL PROPERLY ALLEGES A CAUSE OF ACTION AGAINST ASPEN FOR EQUITABLE ESTOPPEL

Aspen, like National Union, argues that St. Paul has not adequately pled Equitable Estoppel because the doctrine had not been recognized as a standalone cause of action under Nevada law and, even it had, it is improperly asserted as a defense to a defense. In so doing, Aspen relies almost exclusively on National Union's argument that the St. Paul policy is not excess to the National Union policy, as St. Paul alleges.

St. Paul addresses these arguments at length in its opposition to National Union's motion to dismiss and, in the interests of justice and judicial economy, incorporates these arguments in full herein by this reference. Even so, it bears repeating that Aspen's and National Union's contention that as a co-excess insurer St. Paul "could have taken any actions it wanted to settle the [underlying] case regardless of National Union's policy" (Aspen's Motion, 21:7-13), is false, misleading, contrary to the allegations of the FAC and unsupported by any admissible evidence.

To the contrary, St. Paul alleges that Moradi filed his complaint on April 4, 2014 (FAC ¶ 8), Aspen acknowledged coverage for Cosmopolitan under its policy (FAC ¶ 27) and appointed conflicted defense counsel (FAC ¶ 28). Subsequently, Cosmopolitan tendered the *Moradi* action to National Union (FAC ¶ 34), which assumed the defense, without a reservation of rights[4] and appointed its own conflicted defense counsel (FAC ¶ 35-37). Aspen and National Union proceeded to keep St. Paul in the dark regarding the litigation until finally providing notice on February 13, 2017, nearly three full years after the *Moradi* action was commenced (FAC ¶ 62).

[4] National Union eventually did get around to issuing a reservation of rights on March 21, 2017, *the day after trial began*. FAC ¶ 55. Cosmopolitan rejected the late and improper reservation and demand that National Union immediately settle the case within its limits. FAC ¶ 58.

Notice was not provided to St. Paul until after an Offer of Judgment of $1.5 million, within the limits of the Aspen policy, and an Offer of Judgment for $26 million, within the combined Aspen/National Union limits, were allowed to lapse. Nor did Aspen or National Union inform St. Paul of the $26 million Offer of Judgment made on March 9, 2017, until that offer too had expired. Aspen and National Union intentionally kept St. Paul in the dark so they could continue to control the defense and in furtherance of their plan to roll the dice and gamble with their insureds' money. Therefore, the assertion that St. Paul could have spent its own money at any time to settle the case is not only a fiction, it is intentionally and cynically misleading.

For these reasons and as explained in greatly detail in St. Paul's opposition to National Union's motion to dismiss, filed concurrently herewith, the motion to dismiss St. Paul's cause of action for equitable estoppel should be denied.

V. CONCLUSION

For all the foregoing reasons, St. Paul respectfully requests the Court deny Aspen's motion to dismiss in its entirety. In the alternative, St. Paul respectfully requests that the Court grant leave to amend the first amended complaint.

Dated: August 15, 2018

MORALES FIERRO & REEVES

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

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

CERTIFICATE OF SERVICE

I, Noemi Gonzalez, declare that:

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

On the date specified below, I served the following document:

- ST. PAUL'S OPPOSITION TO ASPEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT;

Service as effectuated in the following manner:

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

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

Dated: August 15, 2018

Noemi Gonzalez

OPP

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, 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 ST. PAUL'S OPPOSITION TO AIG'S MOTION TO DISMISS FIRST AMENDED COMPLAINT Hearing Date: October 30, 2018 Hearing Time: 9:30 AM

TABLE OF CONTENTS

///

TABLE OF AUTHORITIES

Federal Decisions

Rules /Statutes

Other

INTRODUCTION

This matter arises from an underlying bodily injury action in which Defendants Aspen Specialty Insurance Company ("Aspen") and National Union Fire Insurance Company of Pittsburgh, Pa ("AIG") (collectively "Carrier Defendants") voluntarily elected to reject multiple reasonable settlement demands choosing instead to gamble and take their chances at trial. When their gamble failed resulting in a massive verdict substantially in excess of every pretrial settlement demand, the Carrier Defendants proceeded to ignore the gamble they took by refusing to fully indemnify their insureds. St. Paul Fire & Marine Insurance Company ("St. Paul") now seeks to hold Aspen and AIG accountable for the gamble they took not accepting one of several reasonable settlement demands.

The Carrier Defendants have each filed separate pre-answer motions to dismiss St. Paul's First Amended Complaint ("FAC") by raising a variety of arguments. In this Opposition, St. Paul responds to AIG's argument that it cannot be held liable under the legal theories of subrogation and contribution. In connection with other Oppositions filed herewith, St. Paul separately responds to the balance of arguments made by the other defendants.

AIG moves to dismiss St. Paul's FAC, and specifically St. Paul's second, fourth, seventh and eighth causes of action against it, once again essentially claiming the presence of other insurance provided it license to commit bad faith. AIG apparently forgets that on a motion to dismiss, the allegations of the complaint are presumed to be true. Rather than argue deficiencies in the pleadings, AIG's motion focuses primarily on the substance of claims asserting, erroneously, that St. Paul will be unable to prove them. AIG's motion is without merit and should be denied.

AIG does not dispute that it breached the duty to settle on behalf of its insured, Cosmopolitan, that it breached the duty to provide its insured with an adequate defense by defending both Marquee and Cosmopolitan with the same lawyers despite a blatant conflict or that it paid nothing on Cosmopolitan's behalf to settle its liability in the underlying personal injury suit. As a result of its conduct, judgment was entered against Cosmopolitan for $160,500,000, far more than AIG's limits and St. Paul settled the claim on Cosmopolitan's behalf. As alleged in St. Paul's first amended complaint, it is entitled to recover the amount it paid on behalf of Cosmopolitan

because it is subrogated to Cosmopolitan's breach of contract and bad faith claims against AIG, and it has its own right based on the cause of action for equitable contribution.

AIG's attacks on the breach of contract and bad faith claims are easily parried. Nevada recognizes the right of subrogation to allow a party who pays another's injuries to recover the amount it paid from the guilty tortfeasor. A Nevada federal court has recognized this right in the insurance context. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 (D. Nev. June 9, 2016) ("*Colony I*"); *see also, Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. July 5, 2018) ("*Colony II*"). Subrogation is simply a means by which a party who has been required to satisfy the loss of another is able to pursue recovery. *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428 (2010); *Laffranchini v. Clark*, 39 Nev.48 (1915). In the context of an insurer's exposure for a verdict in excess of limits in lieu of accepting a reasonable settlement demand, courts nationwide have held that equitable subrogation is available to the excess insurer to require the other insurer to pay the full verdict amount. *Zurich Amer. Ins. Co. v. Southern-Owners Ins. Co.*, 2018 WL 2299043 (U.S.D.C., D.C. Fl. 2018); *Preferred Professional Ins. Co. v. The Doctors Co.*, 419 P.3d 1020 (Colo. 2018); *Continental Cas. Co. v. Nationwide Mutual Ins. Co.*, 2015 WL 12832046 (C.D. Cal. 2015); *St. Paul Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 135 Hawaii 449 (Haw. 2015); *ACE American Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal.App.5th 159 (Cal. 2016). By virtue of the case law above and cited herein, equitable subrogation constitutes a valid legal theory pursuant to which St. Paul may seek damages in this case.

AIG's argument regarding superior equities is improper on a motion to dismiss because it violates the bedrock principle that on such a motion, the allegations of the complaint are deemed true. Even so, St. Paul has the far superior equities because AIG controlled Cosmopolitan's defense through conflicted counsel, at least twice failed to settle the claims against Cosmopolitan within its limits when it had the opportunity, failed to notify St. Paul about the Moradi action until the eve of trial, refused St. Paul's reasonable requests for information about the case, and did not inform St. Paul of a pending settlement demand until after it had expired. Thus, the motion as to the second and fourth causes of action must be denied.

AIG cites no authority for the argument that a claim for equitable contribution between Carrier Defendants is not available under Nevada law because there is none. Rather, the Nevada Supreme Court has not considered the issue. Without any rational basis and citing no authority, AIG argues that even if the claim were valid, exhaustion of its limits insulates it from liability for contribution. But AIG is barred by law from exhausting its limits to resolve claims against one insured after squandering multiple opportunities to resolve claims on behalf of all its insureds. Because AIG had sufficient policy limits to resolve all claims at several points in the underlying case, it cannot now claim that it may simply pay the policy limit on behalf of one insured and wash its hands of the mess it created. St. Paul should be permitted to proceed with this cause of action.

