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 VI 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

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 18th day of February, 2021 the foregoing ***APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME VI 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

ERR

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 ERRATA TO TABLE OF CONTENTS TO ST. PAUL'S OPPOSITION TO ASPEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT Date: October 30, 2018 Time: 9:00 a.m. Dept: XXVI

Plaintiff St. Paul Fire & Marine Insurance Company hereby submits its Errata to Table of Contents to correct page numbering within the table only thereby correcting page i to St. Paul's Opposition to Aspen's Motion to Dismiss First Amended Complaint filed August 15, 2018.

Dated: August 16, 2018

MORALES FIERRO & REEVES

By: */s/ Ramiro Morales*
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

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PROOF OF SERVICE

I, Carol J. Hastings. 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:

ERRATA TO TABLE OF CONTENTS TO ST. PAUL'S OPPOSITION TO ASPEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Service was effectuated in the following manner:

_____ BY FACSIMILE:

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 16, 2018

Carol J. Hastings

ROPP
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)
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 REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT

Date: October 30, 2018
Time: 9:00 a.m.

Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") hereby submits the following Reply in Support of Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") First Amended Complaint ("FAC").

I.

INTRODUCTION

St. Paul's opposition contains numerous inapplicable and misplaced arguments that are insufficient to defeat Marquee's Motion. Failing to cite to any authority supporting its position, St. Paul resorts to citing cases that do not stand for the claimed proposition or are otherwise clearly distinguishable. As for St. Paul's subrogation claim for express indemnity against Marquee, it fails as a matter of law pursuant to the express terms of the Nightclub Management Agreement ("NMA"), which St. Paul finally admits is the agreement upon which its claims against Marquee are based. Despite St. Paul's assertions to the contrary, the plain terms of the NMA establish that Nevada Property 1, LLC dba Cosmopolitan ("Cosmopolitan") and St. Paul are bound by the NMA's waiver of subrogation provision as Cosmopolitan agreed to procure the insurance required of its wholly-owned subsidiary, Nevada Restaurant Venture 1, LLC, under the NMA subject to a waiver of subrogation. The indemnity provision in the NMA also applies to bar St. Paul's subrogation claim as Marquee's indemnity obligation to Cosmopolitan is limited to uninsured losses. Since Cosmopolitan was fully defended and indemnified by the insurers in the underlying action and has no uninsured losses, Cosmopolitan has no shoes for St. Paul to step into in support of a claim against Marquee. As for St. Paul's statutory subrogation claim under the Uniform Contribution Act (the "Act"), that claim fails based on the plain language of the Act and the jury's verdict in the underlying action finding that Cosmopolitan was liable for multiple intentional tort claims. Because St. Paul's claims for express indemnity and statutory subrogation fail as a matter of law, the Court should grant Marquee's Motion and dismiss with prejudice each of the claims brought in the FAC against Marquee.

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II.

ARGUMENT

A. St. Paul's Express Indemnity Claim Should Be Dismissed

1. St. Paul Is Bound By The Waiver of Subrogation Provision In The NMA Because Cosmopolitan Was Required To Procure the Owner's Insurance Under The NMA

While St. Paul finally concedes that the NMA is in fact the operative agreement upon which it relies in support of its alleged express indemnity claim against Marquee, St. Paul now contends that Cosmopolitan (and thus St. Paul by way of subrogation) is not bound by the waiver of subrogation provision contained in Section 12.2.6 of the NMA because such provision only applies to its subsidiary, Nevada Restaurant Venture 1, LLC ("NRV1"). This argument fails because it ignores Section 17.2 of the Lease attached as Exhibit D to the NMA which delegated NRV1's insurance requirements under the NMA to Cosmopolitan. As discussed more fully below, Section 17.2 of the Lease provides that Cosmopolitan shall procure "all insurance required to be obtained by" NRV1 under Section 12.1 of the NMA. (*Ex. D to NMA*, Lease, ¶ 1(h), Section 17.2.) Even if Section 12.1 of the NMA was not one of the provisions of the NMA to which Cosmopolitan expressly agreed to be bound, Cosmopolitan expressly assumed NRV1's obligation to provide the insurance required by Section 12.1 of the NMA in Section 17.2 of the Lease. Accordingly, Cosmopolitan assumed the obligation to procure the insurance that complied with all of the terms of Section 12, including the waiver of subrogation obligation set out in Section 12.2.6.

St. Paul asks this Court to find that Cosmopolitan was only a party to the portions of the NMA that allegedly benefit St. Paul's claims, but not a party to the NMA with respect to the provisions that defeat St. Paul's claims. Not surprisingly, St. Paul has cited no authority to support this position. The cases cited by St. Paul in its opposition, *Willis Realty Assocs. v. Cimino Const. Co.*, 623 A.2d 1287 (Me. 1993); *Gulf Ins. Co.*; *Gulf Ins. Co. v. Quality Bldg. Contractor, Inc.*, 58 A.D.3d 595 (2009); and *St. Paul Fire & Marine Ins. Co. v. FD Sprinkler Inc.*, 76 A.D.3d 931 (2010), have no application and are inapposite to the facts of this case. These cases involved waiver of subrogation provisions where the entities were not parties to the contracts that contained the relevant provisions. Here, Cosmopolitan was both a signatory and a party to the NMA and expressly assumed the obligation to

obtain the insurance required by NRV1 under the NMA.

It is clear from the express terms of the NMA that the St. Paul policy, which was procured by Cosmopolitan pursuant to the requirements of the NMA, is subject to the waiver of subrogation provision. Section 12.2.6 of the NMA provides that the waiver of subrogation requirement 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 maintained by any "Owner Insured Parties." Section 12.2.3 of the NMA defines "Owner Insured Parties" to include the Owner (NRV1), the Project Owner (Cosmopolitan), the landlord and tenant under the Lease (also Cosmopolitan and NRV1), their respective parents, subsidiaries, affiliates, and other related persons and entities. Accordingly, despite St. Paul's contentions otherwise, the waiver of subrogation clause in the NMA expressly applies to Cosmopolitan's insurance requirements, including the policy issued by St. Paul, which mandated that Cosmopolitan's policies include a waiver of subrogation against Marquee.

While St. Paul initially contends that its policy does not contain a waiver of subrogation provision, it goes on to admit that its policy includes a "Waiver of Right of Recovery Endorsement." Despite St. Paul's assertion to the contrary and although a subrogation waiver endorsement is not required when, as here, the parties to the NMA waived subrogation rights, the Waiver of Right of Recovery Endorsement only further operates as a waiver of St. Paul's subrogation rights. St. Paul attempts to circumvent the fact that its policy contains a waiver of subrogation provision by asserting that the endorsement only applies if Cosmopolitan waived its rights of recovery against Marquee. However, Cosmopolitan need not expressly agree to the subrogation waiver provision when the unambiguous language of the NMA establishes that the subrogation rights were waived and Cosmopolitan assumed the obligation to procure the Owner Insured Parties' insurance requirements set out in Section 12.2.6 of the NMA. The parties to the NMA mutually agreed that all insurance policies issued pursuant to the NMA would contain a waiver of subrogation of the insurers' rights against the Owner Insured Parties, which includes Cosmopolitan. In fact, St. Paul admitted in its opposition to Marquee's first Motion to Dismiss, that this provision requires its policy to contain a waiver of subrogation endorsement. (Opposition to Marquee's Motion to Dismiss Complaint, p. 8,

ln. 13-14.) Given that Cosmopolitan expressly agreed to waive its insurers' subrogation rights against Marquee when it assumed the obligation to procure the insurance required by NRV1 under the NMA, St. Paul has no shoes to step into to pursue Marquee. Any other reading of the NMA would be contrary to the clear language of the NMA, which this Court can interpret as a matter of law.

St. Paul further asserts that, even if Cosmopolitan did waive subrogation rights, courts have refused to enforce exculpatory contractual clauses, such as waiver of subrogation provisions, where the alleged harm was the result of gross negligence or intentional or willful misconduct. However, none of the cases cited by St. Paul involved a waiver of subrogation provision.[1] The *Rhino Fund*, *Wright*, and *Finch* cases involved exculpatory clauses which sought to relieve a party from liability while the *Airfreight* and *Fremont Homes* cases involved contractual provisions limiting remedies or damages. Courts draw a distinction between clauses limiting liability and waiver of subrogation provisions and have found that agreements to waive subrogation are enforceable even if there are allegations of misconduct. *See, Abacus Federal Savings Bank v. ADT Security Services, Inc.*, 18 N.Y.3d 675, 684, 967 N.E.2d 666, 670 (App. 2012). Therefore, St. Paul's assertion that the subrogation waiver in Section 12.2.6 does not apply due to gross negligence or intentional conduct has no merit.

Further, the clauses at issue in the cases cited by St. Paul were one-sided while the waiver of subrogation provision in Section 12.2.6 was mutual between the parties to the NMA. Irrespective of its assertion that Cosmopolitan only agreed to be bound by certain provisions of the NMA, Cosmopolitan agreed to provide the insurance required by NRV1 under the NMA, which was to include a waiver of subrogation. Because Cosmopolitan expressly agreed to waive its insurers' subrogation rights against Marquee, its insurer, St. Paul, has no shoes to step into to pursue Marquee. *See, St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73, 84 (2nd Cir. 2005); *Kaf-Kaf, Inc. v. Rodless Decorations, Inc.*, 90 N.Y.2d 654, 660, 687 N.E.2d 1330 (1997) (finding

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[1] *Rhino Fund, LLP v. Hutchins*, 215 P.3d 1186 (Colo. App. 2008) ("*Rhino Fund*"); *Wright v. Sony Pictures Entm't, Inc.*, 394 F.Supp.2d 27 (D.D.C. 2005) ("*Wright*"); *Finch v. Southside Lincoln-Mercury, Inc.*, 274 Wis.2d 719 (App.2004) ("*Finch*"); *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103 (App.2007) ("*Airfreight*"); and *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952 (Wyo. 1999) ("*Fremont Homes*").

"parties to an agreement may waive their insurer's right of subrogation.")

St. Paul further argues, without any factual or legal support, that Marquee accepted Cosmopolitan's tender of defense and indemnity and, thus, "effectively bought the claim" such that the waiver of subrogation provision in the NMA is of no consequence. However, this argument incorrectly conflates the waiver of subrogation provision and the contractual indemnity obligation. *See, Davlar Corp. v. Superior Court*, 53 Cal.App.4th 1121, 1125 (1997) (finding there was "no inconsistency" between a waiver of subrogation clause and indemnity clause in a subcontract, which were "two distinct provisions".) Nonetheless, assuming *arguendo* that Marquee did accept Cosmopolitan's contractual indemnity tender, the express indemnity obligation itself does not apply to claims covered by the parties' insurance required under the NMA. On this basis alone, St. Paul's subrogation claim fails against Marquee as a matter of law. In any event, the St. Paul policy is insurance that was required by Cosmopolitan under the NMA. Therefore, Marquee has no obligation to indemnify Cosmopolitan (or St. Paul by extension) for amounts paid by St. Paul. Construing Section 13 together with Section 12.2.6 of the NMA, the unambiguous language of the NMA makes clear that insurers are precluded from pursuing any subrogation claims against the parties to the NMA.

2. <u>The St. Paul Policy Was Insurance Required By The NMA, And Marquee Owes No Indemnity With Respect To Claims Covered By The St. Paul Policy</u>

In an attempt to avoid dismissal of the FAC, St. Paul contends that there was no requirement for Cosmopolitan to provide insurance, and therefore, its policy was not insurance required under the NMA such that the limitations in the indemnity provision in Section 13 do not apply. This argument also fails because Section 12.1.3 of the NMA and the Lease agreement between NRV1 and Cosmopolitan required Cosmopolitan to procure the insurance required by the Owner Insured Parties under the terms of NMA. Section 12.1.3 of the NMA states that the Owner, NRV1, shall provide "any coverage required under the terms of the Lease to the extent such coverage is not the responsibility of [Marquee] to provide pursuant to <u>Section 12.2</u> below." Exhibit D to the NMA is the Lease between Cosmopolitan and NRV1 with regard to the subject premises. Pursuant to the insurance requirements set out in Section 17.2 of the Lease, Cosmopolitan agreed to "carry and maintain all insurance required under paragraph 1(h)" of the Lease. Paragraph 1(h) of the Lease titled "Landlord Insurance"

provides that Cosmopolitan will maintain "[a]ll insurance required to be obtained by [NRV1] under Section 12.1 of the RMA." RMA is defined by the Lease as the NMA entered into between Marquee and NRV1. Given Cosmopolitan's agreement to procure and maintain the insurance required by NRV1 under Section 12.1 of the NMA, St. Paul's assertions that Cosmopolitan was not required to provide insurance and that its policy was not insurance required under the NMA are specious. St. Paul even admits in its concurrently filed opposition to National Union's Motion to Dismiss that its policy is the "Owner Policy" set forth in the NMA. (Opposition at p. 19 ["Plainly, the NMA provides that the Owner Policy (St. Paul) is to be excess to the Marquee Policy (AIG)."])

Pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify Cosmopolitan for losses "not otherwise covered by the insurance required to be maintained under the agreement." Because (i) the St. Paul policy obtained by Cosmopolitan was "required" by the NMA and (ii) Cosmopolitan was fully defended and indemnified in the underlying action by National Union and its other insurers, Cosmopolitan does *not* have any uninsured losses and, therefore, the indemnity provision cannot apply. As a matter of law, these facts are fatal to St. Paul's subrogation claim against Marquee for express indemnity.

Knowing that the indemnity provision in the NMA defeats its subrogation claim against Marquee, St. Paul attempts to create ambiguity where none exists by asserting that the definition of Losses refers to sums "reimbursed" by insurance while the indemnity provision refers to losses that are not "covered" by insurance. St. Paul then attempts to conflate the differences between commercial general liability policies and indemnity policies. However, these distinctions have no relevance or application to the indemnity provision in the NMA. When reading the definition of the term Losses with the rest of the indemnity provision in Section 13.1, the unambiguous language of the NMA makes clear that the NMA adopted a "belt and suspenders" approach to indemnity and does not allow indemnity in any circumstance when a loss is paid by insurance required under the NMA. St. Paul's attempt to distinguish between commercial general liability policies and indemnity policies is of no significance and does not save its deficient claim. Accordingly, St. Paul's subrogation claim for express indemnity against Marquee must be dismissed.

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B. St. Paul's Statutory Subrogation Claim Should Be Dismissed Because St. Paul Has No Contribution Rights Under NRS 17.225

In its opposition, St. Paul attempts to escape the realities of the underlying action and re-write the jury's verdict by asserting that the underlying plaintiff's injuries and damages were caused solely by Marquee. However, the jury's verdict in the underlying action unambiguously provides that Cosmopolitan and Marquee were jointly and severally liable for the intentional torts of assault, battery, and false imprisonment. (FAC ¶¶ 13-14, Ex. C.) Under Nevada law, a party can be vicariously liable for the intentional torts of another. *See, Rockwell v. Sun Harbor Budget Suites,* 112 Nev. 1217 (1996). Because Cosmopolitan was found liable for several intentional torts in the underlying action, St. Paul's statutory subrogation claim for contribution fails under NRS 17.255.

St. Paul argues that the verdict is of no consequence because the underlying action settled prior to the entry of judgment. In support of this position, St. Paul cites to an unpublished federal decision, *Terrell v. Cent. Washington Asphalt, Inc.,* No. 211CV00142APGVCF, 2016 WL 8738266 at *3 (D. Nev. Mar. 4, 2016), for the proposition that "where the complaint alleges both negligence 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." (Opposition at p. 12.) Although the *Terrell* court denied a motion for summary judgment which argued certain parties were not entitled to contribution pursuant to NRS 17.225 because the parties were intentional tortfeasors, the court reasoned that such a denial was correct because "[n]o jury has found the CW Defendants engaged in intentional conduct…" *Terrell*, at *3. Unlike in *Terrell*, here, the settlement of the underlying action occurred after the jury already found Cosmopolitan liable for multiple intentional torts.

The other case cited by St. Paul, *Hanson v. Johnson*, No. 2:10-CV-1649-GMN-LRL, 2011 WL 3847203 at *4 (D. Nev. Aug. 30, 2011), is similarly inapplicable as it involved circumstances in which the defendants were found jointly and severally liable for a negligence claim. Cosmopolitan and Marquee were found jointly and severally liable for both negligence and intentional tort claims. Accordingly, the *Terrell* and *Hanson* cases are of no assistance to St. Paul given the jury's verdict in

the underlying action found that Cosmopolitan was jointly and severally liable with Marquee for intentional torts. As such, St. Paul is precluded from stepping into Cosmopolitan's shoes to pursue contribution under NRS 17.265.

St. Paul misconstrues the plain language of NRS 17.265 by asserting that there is a distinction between a "right" to indemnity and an "entitlement" to indemnity. However, the terms "right" and "entitlement" are synonymous. *See, Oxford Dictionaries*, https://en.oxforddictionaries.com/thesaurus/entitlement; *see also*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/entitlement (defining "entitlement" as "the state or condition of being entitled: right" and "a right to benefits specified especially by law or contract"). The Nevada Legislature also views the terms synonymously given the title of NRS 17.265 is "Certain rights of indemnity unimpaired." Of note, St. Paul has provided no authority for its position that, in the event its indemnity claim ultimately fails, it may rely upon NRS 17.265 to pursue contribution. That is not surprising since Nevada courts have found that implied indemnity claims cannot be sustained when express indemnity claims exist. *See, Calloway v. City of Reno*, 113 Nev. 564, 578 (1997). Accordingly, 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 and, consequently, St. Paul has no shoes to step into and no right to contribution against Marquee.

C. Marquee Is Entitled To An Award Of Attorneys' Fees Against St. Paul

Similar to its attempt to carve out application of the waiver of subrogation requirements under the NMA, St. Paul asserts that it is not subject to the prevailing party attorney fee provision in Section 28 of the NMA because Cosmopolitan did not agree to be bound by this provision. St. Paul then takes the absurd position that, nonetheless, it is entitled to prevailing party attorneys' fees from Marquee pursuant to Section 28 of the NMA. St. Paul cannot have it both ways. Regardless of whether Cosmopolitan agreed to be bound by certain provisions in the NMA, St. Paul is bound by the terms of the NMA by operation of law as St. Paul's claims against Marquee are based on the NMA.

St. Paul improperly characterizes Section 28 as a "unilateral" prevailing party attorney fee provision. It is actually a bilateral provision as it provides that "[i]n the event of a dispute between

the Parties concerning the enforcement or interpretation of [the NMA], the prevailing party … shall be reimbursed immediately by the other party to such dispute for reasonably incurred attorneys' fees and other costs and expenses." As noted in the *Morales* case cited by St. Paul, "a contractual provision for the recovery of attorneys' fees will be enforced according to its express terms." *Morales v. Aria Resort & Casino, LLC*, No. 2:11-CV-02102-LRH, 2014 WL 1814278 at *1 (D. Nev. May 7, 2014). Given Cosmopolitan is a party to the NMA, and further given St. Paul is attempting to step into the shoes of Cosmopolitan to enforce the NMA, Marquee is entitled to an award of attorneys' fees from St. Paul under the NMA.

Further, contrary to St. Paul's assertion, NRS 18.010(2)(b) also provides grounds for the Court to award Marquee its attorneys' fees. Despite that St. Paul knew the NMA contained a waiver of subrogation provision that applied to its policy issued to Cosmopolitan and also knew that the mutual indemnity provisions in Section 13 of the NMA only applied to out-of-pocket losses incurred by the parties that were not covered by insurance, it went forward with its baseless complaint against Marquee without reasonable grounds. Therefore, Marquee is entitled to recover its attorneys' fees for having to defend against St. Paul's frivolous complaint. St. Paul asserts from one side of its mouth that NRS 18.010 does not apply when there is a written agreement entitling the prevailing party to an attorney fee award such as the NMA. Yet, from the other side of its mouth, St. Paul argues that the prevailing party attorney fee clause in the NMA does not apply to claims between Marquee and Cosmopolitan. Again, St. Paul cannot have it both ways. Either the prevailing party attorney fee provision in the NMA applies between Marquee and Cosmopolitan or it does not. If the prevailing party attorney fee provision does not apply, then Marquee is entitled to recover its attorneys' fees under NRS 18.010(2)(b).

D. St. Paul's Complaint Should Be Dismissed Without Leave To Amend

St. Paul acknowledges the FAC's deficiencies when it alternatively requests additional leave to amend. But St. Paul has already been given an opportunity to amend against Marquee and has failed as a matter of law to allege any viable claims. As established in Marquee's Motion and herein, St. Paul has no valid claims against Marquee for subrogation or statutory contribution and no amendments can fix the FAC's deficiencies. Nothing St. Paul could plead would circumvent the

clear language of the waiver of subrogation and indemnity provisions in the NMA or the clear language of the Uniform Contribution Act. After multiple bites of the apple, St. Paul should not be allowed another.

III.

CONCLUSION

For foregoing reasons, St. Paul's FAC against Marquee should be dismissed with prejudice, and Marquee should be awarded its attorneys' fees and costs.

DATED: September 14, 2018

HEROLD & SAGER

By: _____

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)
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 **DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S 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 **September 14, 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

Monica Z. Hodge
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).

ROPP
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)
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 NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT

Date: October 30, 2018
Time: 9:00 a.m.

Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") hereby submits the following Reply in Support of Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") First Amended Complaint ("FAC").

I.

INTRODUCTION

St. Paul, desperate for a viable cause of action against National Union, asks the Court to accept several novel legal theories that have never been adopted by the Nevada Supreme Court and many of which have not been adopted in any jurisdiction. In doing so, St. Paul relies upon a mishmash of historical legal concepts and principles that, as a matter of law, have no application to the claims and damages at issue in this action. Not only is St. Paul asking this Court to adopt equitable subrogation law that has not been recognized in Nevada in the context of actions between insurers, but it is also asking the Court to allow equitable subrogation between two excess carriers, a position for which St. Paul provides no legal authority from any jurisdiction. Similarly, there is no legal authority for St. Paul's contractual subrogation claim against National Union as Nevada courts have expressly rejected such claims. Finally, St. Paul's assertion that its policy is excess to National Union's policy is nothing more than an unsupported and baseless legal contention that is contrary to the allegations in the FAC. Because St. Paul has no legal or equitable basis to pursue any claim against National Union, the Court should dismiss with prejudice each of the claims against National Union in the First Amended Complaint.

II.

ARGUMENT

A. National Union's Motion Properly Seeks Relief Available Under NRCP 12(b)(5)

As a threshold matter, National Union addresses St. Paul's contention throughout its opposition that National Union "does not dispute" various allegations in St. Paul's FAC. (*See, e.g.,* Opposition at p.2.) The mere fact that National Union did not specifically address an alleged fact in its Motion is not the equivalent of admitting or "not disputing" any particular fact where, as here, such matters simply are not relevant to a determination of the Motion to Dismiss. As this Court is well aware, there is no requirement in presenting a motion to dismiss to either admit or deny each

allegation of the complaint when such allegations are not germane to the requested relief. Rather, as is typically the case with a 12(b)(5) motion, National Union has focused its Motion on the lack of legal support for St. Paul's claims against National Union that the Court can and should determine at this stage.

Similarly, St. Paul misinterprets the proper legal weight to be given its allegations by the Court in ruling on National Union's Motion. Throughout its opposition, St. Paul takes issue with National Union's Motion, contending that National Union improperly disputes St. Paul's allegations, which must be assumed true for the purposes of the Motion. While courts must accept as true all material factual allegations in a complaint for purposes of a motion to dismiss, National Union's Motion requests the Court to address the legal effect of St. Paul's allegations, regardless if presumed true. Specifically, National Union contends that St. Paul's allegations, even if presumed true, do not allow the recovery sought by St. Paul as a matter of law. Such a contention does not undermine the purpose of a motion to dismiss, but rather seeks the precise relief the Court is permitted when addressing a motion to dismiss. *See* NRCP 12(b)(5); *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008). While National Union disputes the vast majority of the facts set out in the FAC and raised in St. Paul's opposition, even if true, St. Paul has no valid claims against National Union.

B. St. Paul Is Not Entitled To Seek Equitable Subrogation Against National Union Because The Nevada Supreme Court Has Never Recognized Such A Claim Between Insurers

St. Paul's opposition provides a dissertation on the "origin, meaning, and purpose" of subrogation in the hope that it can distract the Court from the lack of legal authority for its specific claims. But the general principles regarding subrogation cited by St. Paul do not change the fact that an equitable subrogation claim between insurers is not an established right in Nevada. While St. Paul cites to *AT&T Technologies, Inc. v. Reid*, 109 Nev. 592, 595-596 (1993), *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428 (2010), *Federal Ins. Co. v. Toiyabe Supply,* 82 Nev. 14 (1966), *Globe Indem. v. Peterson-McCaslin*, 72 Nev. 282 (1956), and *Laffranchini v. Clark*, 39 Nev. 48 (1915) in purported support of its contention that Nevada recognizes equitable subrogation

claims between insurers, none of those cases involved an action for equitable subrogation between insurers, and accordingly, provide no support for St. Paul's position.

AT&T involved a self-insured employer's statutory subrogation claim against its employee injured by a third-party tortfeasor. *American Sterling Bank* involved equitable subrogation in the context of mortgage lienholders. *Federal Ins. Co.* involved subrogation rights of a surety against a bank. *Globe* involved the scope of a surety's subrogation rights on a public works bond arising from a contractor's failure to perform. *Laffranchini* involved the subrogation rights of a subsequent mortgagee as to the original mortgagee. Even the federal district court in *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL3360943 at *4 (D. Nev. June 9, 2016) ("*Colony I*") and *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 at *5 (D. Nev. July 5, 2018) ("*Colony II*"), relied on by St. Paul, noted that the Nevada Supreme Court has never addressed the question of whether equitable subrogation applies between insurers. *Id.* Moreover, not only is St. Paul asking this Court to adopt subrogation law not yet recognized in Nevada, it is asking the Court to re-write equitable subrogation to allow equitable subrogation between co-excess insurers, something for which St. Paul can provide no legal authority from any jurisdiction.

While St. Paul asserts that National Union fails to cite any legal authority that bars subrogation between insurers, National Union is not obligated to do so. It is St. Paul's burden as plaintiff to provide legal authority to support a valid claim against National Union. As discussed in National Union's Motion and herein, Nevada state courts have not recognized equitable subrogation claims between insurers, let alone a claim by an excess insurer against another excess insurer for the alleged failure to settle. Because an equitable subrogation action between insurers is not a recognized claim under Nevada law, St. Paul has no legal basis to assert equitable subrogation claims against National Union and, therefore, its equitable subrogation claims fail as a matter of law.

C. St. Paul Is Not Entitled To Contractual Subrogation Against National Union Because Such A Claim Is Not Permitted Under Nevada Law

As discussed in National Union's Motion, the Nevada federal district court expressly rejected contractual subrogation claims between co-insurers finding that "in the insurance context,

contractual subrogation is generally applied not by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor." *Colony I,* at *6. The *Colony* court soundly noted that "the Nevada Supreme Court has held that contractual subrogation in the context of insurers and insureds may contravene public policy" and that contractual subrogation may provide for windfalls in the insurance context. *Id.*

St. Paul takes issue with the *Colony* decision contending that the court "misapplied" *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502 (1986). St. Paul argues that the *Maxwell* case was limited to the context of medical payments. (Opposition at p. 13.) However, there is no such limitation in the *Maxwell* holding. Rather, the *Maxwell* court noted that it need not consider the characterization of the assignment, holding that "[w]hether the subrogation clause is viewed as an assignment of a cause of action or as an equitable lien on the proceeds of any settlement, the effect is to assign a part of the insured's right to recover against a third-party tortfeasor. … We hold such an assignment is invalid." *Maxwell*, 102 Nev. at 505. Further, the *Colony I* court correctly noted that, in the context of an excess insurer suing a primary insurer, allowing for contractual subrogation could provide a windfall. *Colony I,* at *6. The cases relied upon by St. Paul with respect to the alleged misapplication of *Maxwell* were not set in the subrogating carrier context and accordingly are not instructive. *See, e.g., Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771 (2005) (dispute between insureds and employer-insurer with respect to employer-insurer's lien rights following settlement of underlying lawsuit by insureds against defendants arising out of fire incident at gas station.) Accordingly, this Court should apply the reasoning of the *Colony I* court and dismiss St. Paul's contractual subrogation claim under Nevada law for failure to state a cause of action.

D. St. Paul Is Not Entitled To Seek Equitable Subrogation or Contractual Subrogation Against National Union Because The St. Paul Policy Is Not Excess To The National Union Policy

Similar to its opposition to National Union's first motion to dismiss, St. Paul attempts to rely on the *Colony I* and *Colony II* cases and out-of-state authorities in support of its contention that it has a valid subrogation claim against National Union for breach of the duty to settle. However, as

discussed in both National Union's initial motion to dismiss and the instant Motion, such authorities are inapposite as they involved actions between primary and excess insurers in the same tower of insurance coverage. As a matter of law, National Union is neither a primary insurer nor a first-layer excess carrier below St. Paul. In the FAC, St. Paul implausibly asserts the flawed legal contention that its policy is excess to the National Union policy. (*see, e.g.,* FAC ¶ 44.) However, St. Paul's assertion of a legal conclusion does not make it true, and the Court does not have to assume it to be true as required with a presumed fact. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012). It is undisputed that both St. Paul and National Union issued umbrella policies which provided coverage to Cosmopolitan under two separate and distinct coverage towers. The St. Paul excess policy provided coverage to Cosmopolitan as its named insured, while the National Union excess policy provided a separate tower of coverage to Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") as its named insured under a policy to which Cosmopolitan was an additional insured.[1] (FAC ¶¶ 30, 40; Declaration of Michael 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 ("Muscarella Decl."), ¶ 2, Ex. A.)

St. Paul does not dispute the accuracy of the graphic depicting these separate towers of coverage that are set out in the Motion to Dismiss. As shown by National Union's graphic, Marquee and Cosmopolitan are named insureds in separate insurance towers. St. Paul cannot plausibly allege otherwise or in good faith challenge this indisputable fact. Whether St. Paul is an excess insurer to National Union is not a factual issue, but rather a legal issue which this Court can and should decide as a matter of law.