AIG's only arguments against the cause of action Equitable Estoppel are that it is unavailable when asserted as a defense to a defense, and is derivative of the other causes of action, so it must fail along with them. But the arguments make no sense. Nevada recognizes a claim for equitable estoppel and St. Paul had pled the necessary elements.

For all of the foregoing reasons, AIG's motion to dismiss St. Paul's First Amended Complaint should be denied.

BACKGROUND FACTS[1]

This dispute arises out of a $160,500,000 verdict entered against both Cosmopolitan and Marquee in connection with the *Moradi* matter ("Underlying Action"). FAC ¶ 6. In the Underlying Action, Moradi claimed he was brutally attacked and injured at the Marquee Nightclub so as to sustain lost income in excess of $100,000,000. FAC ¶ 12. In awarding in excess of $160,000,000, the jury agreed.

At all times relevant herein, Marquee managed and operated the Club Marquee for the benefit of Cosmopolitan. FAC ¶ 25. Pursuant to a written contract, Marquee agreed to defend and indemnify Cosmopolitan for any and all claims while also agreeing that Cosmopolitan would be named as an additional insured under any liability policies Marquee procured. FAC ¶¶ 25, 44.

[1] AIG's recitation of the "facts" in its motion is misleading and incomplete. As all pled facts are assumed true for purposes of a pre-answer motion to dismiss, St. Paul offers the following statement of facts as alleged in the First Amended Complaint.

Aspen and AIG issued liability policies to Marquee pursuant to which Cosmopolitan qualified as an additional insured. FAC ¶¶ 16, 30, 31, 44. In response to a tender, Aspen agreed to provide a joint defense to both Marquee and Cosmopolitan while AIG, based on the large exposure, agreed to do the same. FAC ¶¶ 26-27, 35-37.

Carrier Defendants provided a single attorney to represent Cosmopolitan and Marquee jointly, despite the fact that Cosmopolitan was entitled to be indemnified by Marquee pursuant to contract, thus waiving Cosmopolitan's rights. FAC ¶¶ 27, 35. Carrier Defendants mishandled the claims and then failed to accept reasonable settlement offers within their limits and failed to inform either Cosmopolitan or St. Paul of opportunities to settle before the offers expired. FAC ¶¶ 131 - 135And throughout the Underlying Action, Carrier Defendants consistently represented that their coverage for Cosmopolitan was primary to St. Paul's coverage and, therefore, that Carrier Defendants were responsible for defending and resolving the Underlying Action. FAC ¶ 132, Based on the totality of their conduct, Carrier Defendants cannot now claim they were entitled to pay all policy limits on behalf of one of the two insureds.

During the pendency of the case, several demands were made within the limits of the Aspen and AIG policies (allegedly a collective $26,000,000) that were reasonable in light of the damages alleged. FAC ¶¶ 48-53. Rather than accept these demands, the Carrier Defendants elected to reject the demands and instead unreasonably take their chances that they would do better at trial. The Carrier Defendants proceeded to lose this gamble by virtue of the jury awarding damages in excess of $160,500,000.

Having lost their gamble the Carrier Defendants then took the position that their exposure was capped at $26,000,000 and that they would pay the alleged policy limit to protect Marquee. So as to take Cosmopolitan out of harm's way, St. Paul proceeded to fund Cosmopolitan's settlement. FAC ¶¶ 70-71. St. Paul now seeks reimbursement from Aspen, AIG and Marquee for the sums incurred and paid.

LEGAL STANDARDS

Nevada is a notice pleading jurisdiction; courts construe pleadings liberally to place into issue matters that are fairly noticed to an adverse party. *Nevada State Bank v. Jamison Family*

Partnership, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). A motion to dismiss for failure to state a claim shall be denied unless it is established beyond a doubt that plaintiff is entitled to no relief under any set of facts that could be proved in support of the clam. *See Buzz Stew LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). All facts alleged in the complaint are presumed true and all inferences drawn in favor of the complainant. *Id*. Dismissal is not proper where the allegations of the complaint are sufficient to establish the elements of a claim for relief. *Stockmeir v. Nevada Dep't of Corr*., 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). As discussed below, St. Paul has sufficiently alleged all the elements of all of the causes of action in the FAC, so the motion to dismiss should be denied.

In Nevada, a complaint need accomplish no more than to "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); *see also Nevada Civil Practice Manual*, Matthew Bender & Company, Answers and Responsive Motions, section 9.08[6][a] (Sixth Edition, 2016).

Further, where the action raises an issue of law that is one of first impression, as AIG suggests St. Paul has done, motions to dismiss are highly disfavored. *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) (dismissals for failure to state a claim "'are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development,'") *quoting Baker v. Cuomo*, 58 F.3d 814, 818–19 (2d Cir.), *cert. denied sub nom., Pataki v. Baker*, 516 U.S. 980, 116 S.Ct. 488, 133 L.Ed.2d 415 (1995), *vacated in part on other grounds*, 85 F.3d 919 (2d Cir.1996) (en banc)); *Elec. Constr. & Maint. Co., Inc. v. Maeda Pac. Corp.*, 764 F.2d 619, 623 (9th Cir.1985)("'[t]he court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.'") (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil § 1357, at 601–03 (1969)); *Wright v. State of North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) ("to the extent plaintiffs' claims do not fall within the four corners of our prior case law dismissal not justified").

As discussed in greater detail below, all of the causes of action in the FAC are adequately pled, leaving AIG little more to do than improperly argue the merits of the claims. Accordingly, the motion to dismiss should be denied.

ARGUMENT

AIG's motion provides a full-frontal assault on the doctrine of subrogation arguing both that subrogation is not available under Nevada law and, even if it is, that St. Paul does not qualify as Cosmopolitan's subrogee. These arguments evidence a lack of basic understanding of subrogation. Accordingly, St. Paul's opposition begins with a brief discussion of the history and purpose of the doctrine. St. Paul then explains why it is subrogated to Cosmopolitan's claims. Finally, St. Paul addresses the claims for equitable contribution and equitable estoppel, which do not depend on subrogation. Contrary to AIG's assertions, all of these claims are adequately pled under the facts and law. Therefore, AIG's motion must be denied. [2]

I. ST. PAUL IS SUBROGATED TO COSMOPOLITAN'S CLAIMS

A. The Law of Subrogation

1. The Origin, Meaning, and Purpose of the Doctrine

"Even lawyers find words like 'indemnity' and 'subrogation' ring of an obscure Martian dialect." *Herrick Corp. v. Canadian Ins. Co.*, 29 Cal.App.4th 753, 756, 34 Cal.Rptr.2d 844, 845 (1994); *see also, U.S. Fid. & Guar. Co. v. Federated Rural Elec. Ins. Corp*., 37 P.3d 828, 832 (Okla. 2001) ("Even a cursory reading of judicial decisions in this area reveals a great deal of confusion in the courts about the equitable doctrines of subrogation and contribution, their differences and their appropriate applications to various factual circumstances."). It is not surprising then that sometimes even courts are confused by the concepts.

The doctrine of subrogation has been an integral part of the law for more than three centuries. M. L. Marasinghe, "An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine I", 10 Val. U. L. Rev. 45, 48 (1975) "Since *Mason v. Sainsbury*, 3 Doug. 61,

[2] AIG challenges St. Paul's right to stand in Cosmopolitan's shoes, but does not question that Cosmopolitan would have claims against AIG for providing conflict-free counsel and for failing to accept reasonable settlement demands within AIG's limits.

99 Eng. Rep. 538 (1782), the right of the insurer to stand in the place of the assured has been unquestionably accepted and applied in the common law courts, with the same ease as it has been in the courts of equity." *Id.* at 49.