Contrary to St. Paul's assertion, the Nightclub Management Agreement ("NMA") does not

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[1] St. Paul continues to refuse to cite to the relevant portions of its policy or attach them as an exhibit to its FAC despite repeated requests to do so and the raising of this deficiency in National Union's initial motion to dismiss. Despite these failures, St. Paul's FAC admits that Cosmopolitan was a named insured on its umbrella policy while Cosmopolitan was an additional insured on the National Union umbrella policy. (FAC ¶¶ 15, 24, 30, 33, 40-41.)

control the priority of coverage issues between the insurers, as neither St. Paul nor National Union were parties to the NMA. In actions between insurers regarding priority of coverage issues, such as here, courts have found the provisions of an insurance policy control over the terms in an insured's contract. *See Travelers Cas. & Surety Co. v. American Equity Ins. Co.*, 93 Cal.App.4th 1142, 1157-1158 (2001) (holding that disputes between two insurers should be governed by general principles governing the interpretation and enforcement of the policies, as opposed to contractual indemnification clauses); *Reliance National Indem. Co. v. General Star Indem. Co.*, 72 Cal.App.4th 1063, 1081 (1999) ("*Rossmoor* did not purport to establish a general rule that a contractual indemnification agreement between an insured and a third party takes precedence over well-established general rules of primary and excess coverage in an action between insurers…"); *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc.*, 156 Cal.App.4th 1448, 1465-1466 (2007) ("contractual terms of insurance coverage are enforced whenever possible.")

St. Paul's reliance on *Rossmoor* and *Mt. Hawley* is misplaced as those decisions involved actions between primary insurers stepping into the shoes of their insureds to pursue their insureds' contractual rights for indemnity. Here, St. Paul's claims against National Union are based on an alleged breach of the duty to settle. St. Paul is not stepping into Cosmopolitan's shoes to pursue claims against National Union under the NMA. Accordingly, in this dispute between two excess insurers regarding the priority of coverage of their policies, it is the insurers' applicable insurance policy language that controls the determination of the priority of coverage.

As discussed in the moving papers, the National Union policy provides that it is excess over scheduled underlying primary insurance and other insurance providing coverage to the insured, including the coverage provided by St. Paul. (Muscarella Decl., ¶ 2, Ex. A.) St. Paul refuses to attach its policy or cite the relevant policy provisions to refute this undisputed fact. As such, St. Paul's bald legal contention that its policy is somehow excess to the National Union policy is meritless and cannot provide a basis for denying National Union's Motion. Accordingly, St. Paul's claims for equitable subrogation and contractual subrogation fail as a matter of law.

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E. The Doctrine Of Superior Equities Defeats St. Paul's Subrogation Claims For Breach of the Duty to Settle

While subrogation allows an insurer to step into the shoes of its insured, the insurer's substitute position is subject to important equitable principles, one of which is the doctrine of superior equities, which prevents an insurer from recovering against a party whose equities are equal or superior to those of the insurer. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal.App.4th 1098, 1107 (2006); *Sompo Japan Ins. Co. of America v. Action Exp., LLC*, 19 F.Supp.3d 954, 958 (C.D. Cal. 2014). Although St. Paul claims the *State Farm General Ins. Co.* decision noted that California was one of the "few" jurisdictions to apply this doctrine, the court actually stated that "California, along with other jurisdictions, has adopted superior equities doctrine in all cases of equitable or conventional subrogation." *State Farm General Ins. Co.*, 143 Cal.App.4th at 1109. The court's use of the term "few" in *State Farm* was in reference to jurisdictions that have rejected the doctrine of superior equities all together and allow insurers to subrogate against other insurers whether or not they can demonstrate superior equities. *Id.* Notably, the jurisdictions identified did not include Nevada, but rather are decisions from New Jersey, South Carolina, and Alabama. *Id.* Accordingly, St. Paul's reading of *State Farm* seeks to distract from the inescapable conclusion that it cannot provide any Nevada authority supporting its position that the doctrine of superior equities does not apply to its subrogation claims as followed in the vast majority of jurisdictions.

St. Paul contends that it has superior equities to National Union because National Union breached its duty to settle the underlying action prior to verdict. (FAC ¶¶ 88-89.) However, St. Paul owed an independent duty to Cosmopolitan to investigate the claim and settle the underlying action under its own policy. St. Paul does not deny (and cannot deny) this independent duty. St. Paul had the opportunity to settle the underlying case and could have settled the matter prior to the verdict (*id.* ¶¶ 53, 132b.) if it desired to protect its insured from an adverse verdict, as it contends National Union should have done. *See generally, Physicians Ins. Co. of Wisconsin, Inc. v. Williams*, 128 Nev. 324, 335, n.7 (2012). Where, as here, St. Paul had the same duty to settle and an opportunity to settle the underlying action and chose not to, it cannot now claim it has superior equity to

National Union.

As anticipated, St. Paul implausibly asserts that Cosmopolitan was akin to an innocent bystander and that the loss was "caused" by Marquee. However, Cosmopolitan was facing its own liability for breach of its "non-delegable duty" to keep patrons safe, and Cosmopolitan was ultimately found to be jointly and severally liable with Marquee. (FAC ¶ 13.) Cosmopolitan's liability for its own negligence is covered by its insurance provided by Zurich and St. Paul, who were placed on notice of the underlying action and had the same duty to settle that St. Paul contends was owed by National Union.

F. St. Paul Is Not Entitled To Seek Equitable Contribution Against National Union Because St. Paul Cannot Seek Contribution Beyond National Union's Limits

As noted in National Union's Motion, Nevada has not recognized an equitable contribution claim by an insurer against another insurer. However, even if such a claim existed under Nevada law (which it does not), equitable contribution does not allow for the recovery of damages beyond the limits of an insurer's policy. *See Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, 2012 WL 870289 at *3 (D. Nev. Mar. 14, 2012) ("... once the [limits are] reached, the insurer's duties under the policy are extinguished.") As National Union exhausted its policy limit in settlement of the underlying action, National Union has no further co-obligation under the policy and St. Paul cannot obtain contribution from National Union.

In an attempt to circumvent National Union's well-established defense, St. Paul makes an incorrect and baseless allegation that National Union exhausted its policy limit through payments made on behalf of Marquee rather than Cosmopolitan. Regardless of the truth of this allegation, St. Paul's attempt to pursue a claim for contribution under a theory of bad faith premised on an assertion that National Union favored one insured over another is not a claim possessed by St. Paul. Even if true (which it is not), St. Paul cannot seek contribution by stepping into Cosmopolitan's shoes to pursue a bad faith claim against National Union. The "right of equitable contribution belongs to each insurer individually. It is not based on any right of subrogation to the rights of the insured, and is not equivalent to 'standing in the shoes' of the insured." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 1294 (1998). No court has ever recognized the ability of

a carrier to seek contribution or subrogation (whether excess or not) against a co-carrier on the premise that it favored one insured over another. To the extent a claim for bad faith resulting from the alleged favoring of one insured over another were viable, such a claim would be personal to Cosmopolitan and would require express assignment from the insured for which none was given to St. Paul.[2] There is no authority, and St. Paul cites to none, that allows it to seek damages from National Union in excess of National Union's policy limit either premised on a theory of contribution or on a bad faith subrogation theory that one insured was favored over another. Therefore, St. Paul's claim for contribution fails as a matter of law.

G. The Remainder Of St. Paul's Claims Fail Because They Are Based Upon Alleged Damages That St. Paul Has No Legal Ability to Pursue

St. Paul's legal theory asserting subrogation for breach of contract suffers from the same problem as its claim for equitable contribution. Specifically, any alleged damages suffered under such a claim belong to Cosmopolitan. St. Paul has no legal standing to pursue a breach of contract claim in the shoes of its insured without an express assignment to do so and when, as here, its insured has suffered no such damages. Any damages that Cosmopolitan may have suffered based on National Union's defense of the underlying action simply have no bearing upon the damages that St. Paul is seeking in this matter, which is derived from St. Paul's contribution to the settlement in the underlying action. As with the alleged claim for favoring one insured over another, Cosmopolitan has no viable claim for breach of contract or breach of the covenant of good faith and fair dealing, as Cosmopolitan suffered no damages when the underlying action was settled post-verdict by the insurers. Finally, St. Paul has not and cannot provide any authority that would support a right to recover monetary damages with respect to its equitable estoppel cause of action.

H. St. Paul's Complaint Should Be Dismissed Without Leave To Amend

Acknowledging the insufficiency of its pleading, St. Paul alternatively requests leave to

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[2] *See Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn.App. 185, 202-203 (2013); *Page v. Allstate Ins. Co.*, 614 P.2d 339, 340 (Ariz. Ct. App. 1980); *Rowlands v. Phico Ins. Co.*, 2000 WL 1092134 at *5 (D. Del. July 27, 2000) ("without an assignment [of the insured's bad faith claims], Rowlands has no standing...").

amend the FAC to correct its deficiencies. But as rounds of motion to dismiss briefing has made apparent, St. Paul has – as a matter of law – no viable claim against National Union, and no amendment by St. Paul can cure these issues. After multiple bites of the apple, St. Paul should not be allowed another.

III.

CONCLUSION

For foregoing reasons, St. Paul's First Amended Complaint against National Union should be dismissed with prejudice for leave to amend.

DATED: September 14, 2018

HEROLD & SAGER

By: John Ozmet (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)
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 **DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S REPLY IN SUPPORT OF 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 **September 14, 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

Monica Z. Hodge
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).

RSPN
Ramiro Morales [Bar No.: 007101]
William C. Reeves [Bar No.: 008235]
Marc J. Derewetzky [Bar No.: 006619]
MORALES FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Telephone: 702/699-7822
Facsimile: 702/699-9455

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI RESPONSE TO ADDITIONAL ARGUMENTS RAISED ON REPLY IN CONNECTIONS WITH DEFENDANTS' MOTIONS TO DISMISS DATE: October 30, 2018 TIME: 9:00 a.m.

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiff St. Paul Fire & Marine Ins. Co. ("Travelers") responds to the additional arguments raised by Defendants National Union Fire Ins. Co. of Pittsburgh PA ("AIG") and Roof Deck Entertainment, LLC d/b/a/ Marquee Night Club ("Marquee") in their respective Reply briefs as follows:[1]

Introduction

As this Court is aware, this matter arises from an underlying bodily injury action in which Aspen and AIG (collectively "Insurers") jointly defended both Marquee and Nevada Property I, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan"). While the Insurers were each presented with multiple opportunities to settle all claims on behalf of Marquee and Cosmopolitan, both improperly rejected these chances to protect their insureds, instead electing take their chances

[1] While Defendants AIG and Marquee filed optional reply briefs by the September 14, 2018 deadline ordered by this Court, Defendant Aspen Specialty Ins. Co. elected not to do so.

at trial. As a result of these ill-informed decisions, the jury proceeded to award damages in excess of $160,000,000, a figure substantially above the rejected settlement demands. At Cosmopolitan's request, Travelers proceeded to extricate Cosmopolitan from the situation the Insurers created. In this case, Travelers seeks reimbursement for sums it incurred resulting from the decision making of both Aspen and AIG.[2]

In its Reply brief, AIG argues for the first time that Travelers' claims are somehow foreclosed as an "express assignment" from Cosmopolitan is required. AIG's argument fails as under Nevada law, an insurer that pays money on behalf of an insured acquires its insured's rights via both contract and equity without the need for a separate assignment. *Fidelity and Deposit Co. of Maryland v. Travelers Cas. and Surety Co. of America*, 2018 WL 4550397 (D. Nev. 2018); see also *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. 2018), holding that no rigid application applies to equitable subrogation as equity controls.[3] Meanwhile, the out of state decisions AIG relies upon are inapposite as they each involve circumstances substantially different than those at issue in this case. AIG's argument, therefore, fails.

Separately, in its Reply brief, Marquee misrepresents the terms of the Management Agreement by improperly arguing that Cosmopolitan is a direct party to the Agreement such that is bound to all terms and provisions. As reflected in the cover page of the Agreement itself, the Agreement is between the Lessee of the premises (Nevada Restaurant Venture 1, LLC) and the Tenant/Operator (Marquee). See excerpt attached hereto as Exhibit A.[4] While Cosmopolitan (the Property Owner and Lessor) is designated as an intended third party beneficiary of certain provisions of the Agreement (as is customary for lessors of commercial establishments), it did not agree to, and is therefore not bound by, the waiver of subrogation provision set forth in the

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[2] As AIG is apparently defending Marquee in this matter (as evidenced by the fact that the same law firm is representing both parties in this case), AIG should bear all exposure Marquee faces pursuant to the express indemnity provision in the Management Agreement.

[3] Both *Colony* and *Fidelity & Deposit* undercut AIG's separate argument that no Nevada Court has ever recognized the concept of equitable subrogation.

[4] Given that the Management Agreement includes sensitive financial and proprietary information, the parties have only publicly filed excerpts with their respective briefs. As a complete copy of the Management Agreement was previously lodged under seal, request is made that this Court review that copy to the extent needed and/or helpful.

Management Agreement at paragraph 12.2.6.[5]

Accordingly, as discussed herein, it is respectfully submitted that the newly-raised arguments asserted by AIG and Marquee in their reply briefs be rejected.

Discussion

A surreply is appropriate and warranted if new matters are raised for the first time in the reply to which a party would otherwise be unable to respond and/or new decisional law is issued. *Bank Transactions, Inc. v. Franco*, 2017 WL 216694 (D. Nev. 2017); *Spartalian v. Citibank, N.A.*, 2013 WL 593350 (D.Nev. 2013). As new matters were raised in connection with the Reply briefs filed by both AIG and Marquee, the filing of the instant sur-reply is appropriate and warranted. Meanwhile, the *Fidelity* decision addressed herein (2018 WL 4550397) was only published last month.

A. Travelers' Claims Are Not Foreclosed As An Express Assignment is Not Required.

In its Reply, AIG argues for the first time that Travelers' claims fail as an express assignment from Cosmopolitan is required. As discussed below, this argument fails for numerous reasons.

Under Nevada law, an insurer that pays money on behalf of an insured acquires its insured's rights via both contract and equity. *Fidelity and Deposit Co. of Maryland v. Travelers Cas. and Surety Co. of America*, 2018 WL 4550397 (D. Nev. 2018). While these separate claims may be subject to legal and equitable defenses, respectively, an express assignment is not required. *Id.*; see also *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. 2018), holding that no rigid application applies to equitable subrogation as equity controls.

In this case, Travelers' claims against AIG and Aspen are based both on contract and equity. The contract-based claims are rooted in provisions in the insurance policy Travelers issued in which Cosmopolitan contractually agreed to transfer all rights of recovery in the event Travelers paid money. FAC, ¶ 42; see also *Canfora v. Coast Hotels & Casinos*, 121 Nev. 771 (2005). Additionally, as a matter of equity, Travelers acquired all rights of its insured once requested to pay

[5] In contrast, Cosmopolitan is an intended third party beneficiary of the express indemnity provision included in the Management Agreement. See Declaration of M. Derewetzky, Exhibit 2, provision 13.

money. *Zhang v. Reconstruct Co., N.A.*, __ Nev. __, 405 P.3d 103 (2017); *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423 (2010). Regardless of whether the claim is premised on contract or in equity, an express assignment is not required. See *Fidelity and Deposit*, *supra*.

Colony is instructive. In that case, Colorado Casualty (the primary insurer) failed to accept reasonable settlement demands for its available limit of $1,000,000. At the insured's request, the matter subsequently settled for $1,950,000 with Colorado Casualty tendering its remaining limit and Colony (an excess insurer) funding the balance, roughly $950,000.

In seeking reimbursement, Colony (the excess insurer) asserted a subrogation claim against Colorado Casualty (the primary insurer) based on the failure of Colorado Casualty to accept the limits demand. In ordering the primary insurer to reimburse Colony for the sums it contributed to the settlement, the Court held that Nevada does not employ a rigid application of the factors generally considered and weighed in adjudicating an equitable subrogation claim as the Court is simply empowered to apply equity. Of significance, the Court did not hold that an express assignment was either needed or required. *Colony*, therefore, supports the relief Travelers seeks in this case.

Meanwhile, the out–of-state cases relied upon by AIG are inapposite and have no precedential authority. AIG's reliance on *Trinity* is misplaced as the case is limited to the situation in which an insurer seeks more than the amount it paid, a circumstance not present in this case. See *Western Community Ins. Co. v. Burks Tractor Co., Inc.*, 2018 WL 4265732 (Id. 2018), holding that *Trinity* is limited to circumstances in which an insurer seeks more than it has paid. Meanwhile, *Page* and *Rowlands* involve claims asserted by judgment creditors, and not an excess insurer seeking recovery from the insurers for improperly rejecting settlement offers.

As a practical matter, the *Colony* decision directly addresses the circumstances at issue in this case. Given this, AIG's newly-raised argument based on dissimilar out–of-state decisions that fail to address *Colony* is properly rejected.

B. Cosmopolitan Did Not Agree To The Waiver Of Subrogation Provision

In its Reply, Marquee misrepresents the terms of the Management Agreement by arguing that Cosmopolitan is a direct party to the Agreement. This representation is false.

Per Exhibit A attached hereto, the Management Agreement is a contract entered into by and between Nevada Restaurant Venture 1, LLC (in its capacity as lessee of the premises) and Marquee (in its capacity as the operator of the club). Cosmopolitan (the owner and lessor) is not a party to the Agreement. See Exhibit A.

Admittedly, Cosmopolitan (defined in the Management Agreement as the Project Owner) is an intended third party beneficiary of certain terms of the Agreement, including the express indemnity provision. See Declarations of M. Derewetzky, Exs. 1, 2 and 5. Cosmopolitan, however, did not agree to, and is therefore not bound by, the waiver of subrogation provision set forth in the Management Agreement at paragraph 12.2.6.

As Marquee's representations to the contrary in its Reply are belied by the Agreement itself, its arguments necessarily fail.

Conclusion

For the reasons set forth herein, it is respectfully submitted that the newly-raised arguments by AIG and Marquee be rejected.

Dated: October 22, 2018

MORALES FIERRO & REEVES

By /s/ William C. Reeves
William C. Reeves
MORALES FIERRO & REEVES
600 Tonopah Drive, Suite 300
Las Vegas, NV 89106
Attorneys for Plaintiff

Exhibit A

NIGHTCLUB MANAGEMENT AGREEMENT

between

Nevada Restaurant Venture 1 LLC,
a Delaware limited liability company,

as OWNER

and

Roof Deck Entertainment LLC,
a Delaware limited liability company,

as OPERATOR

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;

"**Additional Funding Notice**" shall have the meaning given to such term in Section 10.2.3;

"**Additional Funding Total**" shall have the meaning given to such term in Section 10.2.3;

"**Additional Funding Total Balance**" shall have the meaning given to such term in Section 10.2.3;

"**Adult Deck**" shall have the meaning given to such term in the definition of Nightclub Venues;

"**Affiliate**" or "**affiliate**" shall mean (i) any Person directly or indirectly controlling, controlled by or under common control with another Person, (ii) any officer, director, partner or member of such Person or (iii) any member of such Person's immediate family. For purposes of this definition, "control" shall mean owning or controlling more than twenty-five percent (25%) of the equity or the voting rights, or otherwise possessing managerial control over, such other Person;

"**Agreement**" shall mean this Nightclub Management Agreement, as amended by any written amendments or modifications thereto;

"**Alteration**" shall have the meaning given to such term in Section 9.4;

"**Annual Operations Budget**" shall have the meaning given to such term in Section 6.3;

"**Annual Statement**" shall have the meaning given to such term in Section 4.4.5;

"**Approved Conceptual Plans**" shall have the meaning given to such term in Section 5.1.1.1;

"**Approved Construction Plans**" shall have the meaning given to such term as in Section 5.1.1.4;

"**Approved Design Plans**" shall have the meaning given to such term in Section 5.1.1.3;

"**Approved Schematic Plans**" shall have the meaning given to such term in Section 5.1.1.2;

"**Assignee**" shall have the meaning given to such term in Section 16.1;

"**Bankruptcy**" shall mean the occurrence of any of the following events in respect of any Person: (i) the granting of relief against such Person in an involuntary case under the Federal Bankruptcy Code that is not removed within one hundred twenty (120) days, or in any such involuntary case, the approval of the petition by such Person as properly filed, or the admission by such Person of material allegations contained in the petition, or (ii) the execution by such Person of a general assignment for the benefit of creditors, or (iii) the commencement of a voluntary case under the Federal Bankruptcy Code by such Person, or (iv) the appointment of a receiver for such Person or for all or a substantial part of the assets of such Person and such receivership proceedings are not removed within one hundred (120) days after the receiver's appointment, or (v) in the case of a Person that is a corporation, joint venture, partnership or other business entity, the commencement by such Person of liquidation, dissolution or winding-up proceedings, or the

commencement against any such Person of a proceeding to liquidate, wind-up or dissolve such Person, which proceeding is not dismissed within one hundred twenty (120) days;

"**Bar**" shall have the meaning given to such term in the definition of Nightclub Venues;

"**Base Development Fee**" shall have the meaning given to such term in Section 4.6.1;

"**Base Rate**" shall mean, for any day, a rate per annum equal to the sum of (a) the Prime Rate for such day and (b) three percent (3.00%). "**Prime Rate**" shall mean the rate of interest publicly announced by Deutsche Bank AG (or if Deutsche Bank AG ceases to publicly announce such rate, then the rate publicly announced by the Wall Street Journal, or its successor) from time to time, as its prime lending rate. The Prime Rate is a reference rate and does not necessarily represent the lowest or best rate actually charged to any customer.

"**Base Rent**" shall have the meaning given to such term in the definition of Operating Expenses;

"**Beneficiary Parties**" shall have the meaning given to such term in Section 19;

"**Breakup Fee**" shall have the meaning given to such term in Section 4.6.1

"**Bungalows**" shall mean the ten (10) bungalow structures located on or adjacent to the Adult Deck and more generally depicted on the site plan attached hereto as Exhibit "B" as the Bungalows. The Bungalows are not part of the Premises or the Nightclub Venues;

"**Bungalow Cabanas**" shall mean the cabanas which are located adjacent to the Bungalows (and intended to be utilized either in association with the use of the Bungalows or independent of such use) and more generally depicted on the site plan attached hereto as Exhibit "B" as the Bungalow Cabanas;

"**Bungalow Fee**" shall mean an amount equal to seven percent (7%) of the actual room rental receipts received by Owner or Hotel Operator from the rental of a Bungalow, which rental resulted from the booking or reservation of a Bungalow by Operator or its Affiliates. No Bungalow Fee shall be payable in connection with any complimentary or promotional bookings or reservations of any Bungalows or any bookings or reservations not procured or obtained by Operator or its Affiliates;

"**Cabanas**" shall have the meaning given to such term in the definition of Nightclub Venues;

"**Casino**" shall mean any establishment or portion of the Project in which gaming activities are conducted as part of the business of such establishment or portion of the Project.

"**Casino Operator**" shall mean the Project Owner or any designee of or successor to Project Owner which operates the Casino.

"**Comp Gaming Dollars**" shall mean credit earned by customers of the Casino, the Hotel and/or the Project and similar customer loyalty and/or reinvestment program(s), the amount of which credits and manner of which credits are awarded shall be determined by Project Owner or its designee in its sole and absolute discretion and which credits may be redeemed by such customers at the Nightclub Venues in the manner determined by Project

Owner or its designee. The Comp Gaming Dollars shall be chargeable and reportable as more specifically set forth in Section 8.10 below;

"**Competing Nightclub**" shall have the meaning given to such term in Section 39.1;

"**Competitive Set**" shall mean the hotel properties located in Las Vegas, Nevada which are intended to be competitive with the quality of service and pricing of the Hotel. The Competitive Set shall initially consist of the Bellagio Hotel, The Hotel at Mandalay Bay, Aria in City Center and Wynn Resort (but shall specifically exclude The Encore Hotel), the Palazzo Hotel and the Venetian Hotel and Resort as they are presently operated. In the event any of the Competitive Set cease operations or can no longer appropriately be considered part of the Competitive Set, the Parties shall in good faith mutually determine a replacement property to include in the Competitive Set, and shall utilize publicly available ratings services, guides and information (such as but not limited to Michelin, AAA, Travelocity.com and other ratings services or guidelines unaffiliated with Owner or Operator) when determining an appropriate replacement property;

"**Conceptual Plans**" shall have the meaning given to such term in Section 5.1.1;

"**Conceptual Plans Approval Date**" shall have the meaning given to such term in Section 5.1.1.1;

"**Construction Budget**" shall have the meaning given to such term in Section 6.1;

"**Construction Costs**" shall mean the aggregate costs set forth in the Construction Budget to construct and build out from Owner's Standard "vanilla shell" (which "vanilla shell" shall be in accordance with Exhibit "G" attached hereto and incorporated herein by this reference) the Premises as the Nightclub Venues;

"**Construction Plans**" shall have the meaning given to such term in Section 5.1.1.4;

"**Construction Plans Approval Date**" shall have the meaning given to such term in Section 5.1.1.4;

"**Construction Schedule**" shall have the meaning given to such term in Section 5.1.1.5;

"**CP System**" shall have the meaning given to such term in Section 8.8.3;

"**Current Anticipated Construction Cost**" shall have the meaning given to such term in Section 6.1.2;

"**Delivery Condition**" shall mean the completion of the Premises Work, and the FF&E described in the Approved Construction Plans shall have been installed in accordance with the Approved Construction Plans and all Laws except for minor details of construction, decoration or mechanical adjustment, the non-completion of which does not materially or unreasonably interfere with the training of Staff and other pre-opening operations of Operator. The Parties acknowledge that the Adult Deck shall not be delivered in Delivery Condition concurrently with the remainder of the Nightclub Venues and delayed delivery shall not affect the satisfaction of the Delivery Condition with regard to the remainder of the Nightclub Venues, provided that Owner shall deliver the Adult Deck in Delivery Condition no later than January 31, 2011;

"**Delivery Date**" shall have the meaning given to such term in Section 5.1.2;

"**Designer**" shall have the meaning given to such term in Section 5.1.1.1;

"**Designer List**" shall have the meaning given to such term in Section 5.1.1.1;

"**Design Plans**" shall have the meaning given to such term in Section 5.1.1.3;

"**Design Plans Approval Date**" shall have the meaning given to such term in Section 5.1.1.3;

"**Development Fee**" shall have the meaning given to such term in Section 4.6.1;

"**Discretionary OCC**" shall have the meaning given to such term in Section 6.1.1;

"**Disputed Charge**" shall have the meaning given to such term in Section 8.6;

"**Documentation**" shall have the meaning given to such term in Section 8.9.2;

"**Effective Date**" shall mean the date of the full execution of this Agreement;

"**Embargoed Person**" shall have the meaning given to such term in Section 33.1;

"**Excluded Repairs**" shall have the meaning given to such term in the definition of FF&E Reserve;

"**Executive Employees**" shall mean the General Manager, the controller, the sales and marketing manager, the senior manager of security and such other senior-level management employees as may be designated as Executive Employees by Owner and Operator from time to time and who are employed by Operator in connection with the operation of the Nightclub Venues;

"**Existing Facilities**" shall have the meaning given to such term in Section 36;

"**Extended Proforma Budget**" shall have the meaning given to such term in Section 6.6;

"**FF&E**" or "**Furniture, Fixtures and Equipment**" shall mean all furniture, fixtures, equipment, finishes, furnishings, decorations, systems, and computer hardware and software required for the operation of the Nightclub Venues in accordance with the terms of this Agreement and the Standards;

"**FF&E Costs**" shall mean the aggregate cost of the FF&E required for the initial opening and operation of the Nightclub Venues;

"**FF&E Reserve**" shall mean an amount to be set forth as part of the Annual Operating Budget as an Operating Expense in an amount equal to one percent (1%) of annual Gross Sales. Notwithstanding the foregoing, the amount of the FF&E Reserve may be modified by mutual agreement of Owner and Operator if reasonably required to maintain the Nightclub Venues in accordance with the Standards and such modified amount is included in any Annual Operating Budget. The FF&E Reserve shall be used to pay for the refurbishment and/or replacement of the Nightclub Venues, including the Furniture, Fixtures and Equipment and finishes. The FF&E Reserve shall not be used to pay for the repair, replacement or refurbishment of load bearing walls, structural supports, structural floors (provided, however, that replacement or

refurbishment of floor coverings, or repair, replacement or refurbishment of Pool decking required as a result of ordinary wear and tear (but not defective workmanship or the like), shall be paid from the FF&E Reserve) and other support and structural components of the Nightclub Venues, as well as the replacement of the electrical, plumbing, mechanical, sanitary, security and other systems exclusively serving the Nightclub Venues and the repair, replacement or refurbishment of any electrical, plumbing, mechanical, sanitary, security and other systems not exclusively serving the Nightclub Venues (the "**Excluded Repairs**"), the cost of which Excluded Repairs shall be borne by Owner and shall not be an Operating Expense or paid from the FF&E Reserve. Maintenance and repair of the Nightclub Venues and the components of the systems exclusively serving the Nightclub Venues shall be an Operating Expense and not paid from the FF&E Reserve. Owner may require the FF&E Reserve to be paid to and retained by Owner until utilized in the Premises. The FF&E Reserve, whether retained by Owner or Operator, shall be held in a segregated, interest-bearing account in a financial institution reasonably approved by Owner. The amounts retained from revenue each Fiscal Year as the FF&E Reserve shall be considered an Operating Expense, and, accordingly, all amounts expended from the FF&E Reserve shall not be included in the calculation of Operating Expenses;

"**First Line Tech Support**" shall mean basic, general technology assistance for systems integrated with Owner's systems provided via telephone or e-mail offered to operators (including Operator) at the Project by Owner, Project Owner, or its Affiliates. First Line Tech Support shall not include any service calls to the Nightclub Venues or any assistance beyond answering general technology related questions from Operator;

"**Fiscal Year**" shall mean (i) with respect to the first Fiscal Year, a period beginning on the execution of this Agreement and ending on December 31st of such year and (ii) with respect to any subsequent period, the twelve (12) month period beginning on January 1st and ending on December 31st (or such earlier date that this Agreement is terminated); or such other twelve (12) month period that the Owner shall designate as the Fiscal Year of the Nightclub Venues in writing from time to time;

"**Flash Report**" shall have the meaning given to such term in Section 4.4.1;

"**Following Fiscal Year**" shall have the meaning given to such term in Section 14.1.5;

"**Food/Beverage Facilities**" shall have the meaning given to such term in the definition of Nightclub Venues;

"**GAAP**" shall mean the generally accepted accounting principles consistently applied;

"**Gaming Authorities**" shall have the meaning given to such term in Section 8.8;

"**General Manager**" shall have the meaning given to such term in Section 7.1;

"**Governmental Agency**" shall mean any governmental agency or quasi-governmental authority, board, bureau, commission, department, instrumentality, or public body, court, or administrative tribunal, including, without limitation, the Gaming Authorities;