"Subrogation is not a cause of action in and of itself," but rather an equitable remedy that allows one party to assert the cause of action of another. 73 Am. Jur. 2d Subrogation § 75; *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 742, 923 A.2d 971, 1005 (2007), *aff'd*, 403 Md. 367, 942 A.2d 722 (2008). Under this doctrine, when an insurer pays for an injury to another caused by a third party, then the insurer has the right to step into the injured party's shoes to recover the amount paid from the wrong doer. *Id.* Thus, the burden of the loss is placed on the party that caused it, where it belongs. 73 Am. Jur. 2d Subrogation § 2; *Kim v. Lee*, 145 Wash. 2d 79, 88, 31 P.3d 665, 669 (Wash. 2001) ("Subrogation is fundamentally an equitable concept designed 'to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it.'").

Foundational to the operation of subrogation is that the party who would have been injured was not in fact injured, because the insurer paid for the injury. Indeed, in the very first subrogation case under the common law, the central issue was whether the insurer could stand in the shoes of its insured given that the insured had not itself suffered injury because the insurer had already paid its loss. The court rejected the argument because the loss should fall on the wrongdoers, thereby introducing the doctrine of subrogation to the common law. *Mason v. Sainsbury, supra* at 540.

Given the effectiveness of subrogation in placing the burden of wrongdoing on the wrongdoer, the courts have repeatedly held that it is to be liberally and expansively applied, even where it has not been applied before. As explained in a well-respected secondary source:

> Subrogation, as a doctrine, is not fixed and inflexible nor is it static, but rather, it is sufficiently elastic to meet the ends of justice. Furthermore, the doctrine is not constrained by form over substance, nor is it within the form of a rigid rule of law. Thus, the mere fact that the doctrine has not been previously invoked in a particular situation is not a prima facie bar to its applicability.

73 Am. Jur. 2d Subrogation § 7 "Flexibility and Scope"; *see also, e.g., Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. (Ill.) 2000) ("doctrine of subrogation should be applied 'where it effectuates a just resolution of the rights of the parties, irrespective of whether the doctrine has

previously been invoked in the particular situation.'").

To argue that subrogation should not be applied in a particular context simply because it has not been applied there before (as AIG does here) is to misunderstand the basis of the doctrine in natural justice, equity, and good conscience. 73 Am. Jur. 2d Subrogation § 7 ("the object of subrogation to do complete and perfect justice between the parties without regard to form or technicality, the remedy will be applied in all cases where demanded by the dictates of equity, good conscience, and public policy.").

2. Equitable Subrogation

Equitable subrogation arises by operation of law based on the legal consequences of the acts and relationships between the parties. 73 Am. Jur. 2d Subrogation at § 5. As such, "it is a broad doctrine . . . given a liberal application; the doctrine of equitable subrogation is highly favored in the law." *Id*. at § 5 *citing U.S. Bank Nat. Ass'n v. Hylton*, 403 N.J. Super. 630, 637, 959 A.2d 1239, 1243 (Ch. Div. 2008). Accordingly, "'equitable subrogation' includes every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity and good conscience should have been discharged by the latter." *Id.*

3. Contractual, or "Conventional" Subrogation

Contractual subrogation developed later, and has its basis in an agreement of the parties granting the right to pursue reimbursement from the responsible third party in exchange for payment of a loss. 73 Am. Jur. 2d Subrogation § 4; *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 646 (Tex. 2007). As contractual subrogation is based on contract, it is governed by the terms of the agreement.[3] 73 Am. Jur. 2d Subrogation § 4. ("A contractual subrogation clause expresses the parties' intent that subrogation should be controlled by agreed contract terms, not external rules imposed under the common law." *Puente v. Beneficial Mortg. Co. of Indiana*, 9 N.E.3d 208 (Ind. Ct. App. 2014)).

One significant difference between equitable and contractual subrogation is that "a subrogee

[3] The St. Paul policy states: "If any Insured has rights to recover from any other person or organization all or part of any payment we have made under this policy, those rights are transferred to us." FAC 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.")

invoking contractual subrogation can 'recover without regard to the relative equities of the parties'" or before the insured has been made whole. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647 (Tex. 2007); *see, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C.*, 646 A.2d 966, 971 (D.C. 1994) ("the superior equities doctrine, although applicable to equitable subrogation claims, has no application in cases of conventional subrogation and assignment.")

Both types of subrogation may exist independently and simultaneously alongside each other, *i.e.*, they are not mutually exclusive, and the non-existence of one does not preclude the other. 73 Am. Jur. 2d Subrogation § 3; *Roberts v. Total Health Care, Inc*., 109 Md. App. 635, 648, 675 A.2d 995, 1001 (1996), *aff'd*, 349 Md. 499, 709 A.2d 142 (1998); *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1538 (10th Cir. 1996). Thus, a party may assert claims for equitable and contractual subrogation simultaneously where it has grounds to do so, and as St. Paul has done here.

B. Nevada's Long History of Applying Subrogation Where It Serves Justice

1. Nevada Recognizes That Subrogation Applies As an Equitable Remedy Whenever It is Just

In accord with jurisdictions nationally, Nevada courts have long applied the doctrine of subrogation expansively and flexibly in the interests of justice. More than one hundred years ago, in *Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250, 251 (1915), the court expanded subrogation by holding a party who paid off a mortgage is subrogated to rights under that mortgage. While no prior Nevada opinion on point existed, the court relied on national authority, including cases from Utah, New York, Iowa, Minnesota, Texas, Ohio, Maryland, Michigan, Nebraska, Washington and others to find that subrogation should be broadly permitted in accord with the modern trend, stating:

> Subrogation is, in point of fact, simply a means by which equity works out justice between man and man. Judge Peckham says, in *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102, that "it is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties;" and the ***courts incline rather to extend than to restrict the principle***, and the doctrine has been ***steadily growing and expanding*** in importance.

Laffranchini, supra at 252 (1915) (emphasis added). Thus, the Nevada Supreme Court found that "[s]ubrogation . . . applies to a great variety of cases, and is broad enough to include ***every*** instance

in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter . . ." *Id.* at 252 (emphasis added).

The Nevada courts adhere to these same principles today. As the Nevada Supreme Court stated in 2010:

> . . . equitable subrogation is also an equitable remedy that requires the court to balance the equities based on the facts and circumstances of each particular case. *Murray v. Cadle Co.*, 257 S.W.3d 291, 300 (Tex.App.2008). Subrogation's purpose is to "grant an equitable result between the parties." 2 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 10.6, at 26 (5th ed.2007). This court has expressly stated that district courts have full discretion to fashion and grant equitable remedies, *Bedore v. Familian*, 122 Nev. 5, 11–12 & n. 21, 125 P.3d 1168, 1172 & n. 21 (2006), and we will review a district court's decision granting or denying an equitable remedy for abuse of discretion.

A*m. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538–39 (2010). That a court may apply subrogation principles in any context to achieve an equitable result is well-established under Nevada law, and will be reviewed only for abuse of discretion. *See also, Zhang v. Recontrust Co., N.A.*, 405 P.3d 103 (Nev. 2017).

For this reason, *Laffranchini*, the court's first subrogation opinion, has been cited favorably by the Nevada Supreme Court as recently as 2012 in *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573, 289 P.3d 1199, 1209 n.8 (2012), where the court observed that it "has recognized the doctrine of equitable subrogation in a variety of situations" including workers compensation (*AT & T Technologies, Inc. v. Reid*, 109 Nev. 592, 855 P.2d 533 (1993)), negotiable instruments (*Federal Ins. Co. v. Toiyabe Supply*, 82 Nev. 14, 409 P.2d 623 (1966)), sureties (*Globe Indem. v. Peterson–McCaslin*, 72 Nev. 282, 303 P.2d 414 (1956)) and mortgages (*Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250 (1915)). In addition to these contexts, the Court has also held that a developer and general contractor's builders risk insurer may subrogate against a subcontractor when the subcontractor was required to indemnify and provide additional insured coverage to the developer and general contractor. *Lumbermen's Underwriting All. v. RCR Plumbing, Inc.*, 114 Nev. 1231, 1232, 969 P.2d 301, 302 (1998).