"**Gross Sales**" shall mean the total amount of revenue (subject to the limitations set forth in this Agreement), whether for cash, credit or hotel room charge, derived from the sales of all food, beverages and merchandise by Operator (including any concession or licensing fees received by Operator) from any permitted licensee or concessionaire whose sales are not otherwise included in

Gross Sales, in, at, or from, or arising out of the use of the Nightclub Venues, including all admission, cover, door, entertainment, membership or other charges of whatever nature, all rental, use and other charges for the temporary use by patrons of components of the Nightclub Venues, all charges for the temporary use by patrons of tables or other areas within any of the components of the Nightclub Venues, all buyout charges for portions of the Nightclub Venues in connection with private events (provided that the amount of sales includable in Gross Sales for Special Events shall be subject to Section 8.3 below), and the proceeds of admission or ticket sales for live performances or promoted or other events at the Nightclub Venues (less the amount of such proceeds paid to or retained by the performers or promoters). All sales by Operator within the Nightclub Venues or anywhere else in the Project (including but not limited to any kiosks or retail outlets located in the Project) of merchandise branded with the Trade Name, Trademarks or other Intellectual Property (it being recognized that no party other than Operator shall have the right to sell merchandise branded with the Trade Name, Trademarks or other Intellectual Property) and all other merchandise sold by Operator in, at or from the Nightclub Venues or kiosks or other retail locations in the Project shall be included in Gross Sales. All amounts paid or credited to Owner or Operator by reason of sponsorships or endorsements in connection with the Nightclub Venue Operations but excluding Project-wide sponsorship endorsements shall be revenue of the Nightclub Venues and included in Gross Sales and, if paid or credited to Owner, shall be remitted by Owner. All sales of food and beverages to the Cabanas and the Bungalow Cabanas and all actual rental revenue from the rental of the Cabanas and the Bungalow Cabanas will be included in Gross Sales, provided Gross Sales shall not include any complimentary or waived charges for the rental or use of a Cabana or a Bungalow Cabana granted by Operator or its Affiliates or designees. Gross Sales shall include all revenue from any specialized food or beverage service provided by Operator to the Bungalows during the operating hours of the Nightclub Venues pursuant to Section 3.1.25 hereof. In the event Owner or Project Owner or their respective Affiliates or designees grants any Owner Complimentaries as contemplated in Section 8.10 of this Agreement, then ninety percent (90%) of the menu price of food or beverage items, ninety percent (90%) of the retail value of merchandise items and ninety percent (90%) of the retail rental rate for Cabanas and Bungalow Cabanas, of the Owner Complimentaries will be paid for by Owner included in the calculation of Gross Sales for all purposes hereunder. Each payment under any installment or credit sale shall be included in Gross Sales for the month during which such payment is received. Gross Sales shall not include any room rental receipts for the rental of Bungalows (provided Operator shall be entitled to the Bungalow Fee as provided above). Notwithstanding anything to the contrary contained herein, Gross Sales shall not include (and if previously included, shall be deducted to the extent they were previously included in Gross Sales): (i) the amount of any city, county, state or federal sales, use, gross receipts, live entertainment, transaction privilege, luxury, or excise tax on such sale which is both added to the selling price (or absorbed in the price) and paid to the taxing authorities by Owner and/or Operator; (ii) income from inventory returned to suppliers; (iii) the sale of gift certificates (but the redemption of gift certificates shall be included in Gross Sales); (iv) the net amount of any cash or credit refunds or credit allowed on services upon any sale from the Premises where the merchandise sold, or some part thereof, is returned by the purchaser after the sale (not exceeding in amount the selling price of the item in question); (v) service charges, interest and collection expenses received or receivable from customers for sales on credit and service, credit card, debit card, and other charges or fees paid by Owner or Operator to debit or credit card companies, banks and similar organizations resulting from use of credit or debit cards by customers; (vi) food or beverages provided to Operator's employees for which Owner does not receive reimbursement or compensation (and to the extent Owner receives reimbursement or compensation, the amount of Gross Sales derived therefrom shall be equal to the amount of such reimbursement or compensation); (vii) the exchange of food, goods or merchandise between other venues of Owner or Operator, if any, where such exchange is made solely for the convenient operation of the business of Owner or Operator and not for the purpose of consummating a sale

from the Premises; (viii) insurance proceeds from casualty losses, including, but not limited to all sums and losses received from insurance companies in settlement of claims for losses or damages to merchandise or trade fixtures or equipment; (ix) the sale of fixtures, equipment or related property which are not stock in trade after their use in the conduct of business in the Premises; (x) the amount of any tips, gratuities or service charges paid to employees to the extent the same are designated as such and separately added to the total price charged, whether the same are collected by Owner or Operator as a stated percentage of the customer's total invoice or bill, or which are voluntarily paid by customers, and which are paid by Owner or Operator to Operator's employees; (xi) uncollected accounts and bad debt not to exceed one percent (1%) of Gross Sales for any Fiscal Year; (xii) any Operator Complimentaries; (xiii) the amount collectible by Owner and/or Operator from customers for the account of, and for direct payment to, unrelated third parties providing services specifically for a customer's function which generated Gross Sales, such as flowers, music and entertainment; (xiv) payroll taxes; (xv) any revenue from any gaming activities in the Nightclub Venues, (xvi) any revenue from the Queuing Bar, (xvii) any Complimentary or waived charges for any door, cover, membership admission, reservation or other use charges; and (xviii) any other items specifically excluded from the definition of Gross Sales pursuant to the terms of this Agreement;

"**Gross Sales Fee**" shall mean an amount equal to: (i) until the occurrence of the Initial Investment Breakpoint Date, five percent (5%) of Gross Sales, (ii) commencing on the day immediately following the Initial Investment Breakpoint Date and continuing until the occurrence of the Secondary Investment Breakpoint Date, five and one-half percent (5.5%) of Gross Sales, and (iii) commencing on the day immediately following the Secondary Investment Breakpoint Date and continuing until the expiration or earlier termination of this Agreement, six percent (6%) of Gross Sales;

"**Guest Information**" shall have the meaning given to such term in Section 15.5;

"**Health District**" shall have the meaning given to such term in Section 3.2;

"**Hotel**" shall mean the hotel and condominium-hotel components of the Project;

"**Hotel Management Agreement**" shall have the meaning given to such term in Section 18;

"**Hotel Operator**" shall mean the operator of the Hotel, as the same may exist from time to time;

"**Incentive Fee**" shall mean (i) until the occurrence of the Initial Investment Breakpoint Date, twenty-five percent (25%) of Net Profits, (ii) commencing on the day immediately following the Initial Investment Breakpoint Date and continuing until the occurrence of the Secondary Investment Breakpoint Date, thirty percent (30%) of Net Profits, and (iii) commencing on the day immediately following the Secondary Investment Breakpoint Date and continuing until the expiration or earlier termination of this Agreement, thirty-five percent (35%) of Net Profits;

"**Incident**" shall have the meaning given to such term in Section 8.9.2;

"**Index**" shall mean the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for all urban consumers, Selected Areas, Subgroup "All Items" for Las Vegas, Nevada (base reference period 1982-84 = 100). If during the term of this Agreement, the U.S. Department of Labor, Bureau of Labor Statistics ceases to publish an Index, such other index or standard as will most nearly accomplish the aim and purpose of said Index and the use thereof

by the Parties hereto shall be selected by Owner in its reasonable discretion. All adjustments in this Agreement that reference changes in the Index shall be calculated as follows: On each date that an amount is to be adjusted in accordance with changes to the Index (the "**Adjustment Date**"), the amount shall be increased by a percentage equal to the percentage increase, if any, in the Index as of the Adjustment Date over the Index as of the date twelve (12) months prior to the Adjustment Date;

"**Initial Investment Breakpoint Date**" shall mean the day on which the aggregate amount paid to Owner by way of total distributions of Net Profits pursuant to Section 4.3 of this Agreement and to Project Owner by way of payment of Base Rent under the Lease and/or other occupancy agreements applicable to the Premises, equals or exceeds the sum of (i) $17,000,000 plus (ii) if and to the extent Owner provides any Additional Funding Installment pursuant to Section 10.2.3 prior to the date that the aggregate amounts paid (A) to Owner by way of total distributions of Net Profits pursuant to Section 4.3 of this Agreement and (B) to Project Owner by way of payment of Base Rent equals or exceeds the amount set forth in subsection (i) hereinabove, one hundred percent (100%) of the amount of any Additional Funding Total Balance due and payable to Owner;

"**Initial Term**" shall have the meaning given to such term in Section 2.1;

"**Intellectual Property**" shall have the meaning given to such term in Section 15.3;

"**Late Opening Fee**" shall have the meaning given to such term in Section 5.2;

"**Law**" shall mean any statute, ordinance, promulgation, law, treaty, rule, regulation, code, judicial precedent or order, of any court or any governmental or regulatory entity, or other power, department, agency, authority, or officer whether foreign, federal, state, local, or any subdivision thereof, including, without limitation, the Americans with Disabilities Act;

"**Lease**" shall have the meaning given to such term in Paragraph C of the Recitals to this Agreement;

"**Letter Agreement**" shall have the meaning given to such term in Section 4.6.1;

"**License Agreement**" shall have the meaning given to such term in Section 15.3.4;

"**List**" shall have the meaning given to such term in Section 33.1;

"**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;

"**Management Fee**" shall have the meaning given to such term in Section 4.1;

"**Material Person**" shall have the meaning given to such term in Section 8.8;

"**Maximum Additional Funding Amount**" shall have the meaning given to such term in Section 10.2.3;

"**Minimum Profit Threshold**" shall have the meaning given to such term in Section 14.1.4;

"**Mitigation Event**" shall have the meaning given to such term in Section 2.2.3;

"**Monthly Statement**" shall have the meaning given to such term in Section 4.4.3;

"**Music Decibel Threshold Level**" shall mean that level of amplified music and/or amplified sound emanating from the Adult Deck at a level of more than ninety (90) decibels as measured from the center of the Adult Deck;

"**Music Desired Hours**" shall mean the following hours, which are the hours during which Operator desires to provide amplified music or amplified sound at or exceeding the Music Decibel Threshold Level on the Adult Deck: 12:00 noon to sunset, on all days that the Adult Deck is open and 9:00 p.m. to 3:00 a.m. on all nights that the Nightclub is open;

"**Music Permitted Hours**" shall mean the hours during which Operator is permitted by Owner to provide amplified music or amplified sound at or exceeding the Music Decibel Threshold Level on the Adult Deck. The Music Permitted Hours on the Adult Deck shall be determined by Owner in its sole discretion;

"**Net Profit Margin**" shall mean a percentage determined by dividing Net Profits by Gross Sales for any Fiscal Year;

"**Net Profits**" shall mean Gross Sales for each Fiscal Year (or, to the extent calculated for any other period, for such period), less (i) the Gross Sales Fee and (ii) all of the costs and expenses incurred in connection with the Nightclub Venues Operations for such Fiscal Year (or to the extent calculated for any other period, for such other period) (all such costs and expenses being collectively referred to as the "**Operating Expenses**"). Net Profits shall be calculated on an adjusted EBIDTA basis, which adjusted basis shall reflect the retention of funds for and establishment of the FF&E Reserve, the Working Capital Reserve and other reasonable reserves as mutually determined by Owner and Operator, and reflect such other adjustments as are consistent with the terms hereof. Operating Expenses shall be calculated in accordance with GAAP except as otherwise provided herein or as may be otherwise determined by Owner and Operator and shall include, without limitation, but without duplication, the following:

(1) cost of food;

(2) cost of beverages;

(3) Payroll Expenses, the cost of employee training and relations, including transportation, if any, and other human resource expenses;

(4) advertising, marketing, public relations, entertainment and promotion expenses for the Nightclub Venues, inclusive of approved shared promotional marketing expenses and costs, including all third party promotional and marketing costs and expenses, but excluding the cost of certain on-site advertising and promotions to be provided by Owner and Project Owner free of charge. No promotion, advertising or marketing charges shall be payable pursuant to the Lease and/or any occupancy agreement;

(5) office expense and supplies;

(6) cost of Operating Supplies;

(7) cost of uniforms, linen and laundry;

(8) cost of maintenance and repairs of the Nightclub Venues (except as otherwise set forth herein and other than the Excluded Repairs) together with any amounts expended in excess of the FF&E Reserve which is required in order to maintain the FF&E and Nightclub Venues in accordance with the Standards; provided that costs intended to benefit more than one Fiscal Year shall be capitalized and depreciated over the estimated useful life of the applicable maintenance, repairs and replacement.

(9) cost of garbage removal, sanitation and pest control to the extent not paid for through the Owner Included Services;

(10) all utilities separately metered to the Premises and, with respect to any utilities that are not separately metered to the Premises, a pro rata portion of the actual cost of each such utility provided to the Premises as equitably allocated by Owner among and between the premises that share such utilities;

(11) cost of local and long distance telephone calls by Operator;

(12) cost of maintenance and repair of the Bungalow Cabanas, Cabanas and the Adult Deck;

(13) cost of communications of Operator, including printing, stationary and postage;

(14) cash losses, including cash shortages, and theft;

(15) cost of decorations, flowers and floral decorations obtained at the request of Operator; provided that costs intended to benefit more than one Fiscal Year shall be capitalized and depreciated over the estimated useful life of the applicable items;

(16) for each month during each Fiscal Year, (a) the Gross Sales Fee, and (b) an amount equal to five percent (5%) of the Gross Sales (the "**Base Rent**") for the immediately preceding calendar month, which Base Rent amount shall be attributable to, and shall be in lieu of, any Fixed Minimum Rent (as may be defined in the Lease), additional rent, real property taxes, common area maintenance and marketing fund charges and other charges of whatever nature and kind payable under the Lease and/or under other occupancy agreements for the Nightclub Venues (or any portion thereof), it being intended that the Base Rent shall be the total amount payable under the Lease and/or under other occupancy agreements for the Nightclub Venues (or any portion thereof). Such amounts shall be calculated monthly and shall be reconciled at the end of each Fiscal Year concurrently with the Annual Statements. For purposes of determining Base Rent, Gross Sales shall be calculated in the same manner and with the same inclusions, exclusions and deductions as used when determining the Gross Sales Fee.

(17) any amounts added to the Working Capital Reserve other than from the Pre-Opening Budget;

(18) cost of cleaning, maintaining, repairing and operating the Pool, including, without limitation, the cost of chemicals for the Pool, and the repair and maintenance of any equipment used to clean or maintain the pool (including pumping or filtration systems), provided that the cost of refurbishing or replacing the Pool or any equipment used to clean or maintain the Pool shall be borne by Owner and shall not be an Operating Expense;

(19) cost of all lifeguards and other safety personnel in connection with the use of the Pool;

(20) fines, penalties or similar charges incurred or arising out of the operation of the Nightclub Venues;

(21) all amounts added to the FF&E Reserve other than from the Pre-Opening Budget and other reasonable reserves as mutually determined by Owner and Operator;

(22) Reimbursable Expenses incurred by Operator;

(23) reasonable out-of-pocket accounting and professional fees and expenses;

(24) legal fees incurred in connection with the Nightclub Venues operations which are not otherwise paid by insurance;

(25) costs incurred by Operator for contracted services;

(26) cost of dues and subscriptions obtained by Operator;

(27) periodic costs of licenses and permits for the operation of the Nightclub Venues other than the permits for the initial construction and initial operation of the Nightclub Venues;

(28) license fee, license taxes, taxes, assessments, charges, levies, fees and other governmental charges assessed, levied or imposed upon the operation of the Nightclub Venues, including any gross receipts taxes, sales taxes, payroll taxes, rent taxes, personal property taxes, business taxes and occupancy taxes;

(29) cost of menus and beverage lists;

(30) premiums on all insurance policies maintained by Owner or Operator pursuant to this Agreement, together with any self-insured losses, deductibles and co-payments;

(31) cost of all live and/or recorded music and entertainment and celebrity appearance or performance fees, including all fees and charges (such as cost of performance or appearance fees and ASCAP fees) payable in connection therewith;

(32) all costs and expenses of providing security solely for the Nightclub Venues or solely in connection with the Nightclub Venues Operations (as opposed to general resort, hotel or casino security and the like), including, without limitation, the cost of all security personnel providing services to the Nightclub Venues;

(33) the cost incurred by Operator in utilizing the Owner Mandatory Services;

(34) to the extent Operator elects to obtain and utilize any of the Owner Optional Services from an Owner Party, the cost incurred by Operator in utilizing such services and, to the extent Operator elects to obtain any of the Owner Optional Services from any third Person, the cost incurred by Operator in utilizing such services from such third Person

(35) the Operator G&A Allocation; and

(36) any other costs of operation of the Nightclub Venues that are expressly included herein as an Operating Expense or, except as otherwise set forth herein, are generally included as Operating Expenses of similar venues.

All Operating Expenses shall be in accordance with the Construction Budget, Pre-Opening Budget or the applicable Annual Operations Budget, as applicable, and with all deviations therefrom as may be expressly permitted pursuant to the terms of this Agreement.

If during any quarter, the aggregate Management Fee and Operating Expenses exceed the Gross Sales for such period so as to result in a net operating loss, such net operating loss (exclusive of the portion of such loss attributable to depreciation and amortization) shall be carried forward to future quarters to reduce any Net Profits for such future quarters and, until such time as the entire net operating loss carried forward has been fully offset against future Net Profits, no Incentive Fee shall be payable to or retained by Operator.

In the event any Operating Expenses are payable for a period other than a monthly period, Operator shall, on an equal and proportionate basis, to the extent funds are available for such purposes, reserve and accrue each month sufficient amounts so as to cause such Operating Expenses to be paid in full when due. By way of example only, if insurance is obtained and paid for once each year, Operator shall reserve each month in an account approved by Owner an amount equal to one-twelfth ($1/12^{th}$) of the total insurance expense. Such reserved amount shall be treated for all purposes as an Operating Expense in the month in which such funds were reserved. Other than the Owner Mandatory Services, Owner Included Services or any Owner Optional Services utilized by Operator, the cost of which shall be as set forth herein, in the event there is no specific method for allocating the expenses or costs of shared or common expenditures or services among various components of the Project, then, for purposes of determining Operating Expenses, Owner shall have the right to allocate or apportion any such expenses or costs among the Nightclub Venues, other venues in the Project, the Project and its components on a fair, equitable and rational basis determined by Owner in its good faith and reasonable discretion and approved by Operator in its good faith and reasonable discretion, which shall reflect the extent and degree to which the Nightclub Venues benefit from such shared or common expenditures or services.

Notwithstanding the foregoing, in determining Net Profits, the following items (as well as other items expressly set forth in this Agreement) shall not be deducted from Gross Sales: (i) the Incentive Fee payable to Operator, if any, (ii) any estate, inheritance, succession, or income, franchise or corporate taxes arising from the operation of the Nightclub Venues, (iii) the cost of the Premises Work, the Construction Costs, the FF&E Costs, or any depreciation or amortization associated therewith, (iv) the cost of the initial construction or development of the Project, or any depreciation or amortization associated therewith, (v) the cost of Excluded Repairs, or any depreciation or amortization associated therewith, (vi) Pre-Opening Expenses, (vii) any mark-up, premium or other charge imposed by Owner, Project Owner or any Affiliate thereof on the cost of any retail items or other merchandise, goods or services, over and above the actual, out-of-pocket costs paid by such party to unaffiliated third parties for such items,

(viii) any political or charitable contributions, (ix) depreciation, amortization and other non-cash items (except as otherwise set forth herein), (x) interest, principal and other payments on loans (other than interest on any Additional Funding Installment), (xi) rent or other costs under any real property lease or other occupancy agreement (other than the Base Rent), provided the foregoing shall not apply to any lease of equipment such as but not limited to dishwashers, (xii) the cost of any items for which Owner or Operator is reimbursed by insurance, warranties, service contracts or otherwise, or (xiii) any and all costs arising from the presence of hazardous substances in or about the Project not brought into the Project by Operator.

"**Neutrality Agreement**" shall have the meaning given to such term in Section 35;

"**Nightclub**" shall have the meaning given to such term in the definition of Nightclub Venues;

"**Nightclub Standards**" shall mean the quality and character of food, beverages, Staff, security, service, maintenance, operation, dress codes, image, marketing and promotion (taking into account for marketing and promotion purposes any material differences in the size, revenue and budgets between the Nightclub Venues and Tao Nightclub, LAVO Nightclub [or with respect to the Adult Deck, Tao Beach], as applicable), and overall management of the Nightclub Venues in a manner not less than an operating standard substantially consistent with the operation of the Tao Nightclub and LAVO Nightclub (and, with respect to the Adult Deck, the operation of Tao Beach) as of the date of this Agreement (or, if a higher standard, the operating standard of the Tao Nightclub and LAVO Nightclub (or with respect to the Adult Deck, Tao Beach) from time to time), which Tao Nightclub, LAVO Nightclub and Tao Beach are currently owned and/or operated by an entity affiliated with Operator existing in Las Vegas, Nevada;

"**Nightclub Venues**" shall mean: (i) the nightclub consisting of a primary area of approximately 12,388 square feet, together with certain ancillary areas (the "**Nightclub**"); (ii) the adult deck (i.e., the "Upper Deck" as depicted on Exhibit "B" attached hereto) consisting of approximately 24,762 square feet (the "**Adult Deck**"), inclusive of the eight (8) "VIP cabanas" located immediately south of the seven dipping pools (collectively the "**Cabanas**"), the bar or bars located on the Adult Deck (collectively the "**Bar**") and the Pools (including the dipping pools) located within the Adult Deck; (iii) the ultra lounge consisting of approximately 7,038 square feet (the "**Ultra Lounge**"); (iv) the VIP ultra lounge consisting of approximately 4,342 square feet (the "**VIP Lounge**"); (v) certain service kitchen and dishwashing facilities (the "**Food/Beverage Facilities**"); (vi) certain storage areas and ancillary areas; (vii) subject to certain priority reservation and use rights, the Bungalow Cabanas; and (viii) subject to Owner's reasonable right of access through such corridor to access certain storage areas, that certain corridor consisting of approximately 1,292 square feet, all as depicted on the site plans attached hereto as Exhibit "B." The aggregate square footage of the Nightclub Venues (exclusive of the Bungalow Cabanas) as depicted on Exhibit "B" is approximately 57,513 square feet.

"**Nightclub Venues Operations**" shall mean the operation of the Nightclub Venues at the Premises;

"**OCC Amount**" shall have the meaning given to such term in Section 6.1.1;

"**OFAC**" shall have the meaning given to such term in Section 33.1;

"**Opening Conditions Satisfaction Date**" shall have the meaning given to such term in Section 5.2;

"**Opening Date**" shall mean the date on which the first component of the Nightclub Venues opens to the public for business on a normal operating basis (as opposed to a "dry run" or an opening party);

"**Operating Expenses**" shall have the meaning given to such term in the definition of Net Profits;

"**Operating Supplies**" shall mean china, glassware, linens, silverware, utensils, pots, pans, and similar items of personal property, as well as paper products, cleaning products, inventories, and other items commonly referred to as consumable products (other than food and beverages), necessary for the efficient operation of the Nightclub Venues;

"**Operator**" shall have the meaning given to such term in the first paragraph of this Agreement;

"**Operator Complimentaries**" shall have the meaning given such term in Section 8.10.3;

"**Operator Designated Representative**" shall have the meaning given to such term in Section 3.9;

"**Operator G&A Allocation**" shall have the meaning given to such term in Section 3.7;

"**Operator Policies**" shall have the meaning given to such term in Section 12.2.1;

"**Operator Pre-Opening Expenses**" shall mean all of the following costs incurred by Operator or its Affiliates prior to the Opening Date in connection with this Agreement and in providing services hereunder, including, without limitation: (i) all internal corporate, office and administrative expenses, (ii) all compensation and benefits of Operator's Principals and all employees of Operator or its Affiliates providing internal corporate, office and/or administrative services for Operator or its Affiliates, (iii) all costs, including, without limitation, legal fees, incurred in connection with negotiating this Agreement and all other ancillary agreements, and (iv) all other internal costs and expenses incurred by Operator or its Affiliates not otherwise expressly included in the Pre-Opening Budget, provided that reasonable and necessary travel and hotel expenses of Operator and Operator's Principals shall not be Operator Pre-Opening Expenses, but shall instead be Pre-Opening Expenses, it being understood that the cost of first class air travel by Operator's Principals shall be considered reasonable in all events;

"**Operator Representatives**" shall have the meaning given to such term in Section 13.1;

"**Operator Shortfall Payment**" shall have the meaning given to such term in Section 14.1.4;

"**Operator's Exclusive Use**" shall have the meaning given to such term in Section 39.1;

"**Operator's Principals**" shall mean Noah Tepperberg, Jason Strauss, Marc Packer and Richard Wolf;

"**Operator's Right of First Offer**" shall have the meaning given to such term in Section 39.2;

"**Option Measuring Years**" shall have the meaning given to such term in Section 2.2.1;

"**Option Net Profits Threshold Amount**" shall have the meaning given to such term in Section 2.2;

"**Option Shortfall Amount**" shall have the meaning given to such term in Section 2.2.2.1;

"**Option Term**" shall have the meaning given to such term in Section 2.2;

"**Other Companies**" shall have the meaning given to such term in Section 3.7;

"**Outside Delivery Date**" shall mean July 31, 2011;

"**Outside Opening Date**" shall have the meaning given to such term in Section 5.2;

"**Owner**" shall have the meaning given to such term in the introductory paragraph to this Agreement;

"**Owner Complimentaries**" shall have the meaning given to such term in Section 8.10;

"**Owner Designated Representative**" shall have the meaning given to such term in Section 3.9;

"**Owner Included Services**" shall mean all of the items and/or services provided by an Owner Party to Operator as set forth below. The Parties acknowledge and agree that (i) Operator may not obtain any of the Owner Included Services from any third Person, and (ii) the cost for all of the Owner Included Services shall not be separately charged as an Operating Expense but instead shall be included in the Base Rent. Owner Included Services shall include:

(1) elevators, lifts, and/or delivery systems, equipment and procedures which may be utilized in connection with providing deliveries to or between the Nightclub Venues and/or in common with other operations in the Project;

(2) use of the Project's common purchasing, receiving, and logistics facilities;

(3) connection of Nightclub Venues' computer and other technology equipment, including POS systems and ethernet/wi-fi, to Project systems;

(4) First Line Tech Support;

(5) trash removal, storage and disposal from the trash drop-off points as designated by Owner (but excluding any costs of transporting trash to such trash drop-off points which shall be undertaken by Staff as an Operating Expense); and

(6) connection to central reservations.

"**Owner Indemnitees**" shall have the meaning given to such term in Section 13.1;

"**Owner Insured Parties**" shall have the meaning given to such term in Section 12.2.3;

"**Owner Mandatory Services**" shall mean the items and/or services set forth below, and any other services for which Owner can establish a reasonable basis to include in Owner Mandatory Services from time to time, that Operator shall be required to use (provided that for any

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;

"**Party**" shall mean Owner or Operator;

"**Payroll Expenses**" shall mean all expenses associated with the compensation and benefits of the Staff, including, without limitation, gross salary, bonuses, overtime expenses, social security, employment and other related taxes, unemployment insurance, worker's compensation, expenses associated with the maintenance of employee benefit plans, if any, retirement payments, health and welfare insurance;

"**Person**" shall mean any individual, partnership, corporation, association or other entity, including, without limitation, any Governmental Agency or subdivision thereof, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so permits;

"**Pool**" shall mean the main swimming pool, wading pool and the plunge pools located in front of certain Cabanas located on the Adult Deck, together with all other water features located on the Adult Deck;

"**POS System**" shall have the meaning given to such term in Section 8.5;

"**Premises**" shall have the meaning given to such term in Paragraph B of the Recitals to this Agreement. The description of the various components of the Premises set forth in Paragraph B of the Recitals are approximate and are subject to change at any time and in any manner as Owner and/or Project Owner may elect in their sole discretion in accordance with Section 9.7 hereof;

"**Premises Work**" shall have the meaning given to such term in Section 5.1.1.4;

"**Pre-Opening Budget**" shall have the meaning given to such term in Section 6.2;

"**Pre-Opening Expenses**" shall mean all reasonable and actual out-of-pocket expenses incurred by Owner or Operator prior to the Opening Date in accordance with the Pre-Opening Budget and the permitted deviations therefrom, including all out-of-pocket expenses incurred by Operator or Owner or any of their respective Affiliates in performing pre-opening services and other pre-opening functions including, without limitation, the total Development Fee paid by Owner to Operator, Payroll Expenses for Staff incurred from the Effective Date and prior to the Opening Date, the cost of recruitment and training and related expenses for all Staff, Owner's and Operator's reasonable expenses of business entertainment, the cost of pre-opening rehearsals and service sessions, sales, marketing, advertising, promotion and publicity, the reasonable cost of obtaining all necessary licenses, approvals and permits for the Nightclub Venues and Nightclub Venues Operations, including, without limitation, the reasonable fees of lawyers, expeditors, and other consultants incident to obtaining such licenses, approvals and permits and the costs and fees of such licensing or other qualification. Reasonable and necessary expenses for travel and lodging by employees, Staff, members and Affiliates of Owner and Operator shall be included in Pre-Opening Expenses;

"**Principal Materials**" shall have the meaning given to such term in Section 15.4;

"**Proforma Budget**" shall have the meaning given to such term in Section 6.6;

"**Prohibited Person**" shall have the meaning given to such term in Section 33.2;

"**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;

"**Residential Units**" shall mean any residential components of the Project including but not limited to condominium components, condo-hotel units, time-share units, fractionalized ownership units or other components of the Project existing now or in the future for use as residential facilities other than the residential facilities utilized solely by the Hotel operations;

"**Restricted Area**" shall have the meaning given to such term in Section 36;

"**Restrictive Covenant**" shall have the meaning given to such term in Section 36;

"**RFO Notice**" shall have the meaning given to such term in Section 39.2;

"**Scheduled Delivery Date**" shall have the meaning given to such term in Section 5.1.2;

"**Scheduled Opening Date**" shall have the meaning given to such term in Section 5.2;

"**Scheduled Project Opening Date**" shall have the meaning given to such term in Section 5.1.3;

"**Schematic Plans**" shall have the meaning given to such term in Section 5.1.1.2;

"**Schematic Plans Approval Date**" shall have the meaning given to such term in Section 5.1.1.2;