These were all specific areas where the Court had not previously spoken and yet found the doctrine of equitable subrogation applied. Indeed, the Nevada federal district court as recently as

last month concluded that current Nevada law supports equitable subrogation by an excess carrier against a primary carrier for bad faith failure to settle. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 (D. Nev. June 9, 2016) ("*Colony I*"); *see also, Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. July 5, 2018) ("*Colony II*"). In those cases, a primary auto insurer rejected settlement demands within its limits. The case later settled in excess of primary limits with the participation of the excess carrier. The excess carrier sued the primary carrier for the sum it paid based on bad faith failure to settle through equitable subrogation. The primary carrier argued, like AIG, that Nevada had not "recognized" the right of an excess carrier to do so. The court rejected this contention and based its holding on the following definition of equitable subrogation as articulated by the Nevada Supreme Court:

> [E]quitable subrogation is "an equitable remedy that requires the court to balance the equities based on the facts and circumstances of each particular case. Subrogation's purpose is to 'grant an equitable result between the parties.' This court has expressly stated that district courts have full discretion to fashion and grant equitable remedies." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 245 P.3d 535, 538 (Nev. 2010) (internal citations omitted).

Colony I, at *3.

Notably, AIG does not actually cite any cases barring subrogation between carriers. This is because such a rule makes no sense, so any cases they could cite would be poorly-reasoned outliers which would undermine their position. As explained above, to forbid subrogation would be to reward wrongdoers like AIG, and to undermine the insurance industry. There is no Nevada public policy in favor of either. Accordingly, established Nevada rules regarding subrogation supports subrogation between Carrier Defendants.

2. Nevada Permits Contractual Subrogation

Without citing authority, AIG rejects the *Colony* holdings that Nevada law supports equitable subrogation based on Nevada's long history of employing that doctrine whenever justice so requires, but then embraces the same decision to overstate a blanket contention that contractual subrogation claim cannot be maintained. AIG's position is incorrect.[4] Nevada law does not bar all

[4] Although contractual subrogation is nearly universally accepted throughout the country, contractual subrogation will not be allowed where a statute reflects a public policy contrary to that particular type of subrogation.

contractual subrogation claims. In *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005), the Nevada Supreme Court enforced a contractual subrogation clause which required that where an employee received benefits from a third party for which it has been paid by its employer-insurer, it must reimburse the employer-insurer. The court held:

> In this case, the language in the subrogation clause could not be more plain. The clause unequivocally provides that when an employee receives the same benefits from the plan and a negligent third party, the recipient "must reimburse the plan for the benefits provided." Since the subrogation clause is unambiguous, the Canforas are bound by the terms of the document.

Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005).

The court specifically distinguished a prior case -- *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986) -- where it had denied contractual subrogation:

> We have previously prohibited an insurer from asserting a subrogation lien against medical payments of its insured as a matter of public policy. In *Maxwell v. Allstate Insurance Co.*, we were concerned about the injured party recovering less than their full damages. However, we have held that where an insured receives "a full and total recovery, *Maxwell* and its public policy concerns are inapplicable."

Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 778, 121 P.3d 599, 604 (2005).

The *Colony* court reached the result it did because it misapplied *Maxwell*, which was the only Nevada case included in the *Colony* court's reasoning on this point. In *Maxwell,* the insurer was attempting to subrogate to an insured's *medical payments damages* at a time when it was unclear that the insured had already been made whole. The court found that *in the context of medical payments,* contractual subrogation clauses were void as against public policy; it did not decide all contractual subrogation clauses in every context are void. This specific public policy was reflected in NRS 41.100, which prohibited not only subrogation, but assignment, loan receipts, or trusts regarding *medical payments* made by insurance companies. There is no public policy against contractual subrogation generally, either in Nevada or any jurisdiction of which St. Paul is aware.

---

73 Am. Jur. 2d Subrogation § 4 ("Subrogation clauses in contracts do not violate public policy; however, despite the parties' contractual agreement, it will not be recognized where a statute expresses a public policy against the enforcement of those rights."). There is no such statute in Nevada.

It is unsurprising then that the California cases cited by *Colony -- 21st Century Ins. Co. v. Superior Court*, 47 Cal. 4th 511, 518, 213 P.3d 972, 976 (2009), and *Progressive W. Ins. Co. v. Yolo Cty. Superior Court*, 135 Cal. App. 4th 263, 37 Cal. Rptr. 3d 434 (2005) -- were also both med-payments claims. The court in *21st Century* stated that "Med-pay Carrier Defendants must seek recovery for personal injury claims through contractual reimbursement rights against their insureds, because they are not allowed to assert subrogation claims directly against third party tortfeasors." *Id*. at 518. "The rule is based on the premise that personal injury claims are not assignable, and therefore a med-pay insurer generally has no right to sue the tortfeasor directly and has no standing to intervene." *Id*. These principles have no bearing on subrogation in this case, which involves the payment of a judgment against the insured that resulted from its insurer's breach of contract and bad faith.

Likewise, those sections of *Progressive W. Ins. Co. v. Yolo Cty. Superior Court*, 135 Cal.App.4th 263, 37 Cal.Rptr. 3d 434 (2005), cited by the *Colony* court for the proposition that contractual subrogation generally adds nothing to equitable subrogation do not mean that contractual subrogation is never available. Rather, it means that in most circumstances those rights granted by equitable subrogation are so broad that the insurer does not gain additional rights by contract. Further, the *Progressive* court took this position because California is one of the few jurisdictions that apply equitable limitations to contractual subrogation. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal.App.4th 1098, 1110, 49 Cal.Rptr.3d 785, 793 (2006). This is not the case in most of the country, where contractual subrogation can expand those rights available in equity, as explained above. Indeed, even the California appellate courts have opined that it makes more sense for contractual subrogation to not be bound by equitable limitations, even while they are themselves bound by precedent to the contrary, at least for now. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal.App.4th 1098, 1110, 49 Cal Rptr.3d 785, 793 (2006) (stating that the position that contractual subrogation should not require the doctrine of superior equities as applied in other jurisdictions was persuasive while being bound by California precedent to apply it). Therefore, these opinions cannot circumscribe St. Paul's right to contractual subrogation in this case.

C. St. Paul has Alleged All Elements of an Insurer's Subrogation Claim

Whether a party is entitled to subrogation depends on the equities, facts and circumstances of each case. 73 Am. Jur. 2d Subrogation § 10. In the insurance context, the California Court of Appeal has broken down subrogation into eight elements:

> (1) the insured suffered a loss for which the defendant is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer; (2) the claimed loss was one for which the insurer was not primarily liable; (3) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (4) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (5) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (6) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (7) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (8) the insurer's damages are in a liquidated sum, generally the amount paid to the insured.

Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal.App.4th 1279, 1292, 77 Cal.Rptr.2d 296, 302–03 (1998). In the context of subrogation by an excess carrier against a lower level carrier, the Nevada federal district court has opined that while Nevada will weigh the California factors, because subrogation is an equitable remedy, *none are dispositive* except that only the insured's rights may be asserted. *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No. 212CV01727RFBNJK, 2018 WL 3312965, at *5 (D. Nev. July 5, 2018).

In this case, the test the court uses and whether it weighs or requires all the factors makes no difference. Under the more rigorous California test, St. Paul adequately alleged each element of equitable subrogation, as follows: (a) Cosmopolitan suffered a loss for which AIG is liable, namely the $160 million excess judgment caused by its bad faith (FAC ¶¶ 35-37, 55, 66); (b) St. Paul is not primarily liable like AIG because AIG breached its duty to settle and St. Paul did not, because AIG breached its duty to provide an adequate defense and St. Paul did not, and because St. Paul's policy responds after AIG's (FAC ¶¶ 44, 85-89, 92); (c) Cosmopolitan has been compensated for the loss through the settlement of the underlying action and the payment by St. Paul (FAC ¶¶ 94, 108); (d) St. Paul paid to protect its own interest, not as a volunteer, because the claim underlying the

judgment was potentially covered under St. Paul's policy (FAC ¶¶ 94, 108); (e) Cosmopolitan had an existing assignable cause of action for bad faith against AIG that it could have asserted had it not been compensated for its loss by St. Paul (FAC ¶¶ 88-89, 105); (f) St. Paul has suffered damages because of AIG's bad faith, in that it had to pay its limit to protect Cosmopolitan (FAC ¶¶ 94, 108); (g) justice requires the entirety of the loss be shifted to AIG, because its equitable position is inferior since (i) it breached its duty to settle; (ii) it breached its duty to defend by providing a conflicted defense; and (iii) St. Paul's policy is excess to AIG's; and (h) the damages are liquidated in the amount St. Paul paid to protect Cosmopolitan.

Again, St. Paul need not prove it is entitled to the relief sought in order to defeat this motion. It merely must show that it has alleged a claim upon which relief may be granted – a much lower burden. AIG is attempting to make this dispute about whether St. Paul has equitable superiority. St. Paul has alleged that is has superior equities for a claim of equitable subrogation. But it does not even need superior equities for its contractual subrogation claim, only an allegation of the contractual subrogation provision, which it has. See FAC, ¶42. AIG' effort to dispute these allegations is both improper and unavailing since the allegations are presumed true for the purposes of this motion.

D. St. Paul has Pled All Elements of Contractual Subrogation

Plainly, in order to plead contractual subrogation, St. Paul must allege the existence of a contract, which it does. FAC ¶¶ 33, 105-106. The St. Paul policy, a contract between St. Paul and Cosmopolitan, expressly provides that any rights Cosmopolitan has to recover a payment St. Paul has made under the policy are "transferred" to St. Paul. As discussed elsewhere in this brief (see Section II, *infra,* at p. 23), St. Paul also alleges that Cosmopolitan had an assignable cause of action for bad faith against AIG that Cosmopolitan itself could have asserted had Cosmopolitan and not St. Paul paid to settle the $160,500,000 judgment against it out of its own pocket. All of the other elements of a subrogation claim are properly pled, as discussed above. Therefore, AIG's motion to dismiss must be denied.

E. Although it Does not Need to, St. Paul Adequately Pled Equitable Superiority

AIG's motion makes three arguments as to why St. Paul should not be allowed to pursue a

claim against it for breach of the duty to settle. In the first two arguments, AIG claims that no right to subrogation exists under Nevada law. These arguments fail for the reasons discussed above. AIG's third argument, assuming a right to subrogate does exist, is that St. Paul cannot pursue subrogation because it lacks "superior equities."

St. Paul does not require equitable superiority for contractual subrogation, but has it in any event because: (1) AIG caused this loss by breaching its covenant of good and fair dealing with Cosmopolitan by: (a) breaching the duty to settle; (b) breaching the duty to provide an adequate defense; (2) the underlying agreements demonstrate St. Paul's coverage was intended to be excess by the parties; and (3) Cosmopolitan is liable for Marquee's acts, which, because Marquee's acts in fact caused the injuries - makes Marquee's coverage with AIG primary to Cosmopolitan's with St. Paul.

1. St. Paul Need Not Plead Equitable Superiority for Contractual Subrogation

As explained above, St. Paul does not need to allege equitable superiority to pursue its contractual subrogation claim. All that is required is that St. Paul allege a contractual right to subrogation, which it does at Paragraph 42 of the FAC. Having done so, it is free to assert the breach of contract and bad faith claims Cosmopolitan would have had against AIG had St. Paul not paid Cosmopolitan's portion of the judgment.

2. St. Paul Has Equitable Superiority Because it is Not Guilty of Bad Faith Like AIG

Assuming that St. Paul must establish superior equities to be subrogated to Cosmopolitan's bad faith failure to settle claim against it, AIG argues that St. Paul lacks superior equities because St. Paul "owed Cosmopolitan an independent duty to settle the Underlying Action under its own policy. Further, St. Paul had the opportunity to settle the case prior to the verdict but chose not to do so." But St. Paul never had an opportunity to settle within its limits, and this assertion is flatly contradicted by the actual allegations of the FAC. St. Paul was not notified about the *Moradi* action until February 13, 2017, so it could not have accepted either the December 10, 2015 $1.5 million Offer of Judgment (FAC ¶ 48) or the November 2, 2016 $26 million Offer of Judgment. (FAC ¶

51.) As to the March 9, 2017 $26 million Offer of Judgment, in Paragraph 63, St. Paul alleges that AIG failed to report it to St. Paul. Paragraph 64 goes on to state: "St. Paul first learned of the March 9, 2017 settlement demand *after the demand had expired* and trial had commenced." These allegations, of course, must be taken as true on a motion to dismiss. But they are in fact true.

The FAC contains no allegation of any other settlement demand by plaintiff of any other opportunity to settle before the $160,500,000 verdict was rendered. AIG cites FAC Paragraphs 53 and 132(b) to support its argument, but neither does. Paragraph 53 simply described the March 9, 2017 demand, but nowhere indicates that (contrary to Paragraph 63) St. Paul was aware of it before it expired. And Paragraph 132(b) states that St. Paul was not notified of the Underlying Action until February 13, 2017, but not when or whether it was made aware of the settlement demand. This is in contrast to AIG, which is alleged to have been defending the case for a considerable time (FAC ¶¶ 35-37), failed to accept at least two open settlement demands within its limits (FAC ¶¶ 48, 51, 53), failed to notify St. Paul of the claim until the eve of trial (FAC ¶ 62); failed to inform St. Paul about a settlement demand within AIG's limits until that demand had expired (FAC ¶ 63) and refused to provide any information about the case, or even the trial date, to St. Paul until after trial had commenced (FAC ¶¶ 62-65). Thus, AIG cannot meet its burden of showing that with respect to the opportunity to settle, it has the superior equities.

The same is true for AIG's mishandling of Cosmopolitan's defense. The First Amended Complaint alleges that AIG assumed Cosmopolitan's defense, but defended with conflicted counsel (FAC ¶¶ 35, 37, 55, 105). As St. Paul had no duty to exercise its right to control the defense, and did not exercise that right (FAC ¶¶ 44, 109), it is not responsible for the mishandling of that defense. This is the case even if, as AIG incorrectly contends, the St. Paul policy is not excess to AIG's.

Notably, events played out this way because AIG itself, contrary to its current position, knew St. Paul was a higher-level excess carrier and did not want St. Paul interfering in the handling of the defense. FAC ¶¶ 61-68. AIG's argument is essentially that a carrier can provide a conflicted defense for years, fail to assert all of Cosmopolitan's, rights and refuse at least two opportunities to settle within limits and nevertheless have superior equities to a carrier that was not even tendered to,

and was kept in the dark about the litigation so that AIG could play out its gamble. *Id.* Merely stating the proposition demonstrates its absurdity. This is not the law. Rather, the law is that that party responsible for the loss (AIG) should be made to bear it.

3. St. Paul Has Superior Equities Because It Is Excess to AIG's Coverage for Cosmopolitan

a. St. Paul is Excess Based on the NMA

AIG, citing FAC Paragraph 40, argues that St. Paul does not have superior equities because, as a "direct" insurer of Cosmopolitan, St. Paul "owed an independent concurrent obligation to Cosmopolitan under its policy, separate and apart from any obligation owed by AIG." But Paragraph 40 of the FAC says only that Cosmopolitan is an insured on the St. Paul policy. It says nothing about independent or concurrent obligations. Nor does AIG support its assertion with a single case citation. Indeed, contrary to AIG's argument, the FAC expressly alleges that the AIG policy is primary to the St. Paul policy and, as such, was obligated to respond first. See FAC ¶ 44. Because this allegation is uncontradicted, it must be presumed true. Indeed, the allegation is true both as a matter of fact and of law.

Factually, Cosmopolitan is a named insured on the St. Paul policy and an additional insured on the AIG policy. In this context, courts turn to the language of the underlying agreements pursuant to which additional insured coverage was provided to determine the priority of that additional insured coverage. Here, the language of the Nightclub Management Agreement ("NMA") could not be more clear. Section 12.2.5 states: "All insurance coverages maintained by [Marquee] shall be primary to any insurance coverage maintained by any Owner Insured Parties (the "Owner Policies"), and any such Owner Policies shall be excess of, and not contribute toward, [Marquee] Policies. . . ." See Declaration of Marc J. Derewetzky is Support of St. Paul's Opposition to AIG's Motion to Dismiss ("Derewetzky AIG Decl.") filed concurrently herewith, ¶ 2, Exh. 5. Plainly, the NMA provides that the Owner Policy (St. Paul) is to be excess to the Marquee Policy (AIG).

Remarkably, this language is quoted in Marquee's motion to dismiss.[5] How then can AIG maintain with a straight face that the St. Paul policy is not excess? There can be no reasonable dispute that the parties intended St. Paul's coverage to be excess to not only Aspen's but also AIG's policy.