"**Secondary Investment Breakpoint Date**" shall mean the day on which the aggregate amount paid (A) to Owner by way of total distributions of Net Profits pursuant to Section 4.3 of this Agreement and (B) to Project Owner by way of payment of Base Rent under the Lease and/or other occupancy agreements applicable to the Premises equals or exceeds the sum of (i) $34,000,000 plus (ii) if and to the extent Owner provides any Additional Funding Installment pursuant to Section 10.2.3 prior to the date the aggregate amount paid (A) to Owner by way of total distributions of Net Profits pursuant to Section 4.3 of this Agreement and (B) to Project Owner by way of payment of Base Rent, equals or exceeds the amount set forth in subsection (i) hereinabove, one hundred percent (100%) of the amount of any Additional Funding Total Balance due and payable to Owner;

"**Special Guests**" shall have the meaning given to such term in Section 8.4;

"**Staff**" shall mean all individuals working in the Nightclub Venues at any time during the Term of this Agreement, including, without limitation, the General Manager, Assistant General Managers, sales and marketing manager, management personnel, cashiers, chefs, cooks and other kitchen workers, bartenders, waiters, buspersons, dishwashers, janitors, entertainers, hosts, doorpersons, captains and such other personnel as shall be appropriate in connection with the operation of Nightclub Venues in accordance with the Nightclub Standards, all of whom shall be employees of Operator;

"**Standards**" shall mean the Project Owner Operating Standards and the Nightclub Standards as appropriate;

"**Target Budget**" shall have the meaning given to such term in Section 6.1.2;

"**Target Profit Margin**" shall mean the projected Net Profit Margin for any Fiscal Year as mutually determined by Owner and Operator and as set forth in the applicable Annual Operations Budget;

"**Term**" shall have the meaning given to such term in Section 2.1;

"**Termination Fee**" shall have the meaning given to such term in Section 14.1.7;

"**Trade Name**" shall have the meaning given to such term in Section 15.3.4;

"**Trademarks**" shall have the meaning given to such term in Section 15.3;

"**Transfer**" shall have the meaning given to such term in Section 16.1;

"**ULTRA Lounge**" shall have the meaning given to such term in the definition of Nightclub Venues;

"**Union**" shall have the meaning given to such term in Section 35;

"**VIP Lounge**" shall have the meaning given to such term in the definition of Nightclub Venues;

"**VIP/Nightclub Queuing Space**" shall have the meaning given to such term in Section 3.8; and

"**Working Capital Reserve**" shall mean an amount to be set forth as part of the Pre-Opening Budget and in each applicable Annual Operations Budget. The Working Capital Reserve shall be maintained in such amount, which amount may vary from time to time, as may be reasonably necessary to pay the anticipated Operating Expenses of the Nightclub Venues which may not be otherwise payable from the revenue of the Nightclub Venues Operations. The Working Capital Reserve shall be held in a segregated, interest-bearing account in a financial institution reasonably approved by Owner. The amounts retained from revenue each Fiscal Year as the Working Capital Reserve shall be considered an Operating Expense, and, accordingly, all amounts expended from the Working Capital Reserve shall not be included in the calculation of Operating Expenses.

2. Term

2.1 Term. The initial term of this Agreement shall commence on the Effective Date and shall continue until the last day of the one hundred twentieth (120th) full calendar month following the Opening Date, unless sooner terminated in accordance with this Agreement (the "**Initial Term**"). The "**Term**" shall mean the Initial Term together with any Option Terms properly exercised by Operator.

2.2 Option Terms.

2.2.1 The Term of this Agreement may be extended for two (2) additional terms of five (5) years each (individually, an "**Option Term**" and collectively, the "**Option Terms**") by Operator upon delivery of written notice of its intent to extend the term to Owner not earlier than eighteen (18) months nor later than twelve (12) months prior to the expiration of the then current term; provided, however, that the exercise by Operator of the applicable Option Term shall only

PROOF OF SERVICE

I, William Reeves, 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:

RESPONSE TO ADDITIONAL ARGUMENTS RAISED ON REPLY IN CONNECTIONS WITH DEFENDANTS' MOTIONS TO DISMISS

Service was effectuated in the following manner:

_____ BY FACSIMILE:

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: October 22, 2018

William Reeves

RPLY
MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT, ESQ.
Nevada Bar No. 8550
NICHOLAS L. HAMILTON, ESQ.
Nevada Bar No. 10893
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
E-mail: medwards@messner.com
rloosvelt@messner.com
nhamilton@messner.com
Attorneys for Defendant
Aspen Specialty 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 1-25; inclusive, Defendants.	Case No.: A-17-758902-C Dept. No.: XXVI **DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** Date: October 30, 2018 Time: 9:30 a.m.

COMES NOW, Defendant ASPEN SPECIALTY INSURANCE COMPANY (hereinafter "Defendant") by and through its attorneys of record, of MESSNER REEVES LLP, and hereby submits its Reply in Support of its Motion to Dismiss Plaintiff's First Amended Complaint as follows:

I. INTRODUCTION

St. Paul's purported subrogation claims, whether based in contract or in equitable principles, are not viable as a matter of law. St. Paul omitted the term "equitable" subrogation from its initial complaint to bring claims for subrogation in its Amended Complaint. Thus, the Amended Complaint on its face appears based on contractual subrogation, which courts have rejected in the insurer-insurer context here. To the extent St. Paul was intentionally vague in its Amended Complaint and intends to also assert equitable claims, they still fail. Nevada has not recognized equitable subrogation in this context either. Even if this Court decided to recognize equitable subrogation in this context for the first time in Nevada, the claims still cannot survive against Aspen for at least three other separate and independent reasons.

First, essential elements of the claim (as recognized in contexts other than those present here) are lacking as a matter of law. For example, St. Paul's insured suffered no damages because the insurers fully defended and indemnified the insured, however, damages to an insured is an element of equitable subrogation. Because there are no damages to the insured, the insured has or had no assignable cause of action, another element that is lacking.

St. Paul wrote an excess policy to cover Cosmopolitan's loss, Cosmopolitan was held jointly and severally liable for Marquee's actions and held to have a non-delegable duty to keep patrons safe, and St. Paul paid under that coverage. The insured suffered no loss because it was fully covered for the settlement and defense fees. Justice does not require the (non)loss be entirely shifted to Aspen, a primary insurer who paid its full limits (yet another element of an equitable subrogation claim which is lacking). Put another way, there has been no injustice here worthy for this court to recognize equitable subrogation in this context for the first time in Nevada. This simply is not a case to open the flood gates for recognition of a new cause of action in Nevada.

Second, there can be no bad faith failure to settle within policy limits or breach of contract against Aspen because no settlement offer was within Aspen's limits. Contrary to St. Paul's attempt to stand insurance law on its head, Aspen's $1 million per "occurrence" limit applies because there was only one occurrence here. An insured does not obtain a double recovery of insurance proceeds

simply because the underlying plaintiff alleged false imprisonment (personal injury) in addition to other claims like negligence (bodily injury), all of which fall under the CGL coverage that specifically contains a $1 million per occurrence policy limit.

Nevada law and the policy make clear that the one occurrence policy limit applies to all injuries resulting from a common cause; an aggregate limit applies where there are *multiple* occurrences, unlike here. Here, all the plaintiff's injuries resulted from one common causal occurrence, and therefore under the policy and Nevada law, the $1 million per "occurrence" limit was the policy maximum. The Endorsement states that the most paid out under the policy, if covered under two separate coverage parts, is the maximum owed under any one coverage part. The maximum under the CGL coverage was $1 million per occurrence, and therefore $1 million was the policy limit for the claims. There was thus no settlement offer within Aspen's $1 million limit, so the bad faith failure to settle claims cannot survive as a matter of law. When St. Paul realized there was no offer within Aspen's limits after the first round of motions, it came up with this new, novel aggregate limits theory that is contrary to the policy and law.

Third, to the extent the Court recognizes equitable subrogation for the first time in this context, and deems the policy language at issue ambiguous concerning what limit applies, the policy is *not* automatically construed in favor of aggregate limits as St. Paul would have this Court believe. Instead, by law, the construction must be reasonable based on *objective* standards. Here, all parties—including the underlying plaintiff, the insureds, and all insurers including St. Paul—treated and understood Aspen's primary limits as $1 million dollars.

Finally, the equitable estoppel claim is directed at National Union and its position in its initial Motion to Dismiss where it denied it is a lower level of excess insurer than St. Paul's excess coverage, as St. Paul was alleging. Thus the claim is not properly taken as against Aspen and should be dismissed.

Therefore, St. Paul's Amended Complaint should be dismissed in full against Aspen. None of the asserted causes of action are viable as against Aspen. Having already amended its pleading

and being unable to assert viable claims, any further amendment should be denied and St. Paul's Amended Complaint dismissed with prejudice as against Aspen.

II. ARGUMENT

A. NEVADA HAS NOT RECOGNIZED EQUITABLE OR CONTRACTUAL SUBROGATION AS A VIABLE CAUSE OF ACTION.

St. Paul's Amended Complaint was drafted vaguely so as to be undiscernible which form of subrogation they are actually asserting, equitable or conventional. The omission of the word "equitable" from its Amended Complaint, which formerly appeared in the initial Complaint, naturally suggests the Amended Complaint at best seeks to state a claim for contractual subrogation only.

However, conventional, or contractual subrogation in the insurance context has been rejected and held to be against public policy in Nevada. *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 505, 728 P.2d 812, 814-815 (Nev. 1986). Even the unpublished Nevada federal *Colony* recognizes that contractual subrogation, between primary and excess insurers, would provide improper windfalls in the insurance context—just as it would here for St. Paul—and that it is not generally applied by an excess insurer against a primary insurer. *Colony Ins. Co. v. Colo. Casualty Ins. Co.* 2016 WL 3360943, *6 (D. Nev. June 9, 2016). Contractual subrogation amongst insurers has also been rejected by other courts too. *See, e.g., Fireman's Fund Ins. Co. v. Maryland Casualty Co.* 21 Cal.App.4th 1586, 1599 (1994) (no direct contractual relationship between primary and excess insurers and insurer is not intended third party beneficiary).

Contractual subrogation in this context is thus not a viable cause of action, and since the Amended Complaint as written appears to be based on conventional subrogation, it must be dismissed. St. Paul cannot dispute there is no contractual privity here. And, in the *California Capital* case cited by National Union, the facts were similar as here, where the Court found, and correctly so, that the insured had no assignable cause of action because, among other things, the insured had not suffered any damages since the post judgment settlement and defense expenses were fully

covered by insurance—just as here. *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815, *4 (Cal. Ct. App. May 18, 2018 (unpublished).

Though the Amended Complaint is unclear, St. Paul's Opposition suggests it is also asserting the subrogation claims alternatively under equitable principles should it be unsuccessful with contractual subrogation. Since St. Paul has omitted the words "equitable" from its Amended Complaint, it would ordinarily, at a minimum, have to file yet another amended complaint (or be denied same) in order to re-assert the formerly abandoned claims. Having abandoned them, the court should deny amendment to re-assert them again.

To the extent the court entertains St. Paul's claims as equitable claims for subrogation, they still fail however, because once again, Nevada state court has not recognized such a cause of action, as even the unpublished federal *Colony* decision recognized: "[T]he question of equitable subrogation's application in the current context—between insurance carriers and excess carriers—has not yet been addressed by the Nevada Supreme Court." *Colony*, 2016 WL 33609413 at *4. This Court should therefore dismiss the claims there being no current authority recognizing them under Nevada state law.

Equitable subrogation is an equitable remedy that has not been extended to the context here by the Nevada Supreme Court. The circumstances present do not implicate equity "to accomplish what is just and fair to the parties," because, among other things, St. Paul's $25 million excess coverage was not the obligation here of Aspen, the primary insurer with $1 million of coverage; shifting that obligation to Aspen here is not equitable, but rather a windfall for St. Paul. Essentially, St. Paul is arguing that it is just for this Court to recognize equitable subrogation in Nevada for the first time, but has not alleged any significant injustice for this court to do so. The circumstances and equities in this case do not call for this Court to recognize a new claim for relief in Nevada which has not previously been recognized in this context.

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B. THERE HAS ONLY BEEN ONE OCCURRENCE SO ASPEN'S POLICY LIMIT IS $1 MILLION; THUS THERE CAN BE NO BAD FAITH FAILURE TO SETTLE WITHIN POLICY LIMITS AS A MATTER OF LAW.

St. Paul intentionally misconstrues the Aspen policy limits in an effort to manufacture a bad faith failure to settle claim within policy limits. St. Paul's argument is contrary to well established insurance law and the Aspen Policy. Realizing that it had no basis for a bad faith failure to settle within policy limits claim against Aspen, St. Paul concocted a novel theory in its Amended Complaint and Opposition. St. Paul now contends Aspen's insurance policy limit for the underlying case *doubles* from $1 million to $2 million because there was also a false imprisonment claim (personal/advertising injury) alleged in addition to other claims like negligence (bodily injury)—though all injuries arise from a common causal event. However, this is not how the Aspen policy operates nor how the law construes the policy's coverage. Instead, the law and policy provide that the one occurrence limit applies because there has been one cause of the damages, regardless of the artful pleading of the underlying plaintiff, and that is the maximum available insurance. Were it otherwise, a plaintiff could double coverage based on artful pleading of claims, which is not how the policy works nor is it permitted by law.

Rather than recognize the $1 million dollar "occurrence" limit applies, as it did implicitly in its initial Complaint, St. Paul now contends in its Amended Complaint that instead, the $2 million "aggregate" limit applies so it can *then* make the leap to argue Aspen did not accept a $1.5 million settlement offer within its aggregate limits, whereas that offer was not and would not otherwise be within Aspen's policy limits. Here, however, there has only been one "occurrence" under the Aspen policy CGL coverage, and therefore the $1 million dollar "occurrence" limit applies and is the maximum policy limit under that coverage for the underlying claim, just as everyone treated it in settlement of the underlying case.

An "'occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Aspen Ins. Policy, Section V (13). Policy limits are determined by the cause of the damage: "**When all injuries emanate from a common source**

..., there is only a single occurrence for purposes of policy coverage. It is irrelevant that there are multiple injuries or injuries of different magnitudes, or that the injuries extend over a period of time." *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.*, supra, 148 CA4th at 633, 55 CR3d at 854. On the other hand, the "aggregate" limit states the maximum amount the insurer will pay during the policy period for such things as multiple occurrences. *National Union Fire Ins. Co. v. Lynette C.*, 27 Cal. App. 4th 1434, 1458, 33 Cal. Rptr. 2d 496 (3d Dist. 1994). Thus, if there are multiple *occurrences*, then the aggregate limits may be implicated unlike here where there is one "occurrence."

Century Sur. Co. v. Casino West, Inc., 99 F.Supp.3d 1262 (D. Nev. Mar. 27, 2015), addressed the occurrence issue. There, the Policy required that Century cover "bodily injury" that is caused by an "occurrence" that takes place during the Policy period, similar to here, *Id.* at 1264. "Occurrence" was similarly defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* "The Policy, however, has an aggregate limit of $2,000,000 if the damages at issue arise from more than a single occurrence." *Id.* In addition to the general liability insurance, Casino West also obtained an excess policy of insurance from Admiral ("the Excess Policy"), with a limit of $5,000,000, which was in effect at the time of the Accident." *Id.* "The Excess Policy applies only once the aggregate amount of all limits of the insured's "Underlying Insurance" have been exhausted "by payment of judgments, settlements, costs or expenses." *Id.*

"Century and Admiral filed cross-motions for summary judgment on the issue of whether the victims' deaths on April 16, 2006 arose from a single 'occurrence' or more than one 'occurrence' as defined by the Policy and controlling law." *Id.* "If the victims' deaths arose from a single 'occurrence,' then Century's $1,000,000 per occurrence limit has been met and Admiral is responsible for covering the remainder of the settlement amounts." *Id.* "On the other hand, if the deaths resulted from multiple 'occurrences,' then Century's aggregate limit of $2,000,000 would apply and Century would be obligated to make additional payments." *Id.* The *Century* Court, applying Nevada caselaw, found there to be one common cause of injury, therefore one occurrence

with a primary policy limit of $1 million, with the excess insurer obligated for the remainder. *Id.* at 1266-1267.