The indemnity provisions of the NMA yield the same result. When an underlying agreement indicates that one party is to bear the risk of loss before the other, that party's insurance is primary, and the other's excess. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal.3d 622 (1975); *Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co.*, 123 Cal.App.4th 278 (2004); *Zurich Am. Ins. Co. v. Acadia Ins. Co.*, 243 F. Supp. 3d 1201, 1208 (D. Colo. 2017). The indemnity agreement at section 13.1 of the NMA, which shifts the risk of loss from Cosmopolitan to Marquee, further supports the argument that St. Paul is excess to AIG. Derewetzky Decl., ¶ 3, Exh. 6. It provides that Marquee shall indemnify the Restaurant and its parents (Cosmopolitan) and members against any and all losses incurred as a result of Marquee's breach or Marquee or its employees or staff's negligence or willful misconduct. There is an exception for liability covered by required insurance, but as Cosmopolitan is not obligated to provide any insurance under the NMA,[6] that provision would not apply to the St. Paul policy. Therefore, because this claim arose out of the negligent or willful acts of Marquee's employees, Marquee owes Cosmopolitan indemnity. This shifts the risk of loss not only to Marquee, but also its Carrier Defendants. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal.3d 622 (1975).

AIG argues that "losses" as defined in the NMA to exclude sums "reimbursed" by insurance, means that the indemnity provision does not apply to losses covered by insurance for Marquee or NRV1. That is not a reasonable interpretation because it renders the insurance language of the indemnity provision meaningless, and also undermines the priority provisions set forth in the insurance requirements. Indeed, the language in the indemnity clause refers to losses "covered" by

---

[5] See Marquee's Motion, 6:19-22.

[6] Section 12.1 of the NMA requires NRV1 to obtain certain insurance. Derewetzky Decl., ¶ 2, Exh. 5. NRV1 is the entity that leased the nightclub from Cosmopolitan. FAC ¶ 10. There is no requirement in the NMA that Cosmopolitan obtain any insurance. Cosmopolitan and NRV1 are different entities.

insurance, whereas the losses definition relates to sums "reimbursed" by insurance. "Reimbursement" refers to an insurer's obligations under an indemnity-style policy as opposed to a true general liability policy. Under an indemnity policy, an insured must first pay a sum, whether it be damages for its liability or whatever the coverage provides, and then the insurer indemnifies it for that sum by reimbursing it; under a typical general liability policy, the insurer must pay the sum in the first instance to protect the insured. *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005) ("It is a general principle under insurance law, that the obligation to pay under a liability policy arises as soon as the insured incurs the liability for the loss, in contrast to an indemnity policy where the obligation is to reimburse the insured for a loss that the insured has already satisfied."). In the context of the liability policies and the judgment against Cosmopolitan at issue here, no sum was "reimbursed" because Cosmopolitan did not pay anything in the first instance, rendering the insurance language of the "losses" definition inapplicable in this case. Rather, only the insurance proviso of the indemnity provisions is relevant, and it does not apply given that St. Paul's coverage for Cosmopolitan was not required under the NMA. Only insurance for Marquee and NRV1, a separate but related entity to Cosmopolitan was.

Accordingly, when read as a whole, the insurance requirements and indemnity provision of the NMA deem St. Paul's coverage to be excess to AIG's. This means that St. Paul's policy responds after AIG's, making it a higher level excess carrier than AIG, and giving St. Paul equitable superiority.

b. St. Paul Has Equitable Superiority As a Matter of Law

Despite AIG's protestations to the contrary, it is plain that the St. Paul policy covering Cosmopolitan is excess to AIG's additional insured coverage for the same entity. An excess carrier (St. Paul) may seek subrogation against a lower level insurer (AIG) for bad faith failure to settle because a lower level insurer has a duty to respond to a loss before the excess carrier.

Cases allowing an excess carrier to proceed against a lower level carrier are legion. Litig. & Prev. Ins. Bad Faith § 7:9 ("The courts are all but unanimous in holding that a paying excess carrier, as subrogee of the insured's rights, may maintain an action against a primary carrier for the latter's bad faith, excess liability resulting from breach of its settlement duties, or defense duties, or both.

The vehicle used has largely been that of equitable subrogation."); *see, e.g., National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 757 n.2 (6th Cir. 2007) (explaining subrogation between primary and excess Carrier Defendants is the "overwhelming majority" rule and citing cases from twenty-seven jurisdictions in support).

It is also well-established that a higher level excess carrier has a right to subrogate against lower level excess carriers. 1 Practical Tools for Handling Insurance Cases § 8:2 (Thomson Reuters 2018) ("Equitable subrogation can apply to second-level excess Carrier Defendants who assert an equitable subrogation claim against a first-level insurer."); *see, e.g., Central Illinois Public Service Co. v. Agricultural Ins. Co.*, 378 Ill.App.3d 728 (2008) (higher level excess insurer had claim for bad faith failure to settle against lower level excess insurer that exerted control over the litigation). This is but a logical extension of the principle that a lower level carrier must respond to the loss before a higher level carrier, given the higher level carrier's superiority.

Thus, the St. Paul policy is excess to the AIG policy.

c. St. Paul Has Priority Because Marquee Caused the Loss

Cosmopolitan's additional insured coverage on the AIG policy is also primary to Cosmopolitan's coverage with St. Paul because Marquee caused the underlying loss. "It is well settled that when two policies of insurance cover a loss, and one of them insures an employer liable only by respondeat superior, while the other covers the employee whose active negligence caused the loss, and where the employer has a right of indemnity against the negligent employee, the insurer of the employee must bear the entire loss." *Berkeley v. Fireman's Fund Ins. Co.*, 407 F. Supp. 960, 969 (W.D. Wash. 1975); *see also Guideone Mut. Ins. Co. v. Utica Nat'l Ins. Grp.*, 213 Cal. App. 4th 1494, 1503, 153 Cal. Rptr. 3d 463, 469 (2013).

Here, Marquee's employees actually committed the beating that caused the underlying claimant's injuries. In contrast, Cosmopolitan was merely found to have a nondelegable duty to prevent that danger as a landowner. FAC ¶ 13. That means that Marquee and its Carrier Defendants are responsible for the loss before Cosmopolitan and its Carrier Defendants.

AIG argues that Cosmopolitan's nondelegable duty means that Cosmopolitan must have committed independent acts for which it was held directly liable, so as between Marquee and

Cosmopolitan, neither is more responsible for the loss than the other, and liability is not vicarious. But AIG's argument contradicts the allegations of the FAC (see ¶13) as well as its own assertion in the motion. Motion, at 2:19-24 ("The Court in the Underlying Action agreed with Moradi's position and imposed vicarious liability on Cosmopolitan for Marquee's actions.").

Frankly, to the extent it is unclear whether or not Cosmopolitan's liability is vicarious (if it had liability), the lack of clarity is a result of AIG's improper handling of the defense. Thus, because AIG could have obtained whatever special verdicts were necessary to clarify the issue, the consequences of any lack of clarity on this issue must fall on them. *See, e.g., Duke v. Hoch*, 468 F.2d 973 (5th Cir. (Fla.) 1972) (burden on insurer to prove judgment against its insured included damages for noncovered acts); *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1499 (10th Cir. 1994) ("Because CNA controlled Magnum's defense in the state litigation, CNA bears the burden of demonstrating the basis of the jury's punitive damage award.").

E. AIG's Argument That Subrogation Fails Because Cosmopolitan Has No Damages Is Fundamentally Contrary to the Nature of Subrogation

AIG also takes the position that St. Paul is not entitled to subrogation because it paid to settle the case, and thus, Cosmopolitan suffered no damages. While this argument is a trap courts sometimes fall into, that is only possible if there is also a misunderstanding of the fundamental nature of subrogation. As explained above, the reason the doctrine of subrogation was introduced into the common law was because of, not despite, the fact that the insurer had paid the insured for its damages. *See, e.g., Troost v. Estate of DeBoer*, 155 Cal. App. 3d 289, 294, 202 Cal. Rptr. 47, 50 (Ct. App. 1984) ("Payment by the insurance company does not change the fact a loss has occurred."); *Maryland Cas. Co. v. Acceptance Indem. Ins. Co.*, 639 F.3d 701, 706 (5th Cir. 2011) (the law "does not bar contractual subrogation simply because the insured has been fully indemnified."). If by paying to protect the insured the insurer obviated subrogation, then subrogation would not exist at all. *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal.App.4th 23, 34, 105 Cal.Rptr.3d 606, 615 (2010) ("Under Cleveland's view, no insurer could *ever* state a cause of action for subrogation in order to recover amounts it paid on behalf of its insured, because of the very fact that it had paid amounts on behalf of its insured.") (emphasis in

original). Yet subrogation clearly does exist in Nevada, including in the insurance context.

In a further attempt to confuse this Court, AIG misrepresents the *unpublished* opinion in *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co*., No. F070598, 2018 WL 2276815 (Cal. Ct. App. May 18, 2018). All this Court really needs to know about *California Capital* is that the Court did not deny subrogation based on the argument that its insured had suffered no damages. Rather, the insurer obtained an *assignment* of its insured's breach of contract and bad faith claims against another insurer. The court there held that the assigned claims were not actionable because the assignee had been fully defended and indemnified and thus had not suffered and damage. As discussed above, subrogation is a completely different animal as it allows the insurer to pay the insured's loss and prosecute the claims the insured would have had if its own insurer had not paid.[7]

The Court should not be misled by AIG's no damages argument, based on a single, unpublished decision. St. Paul's payment does not obviate its right to subrogation. It creates it. Therefore, because St. Paul paid for the insured's damages caused by AIG's bad faith, St. Paul is entitled to subrogation.

II. BAD FAITH IS ADEQUATELY PLED

A. AIG Had a Duty of Good Faith Toward Cosmopolitan

In Nevada, all Carrier Defendants owe a duty of good faith and fair dealing to their insureds. *U. S. Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975); *see also, Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 793, 858 P.2d 380, 382 (1993). If the insurer unreasonably withholds policy benefits from the insured, it breaches this duty, making it liable for bad faith damages. *Peterson*, 540 P.2d at 619-20. An insurer acts without proper cause when it has an "actual or implied awareness" that no reasonable basis to withhold benefits exists. *Falline v. GNLV Corp*., 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991) ("Bad faith, the converse of good faith, has been defined as 'the absence of a reasonable basis for denying benefits ... and the defendant's

[7] Capital did attempt to argue subrogation under its indemnity cause of action, and the court held that even if that was appropriate, it would still fail because Capital could not allege equitable superiority. The court did not, as AIG claims, deny subrogation based on a no damages argument.

knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'"). Bad faith is a tort. *Peterson*, 540 P.2d at 619-20. When an insurer unreasonably withholds policy benefits, it is responsible for all consequential damages proximately caused thereby, including damages in excess of policy limits. *Id*.; *see also, Kelly v. CSE Safeguard Ins., Co*., No. 2:08-CV-0088-KJD-RJJ, 2011 WL 4526769, at *4 (D. Nev. Sept. 27, 2011), *aff'd*, 532 F. App'x 698 (9th Cir. 2013).

B. AIG Concedes that St. Paul Adequately Alleged a Claim for Breach of the Duty to Settle on Behalf of Cosmopolitan

While it may be an interesting exercise to argue whether or not AIG is liable for bad faith, that inquiry is not germane to a motion to dismiss. The only truly important question here is whether St. Paul adequately pled its causes of action. In this regard, while AIG takes issue with the application of the doctrine of subrogation, it **does not dispute** that a claim for breach of the duty to settle, a species of bad faith, is recognized under Nevada law, or that St. Paul has adequately pled the necessary elements of such a claim. In this regard, AIG does not even dispute that it in fact breached the duty to settle when it rejected settlement offers within its limits and, as a direct result, permitted to case go to trial wherein judgment was entered against its insureds in excess of the $160,500,000. AIG attacks only St. Pauls' assertion that it stands in Cosmopolitan's shoes in asserting a claim for breach of the duty to settle. St. Paul addresses each of those arguments in great detail above. None of AIG's arguments has merit. Accordingly, the motion to dismiss the cause of action for breach of the duty to settle must be denied.

C. AIG Concedes that St. Paul Adequately Alleged a Claim for Breach of the Insurance Contract

As with the claim for breach of the duty to settle, AIG does not dispute that St. Paul has adequately alleged a breach of the AIG insurance contract by providing Cosmopolitan an inadequate defense through conflicted counsel. Instead, AIG makes additional arguments as to why St. Paul does not stand in Cosmopolitan's shoes through the doctrine of subrogation. None of these arguments has any merit, for the reasons discussed at length above. Accordingly, the motion to dismiss the cause of action for breach of contract (duty to defend) must be denied.

III. EQUITABLE CONTRIBUTION IS ADEQUATELY PLED

AIG attacks St. Paul's cause of action for equitable contribution by arguing that (1) the Nevada Supreme Court has not recognized it; (2) even if the cause of action were viable, there can be no equitable contribution because AIG's policy is exhausted; (3) St. Paul and AIG do not have the same level of obligation to Cosmopolitan because St. Paul argues its coverage is excess to AIG's; and (4) contribution is only available where the defendant has not paid its fair share. None of these arguments has merit.

Although it is true that the Nevada Supreme Court has not addressed the duty of an insurer to contribute to an insured's defense by another insurer, Nevada federal courts have repeatedly concluded that the Supreme Court would recognize such a claim[8]. *See, e.g., Great American Ins. Co. of New York v. North American Specialty Ins. Co.*, 542 F.Supp.2d 1203, 1211 (D. Nev. 2008). As another court noted:

> [T]his Court may turn to California law for guidance, which is what the Nevada Supreme Court often does when faced with issues of first impression. *Id. (citing Volvo Cars of North America, Inc. v. Ricci,* 137 P.3d 1161, 1164 (Nev. 2006)). In California, "here two or more Carrier Defendants provide primary insurance on the same risk for which they are both liable for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer or Carrier Defendants, without regard to principles of equitable subrogation." *Travelers Cas. and Sur. Co. v. American Intern. Surplus Lines Ins. Co.*, 465 F.Supp.2d 1005, 1026 (S.D. Cal. 2006) (quoting *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 1289 (Cal. App. 1 Dist. 1998)). Equitable contribution "is the right to recover, not from the party primarily liable for the loss, but from a co-obligor who shares such liability with the party seeking contribution." *Id.*

Admiral Ins. Co. v. Illinois Union Ins. Co., No. 208CV01300RCJRJJ, 2010 WL 11579447, at *3 (D. Nev. May 24, 2010).

Even assuming AIG were correct that the Nevada Supreme Court has not *yet* recognized

---

[8] *Ardmore Leasing Corp. v. State Farm Mut. Auto. Ins. Co.*, 106 Nev. 513 (1990) involved a claim for equitable contribution wherein State Farm sought contribution from a leasing company and its insurer. The trial court granted summary judgment in favor of the insurer State Farm. The Nevada Supreme Court reversed, but on the grounds that there were triable issues of fact that precluded summary judgment. The Court did not object that the cause of action for contribution was improper under Nevada law.

equitable contribution among Carrier Defendants, it would be improper for the Court to dismiss this new and novel claim at the pleading stage, for the reasons discuss above. *See, e.g., Elec. Constr. & Maint. Co., Inc. v. Maeda Pac. Corp.,* 764 F.2d 619, 623 (9th Cir.1985).

AIG's argument that exhaustion of its policy limits bars contribution lacks merit and actually highlights another aspect of AIG's bad faith. AIG necessarily exhausted its limits through payments on behalf of Marquee, and not Cosmopolitan. This is true because St. Paul did not insure Marquee and if AIG paid anything on behalf of Cosmopolitan, St. Paul would have paid the balance of what Cosmopolitan owed, leaving a shortfall in the payment on behalf of Marquee.

On the other hand, AIG contends that it can forgo multiple opportunities to settle all claims against both its insureds, prejudice Cosmopolitan's rights and then choose to exhaust the policy limit to protect Marquee while contributing nothing for Cosmopolitan. AIG essentially proffers that dumping its policy to protect Marquee insulates it from contribution for Cosmopolitan's settlement amount.

California Courts of Appeal have consistently upheld the principle that the covenant of good faith and fair dealing requires that the insurer give equal consideration to all insureds. *Lheto v. Allstate Ins. Co.*, 31 Cal.App.4th 60, 75 (1994) (insurer's disbursement of entire policy limit on behalf of additional insured did not discharge its obligations to the named insured; rather it constituted a breach of contract); *see also Strauss v. Farmers Insurance Exchange*, 26 Cal.App.4th 1017, 1021-1022 (1994) (same). AIG's claim that its policy is exhausted does not bar an equitable contribution claim against it because its exhaustion was improper.

AIG next asserts that contribution exists only between Carrier Defendants with the same level of obligation to the insured. This argument presents no obstacle because St. Paul has pled the contribution claim as between Carrier Defendants on the same level as an alternative theory of relief to St. Paul's position that its coverage for Cosmopolitan is excess to AIG's. FAC ¶ 137. For the purposed on the Eighth Cause of Action in the FAC, St. Paul and AIG should be considered co-obligors as all allegations are accepted a true.

Finally, St. Paul in fact alleges in no uncertain terms that it is entitled to contribution because AIG has not paid its fair share of the loss and paid nothing for Cosmopolitan. Because

AIG's conduct is responsible for the loss, its fair share is *the entire loss.* St. Paul alleges that AIG had more than one opportunity to settle the entire Underlying Action within AIG's policy limits, and the only reason St. Paul was called upon to pay anything is because AIG tried so save money from its limits by taking the case to trial, in which its insured's were hit with an excess verdict. The cause of action for equitable contribution is adequately pled, and AIG's motion should be denied.

IV. ST. PAUL ADEQUATELY ALLEGES A CLAIM FOR EQUITABLE ESTOPPEL

The doctrine of equitable estoppel "provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment." *Strong v. Cnty. of Santa Cruz*, 15 Cal.3d 720, 125 Cal.Rptr. 896, 543 P.2d 264, 266 (1975) cited with approval in *Cheqer, Inc. v. Painters and Decorators Joint Comm., Inc., 98 Nev. 609, 655 P.2d 996, 998–99* (1982). As both AIG and Aspen acknowledge, Nevada allows affirmative claims for equitable estoppel:

> Respondent contends, nevertheless, that equitable estoppel is a defense, not a cause of action for money damages. Although some jurisdictions agree with respondent's contention, we have not so limited the power of the courts of this state to seek and do equity. *See Nevada Pub. Emp. Ret. Bd. v. Byrne*, 96 Nev. 276, 607 P.2d 1351 (1980).

Mahban v. MGM Grand Hotels, Inc.,100 Nev. 593, 691 P.2d 421, 424 (1984).

To state a cause of action for equitable estoppel, St Paul must allege:

> (1) The party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped. *Cheqer, Inc. v. Painters & Decorators,* 98 Nev. 609, 614, 655 P.2d 996, 998–99, (1982).
>
> The requirement of actual knowledge of the true facts on the part of the party to be estopped does not apply to a party whose affirmative conduct, consisting of either acts or representations, has misled another. 3 Pomeroy, Equity Jurisprudence § 809 pp. 217–18 (5th ed. 1941).

Mahban, 100 Nev. 593, 596, 691 P.2d 421, 423.

Here, St. Paul's seventh cause of action for Equitable Estoppel alleges in significant detail each of the necessary elements of an equitable estoppel claim:

(1) AIG ("Carrier Defendants"), knowing that Cosmopolitan had direct insurance, and having been provided a copy of Cosmopolitan's own policies, "consistently represented through both words and actions that the coverage they provided Cosmopolitan as both an additional insured and as Marquee's contractual indemnitee was primary to Cosmopolitan's direct coverage under Cosmopolitan's own policies, including the St. Paul Policy, and therefore [AIG was] responsible for defending and resolving the Underlying Action …;" (FAC ¶132.) St. Paul provides numerous factual allegations showing that the Carrier Defendants understood and communicated that they were responsible, not Cosmopolitan's direct carriers, for defending and resolving the *Moradi* action.

(2) "Consistent with AIG's representations, St. Paul contends that it is a high level excess carrier and its coverage to Cosmopolitan for the Underlying Action did not apply until after exhaustion of the Aspen Policy and [AIG] Policy, which is consistent with the words and actions of the Carrier Defendants during the Underlying Action." (FAC ¶ 134.)

(3) "St. Paul was unaware that [AIG] intended to contradict its representations regarding the priority of Marquee's direct insurance to that of Cosmopolitan." (FAC ¶ 134.)

(4) "Instead, St. Paul, and Cosmopolitan's other direct carriers, relied on the Carrier Defendants' representations that they were primarily responsible for defending and resolving the Underlying Action on behalf of both Marquee and Cosmopolitan. As a result, St. Paul, and Cosmopolitan's other direct carriers, did not participate in the defense or settlement negotiations on behalf of Cosmopolitan in the Underlying Action. As alleged above, the Carrier Defendants' unreasonable failure to settle the Underlying Action resulted in a verdict against Cosmopolitan (and Marquee) in the amount of $160,500,000, and St. Paul's eventual contribution of [redacted] on behalf of the insured, Cosmopolitan, towards a post-verdict settlement." (FAC ¶ 134.)

Although they take slightly different tacks, AIG and Aspen oppose St. Paul's claim for equitable estoppel on the grounds that it is not an affirmative claim for relief but rather a "defense to a defense." AIG asserts generally that monetary damages are not an available remedy for a claim of equitable estoppel, and then springboards from that unsupported inaccuracy to the nonsensical statement that St. Paul's equitable estoppel claim is merely derivative of its subrogation and contribution claims. None of the case law AIG cites asserts any such a proposition. Instead, as the

Supreme Court in *Mahban v. MGM Grand Hotels* made clear, the Court has broad discretion to fashion a just and fair remedy in response to affirmative claims for equitable estoppel. 100 Nev. 593, 596, 691 P.2d 421, 423; *accord Tore, Ltd. v. M.L. Rothschild Mgmt. Corp.*, 106 Nev. 359, 363, 793 P.2d 1316, 1318 (1990) (awarding monetary damages on equitable estoppel claim); *accord Nevada Pub. Emp. Ret. Bd. v. Byrne*, 96 Nev. 276, 280, 607 P.2d 1351, 1353 (1980) (same).

Interestingly, Aspen cites *Mahban* for the proposition that while equitable estoppel can be an affirmative cause of action, Nevada does not recognize a claim for relief where equitable estoppel is being pled as a "defense to a defense." Aspen misunderstands *Mahban*, as well as the fundamental nature of a claim for equitable estoppel. Equitable estoppel by its very nature seeks to prevent a party from asserting a position where that party's words or deeds have rendered it inequitable for it to do so. *See Nevada Pub. Emp. Ret. Bd. v. Byrne, 96 Nev. at 280, 607 P.2d at 1353* (Defendant equitably estopped from denying its earlier representations regarding amount of plaintiff's retirement benefits, where plaintiff reasonably relied upon defendant's representation in decision to retire); *Tore*, 106 Nev. at 363, 793 P.2d at 1318 (defendant estopped to deny novation based on its actions in misleading plaintiff into believing an agreement had been reached and was being performed, and plaintiff's reasonable and detrimental reliance); *Costanzo v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 217CV01739APGPAL, 2017 WL 5615441, at *2 (D. Nev. Nov. 20, 2017) (Estoppel may be applied when an insurer prevents the insured from complying with a statute, and it would be inequitable to prevent the insured from bringing a claim because of the insurer's actions.) In other words, an equitable estoppel cause of action, while seeking affirmative relief, is by its very nature defensive. *Mahban* does not suggest otherwise, nor does it in any way limit a plaintiff's right to plead an alternate count for equitable estoppel, nor restrict the Court's inherent power to fashion a fair and just remedy where plaintiff succeeds on its claim for equitable relief. *Byrne*, 96 Nev. at 280, 607 P.2d at 1354 (Court has "inherent power to seek and to do equity").

St. Paul has sufficiently pled it seventh cause of action for Equitable Estoppel against AIG and Aspen, and their motions to dismiss as to this cause of action should be denied.

/ / /

CONCLUSION

For all the foregoing reasons, St. Paul respectfully requests the Court deny AIG's motion to dismiss in its entirety. In the alternative, St. Paul respectfully requests that the Court grant leave to amend the first amended complaint.

Dated: August 15, 2018

MORALES FIERRO & REEVES

By: /s/ *Marc Derewetzky*
Ramiro Morales
William C. Reeves
Marc Derewetzky
MORALES FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Attorneys for Plaintiff