Century recognized that Nevada has adopted the "causal" approach to determining whether "a particular situation constitutes a single occurrence or multiple occurrences for the purposes of insurance liability." *Id.* at 1264, citing *Bish v. Guaranty Nat'l Ins. Co.,* 109 Nev. 133, 848 P.2d 1057, 1058 (1993). "Under this analysis, the inquiry is focused on whether there was one or more than one cause which resulted in all of the injuries or damages." *Id.*

In *Bish,* a young girl was struck by a car when the car's driver backed over her while leaving a driveway. 109 Nev. at 133. Hearing screams and realizing what she had done, the driver put the car in forward gear and drove over the child again. *Id.* Each time the driver struck the child, serious injuries arose. The issue was whether the "underlying circumstances constituted one accident or two for the purposes of collecting under the insurance policy...." *Id.*

"The *Bish* court held that the separate acts of negligence that each resulted in injuries to the child arose from a single occurrence." *Century Sur. Co.,* 99 F.Supp.3d at 1264. "It stated that injuries arising from multiple "causes" are nonetheless attributable to a single 'occurrence' when those causes 'act[ ] concurrently with and [are] directly attributable to' a single first cause." *Id.*, citing *Bish*, 109 Nev. at 137. "The court also observed that '[t]he proximity in both time and space of the events at issue, together with their direct interdependence, leads ... to the conclusion that there was a single accident, and that the sole cause of the accident was [the driver's] negligence.'" *Id.* citing *Bish,* 109 Nev. at 137

The same is true here. There has been <u>one cause</u> of all the underlying plaintiff's injuries and damages—the incident at Marquee—and thus <u>one occurrence</u> under the Aspen policy. In fact, St. Paul has not argued there were two occurrences. Instead, it misconstrues when aggregate limits are implicated.

St. Paul makes lengthy arguments about what is and is not a coverage part under the policy, which is red herring and completely misses the issue. Under Nevada law, there has been a single "occurrence," and the $1 million dollar single occurrence limit applies—that is the maximum

coverage even under St. Paul's 'coverage part' rationale. St. Paul argues that there is also an additional one million of coverage for the personal/advertising injury despite there being one occurrence, and one cause of all the injuries, but the law says otherwise.

Again, even under St. Paul's 'coverage part' argument, $1 million is still the maximum covered due to the one occurrence limitation. The Endorsement provides that if there are more than one coverage parts applying, then the maximum that applies under one coverage part is the maximum it pays out, so if there has been only one occurrence, the maximum limit under the CGL coverage is $1 million:

> 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 under insurance under all Coverage Parts shall not exceed the highest limit of insurance under any one Coverage Part.

Aspen Policy, Endorsement.

Under the law, the policy and the Endorsement, Aspen's policy limits was still therefore $1 million, the maximum covered *here*. This also makes commonsense—coverage is not doubled for the same injuries because the claims for the *same* injuries fall under different coverage parts or different parts of the same coverage—there has been one cause of the same set of injuries, one occurrence, and thus the contemplated insurance was $1 million for such injuries. Neither the plaintiff nor the insured would be entitled to a double recovery simply because a plaintiff plead alternate theories for the same injuries.

Therefore, since the Aspen limit was $1 million, there was no offer within policy limits, and there can be no claims for bad faith refusal to settle within policy limits.

C. IF THE ASPEN POLICY IS DEEMED AMBIGUOUS, THE OBJECTIVELY REASONABLE EXPECTIONS CONTROL--THE $1M OCCURRENCE POLICY LIMIT APPLIED.

A policy provision is ambiguous if it is capable of two or more reasonable constructions. *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 18, 900 P.2d 619 (1995); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 5 Cal.4th 854, 867, 855 P.2d 1263 (1993). In determining

if a provision is ambiguous, a court considers not only the face of the contract but also any extrinsic evidence that supports a reasonable interpretation. *Pacific Gas & E. Co. v. G.W. Thomas Drayage & Rigging. Co., Inc.* 69 Cal.2d 33, 37-38, 42 P.2d 641 (1968). "Even apparently clear language may be found to be ambiguous when read in the context of the policy and the circumstances of the case." *American Alternative Ins. Corp., v. Superior Court,* 135 Cal.App.4th 1239, 1246, 37 Cal.Rptr.3d 918 (Cal. Ct. App. 2006).

If policy language is ambiguous, an interpretation in favor of coverage is reasonable *only* if it is consistent with the objectively reasonable expectations of the insured. *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1265, 833 P.2d 545 (1992). "[I]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the *promisor believed*, at the time of making it, that the *promisee understood it*." *Id.* at 1264-1265 (emphasis added). "Only if this rule does not resolve the ambiguity do we then resolve it against the insurer." *Id.* at 1265.

Thus, the court must first determine whether the coverage under the policy that would result from such a construction is consistent with the insured's objectively reasonable expectations. *Id.* In order to do this, the disputed policy language must be examined *in context* with regard to its intended function in the policy. *Id.* This requires a consideration of the policy as a whole, the circumstances of the case in which the claim arises, and common sense.

Here, everyone, including both insureds and all insurance carriers including the excess carriers and St. Paul itself, treated the primary coverage limits as $1 million each. That's true when the Aspen-National Union policy limits of $26 million was first offered, and it was true when the post-verdict settlement offer was made, and it was true when the post-verdict settlement offer was accepted. All these facts and others belie St. Paul's most recent concoction of a $2 million Aspen limit, particularly when there was no mention of such a thing in the initial complaint before the first round of motion.

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D. THE SUBROGATION CLAIMS ALSO FAIL BECAUSE ESSENTIAL ELEMENTS ARE LACKING.

Even were this court to decide to newly recognize a cause of action in Nevada for equitable subrogation amongst insurers, it would have to find that the elements of the claim are alleged, present, and that equity favors the claim. However, several elements are lacking as a matter of law. *See Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (Cal. Ct. App. 1998) (listing the essential elements for an insurer's equitable subrogation cause of action).

One of the main elements of a claim for equitable subrogation where courts in other jurisdictions have recognized it is that the insured has suffered a loss. *Fireman's Fund Ins. Co.*, 65 Cal. App. 4th at 1292. However, as the Court recognized in the *Capital* case, the insured suffered no damages because the insurers paid the full judgment and defense fees. *California Capital Ins. Co.*, 2018 WL 2276815 at *4. Similarly, here, the insureds suffered no loss because its insurers fully paid the post-verdict settlement as well defense costs.

Another element is that the insured had an assignable cause of action that the insured could have asserted if it had not been compensated. *Fireman's Fund*, 65 Cal. App. 4th at 1292. Here, Aspen paid its full coverage and never had a settlement offer within its $1 million coverage limit in the underlying suit; thus, there is no assignable cause of action for bad faith refusal to settle within policy limits or otherwise.

In addition, "*justice* [must] require[] that the loss be entirely shifted from the insurer to the defendant, whose equitable position is deemed inferior to that of the insurer." *Id.* Conclusory allegations and legal conclusions need not be accepted as true; the Court must look at the facts alleged (including the legal determination that there was no settlement offers within Aspen's $1 million primary limits) to determine whether Aspen is in an inferior or not, and whether justice requires the shifting of St. Paul's $25 million excess obligation to a $1 million primary insurer.

St. Paul was the excess carrier for Cosmopolitan, who was found jointly and severally liable due to, among other things, its non-delegable duty to keep patrons safe. There is no *injustice* here such that St. Paul should be permitted to shift its excess obligations to Aspen, a primary insurer with

a $1 million per occurrence limit—such a shifting would be the injustice here, and a windfall for St. Paul.

Whether or not St. Paul could have settled is not determinative, though, while St Paul argues it could not have settled when the $26 million offer was made during the underlying case, that $26 million offer was *not* a rule-based offer of judgment that expires by operation of the rule and was no longer available, but was rather made in an informal letter that could have been pursued at anytime, even in the weeks following the information letter expiration date. St. Paul could have called and taken the plaintiff up on that offer. It even claims it encouraged *that* settlement through insurers other than itself, but then also alleges in a contrary fashion it did not know about it until *days* after it (informally) expired. But St. Paul did not place a call to try and settle. It took the same risk as the other insurers, and now wants to shift its excess obligation onto Aspen, a primary insurer with a $1 million per occurrence obligation.

The insured paid no out of pocket money and was not ultimately damaged. It would not be just to saddle Aspen with St. Paul's obligation under the circumstances, and St. Paul is not in a superior equitable position to Aspen. The factors that other courts rely on to sometimes recognize equitable subrogation in the insurance context do not weigh in favor of it here as against Aspen.

E. ST. PAUL'S EQUITABLE ESTOPPEL IS NOT PROPERLY BROUGHT AGAINST ASPEN, AND IF IT WERE, IT IS DEPENDENT ON CLAIMS ALSO SUBJECT TO DISMISSAL.

Equitable estoppel, as has been stated, is "essentially a defense to a defense." *Mahlan v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597, 691 P.2d 421 (1984). It is derivative of another claim, raised to bar a litigant from asserting an issue relevant to the *other* cause of action, not a standalone claim in and of itself. In *Mahlan*, the court discussed its application in the context of a separate claim for "damages for breach of a lease agreement" where the doctrine was "raised as a bar to respondent's assertion of its right to terminate under the destruction-of premises clause in the lease agreement." *Id.* Consequently, if the other claims on which equitable estoppel is based are dismissed, there is no basis for the estoppel claim to remain, so it should likewise be dismissed here.

In reality, St. Paul's estoppel claim does not involve Aspen, but rather involves National Union's position in its initial motion to dismiss that St. Paul is not a higher level excess carrier, and whether this is determinative of damages in other claims asserted *against National Union* by St. Paul. In fact, the FAC states this is the precise basis for the claim: "In its motion to dismiss St. Paul's original complaint AIG asserted for the first time it is a 'co-excess' carrier with St. Paul …" FAC, ¶137.

Here, St. Paul asserts the claim with respect to a defense raised by National Union to prevent National Union from asserting it is co-excess concerning the claim for damages by St. Paul against National Union for subrogation. In other words, there is no basis for the claim as against *Aspen*. The issue, claims, and estoppel are between St. Paul and National Union, who dispute whether they are co-excess insurers. St. Paul's claim for equitable estoppel should therefore be dismissed against Aspen.

III. CONCLUSION

For the foregoing reasons and arguments, the Court should grant Aspen's Motion to Dismiss Plaintiff's Amended Complaint in full, deny any further amendments that may be requested, and dismiss the case with prejudice.

DATED this 23 day of October, 2018.

MESSNER REEVES LLP

MICHAEL E. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT
Nevada Bar No. 8550
NICHOLAS L. HAMILTON
Nevada Bar No. 10893
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
Attorneys for Defendant Aspen Specialty Insurance Company

PROOF OF SERVICE

St. Paul Fire & Marine Insurance Company v. Aspen Specialty Insurance Company
Case No.: A-17-758902-C

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed by Messner Reeves LLP, 8945 W. Russell Road, Suite 300, Las Vegas, Nevada 89148. I am readily familiar with Messner Reeves LLP's practice for collection and processing of documents for delivery by way of the service indicated below.

On October 23, 2018, I served the following document(s):

DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

on the interested party(ies) in this action as follows:

Ramiro Morales
William C. Reeves
MORALES, FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Tel: (702) 699-7822
Fax: (702) 699-9455
rmorales@mfrlegal.com
wreeves@mfrlegal.com
Attorneys for Plaintiff, St. Paul Fire & Marine Insurance Company

Andrew D. Herold, Esq.
Nicholas B. Salerno, Esq.
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Tel: (702) 990-3624
Fax: (702) 990-3835
aherold@heroldsagerlaw.com
nsalerno@heroldsagerlaw.com
Attorneys for National Union Fire Insurance Company of Pittsburgh PA & Roof Deck Entertainment, LLC d/b/a Marquee Nightclub

By Electronic Service. Pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused said documents(s) to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

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

An employee of Messner Reeves LLP

OBJ

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)
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

DEFENDANTS NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA AND ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S OBJECTION AND REQUEST TO STRIKE PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S RESPONSE TO ADDITIONAL ARGUMENTS RAISED ON REPLY IN CONNECTIONS WITH DEFENDNATS' MOTION TO DISMISS

Date: October 30, 2018
Time: 9:00 a.m.

WHEREAS, National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") filed Motions to Dismiss St. Paul's First Amended Complaint on June 25, 2018;

WHEREAS, St. Paul Fire & Marine Insurance Company's ("St. Paul") filed oppositions to National Union and Marquee's motions to dismiss on August 15, 2018;

WHEREAS, National Union and Marquee filed reply briefs in support of the motions to dismiss on September 14, 2018; and

WHEREAS, St. Paul filed a Response to Additional Arguments Raised on Reply in Connection with Defendants' Motion to Dismiss on October 22, 2018;

Defendants National Union and Marquee hereby submit the following Objection and Request to Strike Plaintiff St. Paul's Response to Additional Arguments Raised on Reply in Connection with Defendants' Motion to Dismiss.

EDCR 2.20 provides for the filing of motions, joinders, oppositions, notices of nonopposition, and replies. Rule 2.20 does not provide for the filing of a response or surreply to a moving party's reply. Notably, the cases cited by St. Paul that supposedly authorizes its rogue response brief is a federal decision that does not support St. Paul's position. In *Bank Transactions, Inc. v. Franco*, 2017 WL 216694 at *1 (D. Nevada Jan. 17, 2017), the District Court for the District of Nevada held that the plaintiff should be permitted to file a surreply to address a new argument raised for the first time on reply due to the "importance of subject matter jurisdiction." No such jurisdictional concerns are present here and new issues were raised for the first time in the replies.

Even if new issues were raised for the fort time in the replies (which they were not), St. Paul has not obtained the Court's permission to file its response brief. In *Spartalian v. Citibank, N.A.*, 2013 WL 593350 at *2 (D. Nevada Feb. 13, 2013), the District Court for the District of Nevada held that a surreply could only be filed with leave of court and only to address new matters raised in a reply. Further, neither of the above cases cited by St. Paul support the notion that "new decisional law" can serve as a basis for the filing of a surreply as St. Paul appears to contend in its unauthorized filing.

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St. Paul has neither sought nor obtained leave of court to submit its response brief. In addition, the issues raised in National Union and Marquee's replies are not "new issues," but rather merely respond to arguments raised in St. Paul's opposition. Namely, St. Paul argues throughout its opposition that Cosmopolitan had an "assignable" cause of action for bad faith against National Union. Accordingly, National Union's discussion of express assignment in its reply properly responded to St. Paul's opposition rather than raising new matter for the first time. Similarly, St. Paul argued throughout its opposition at length that Cosmopolitan was not bound by provisions of the Nightclub Management Agreement. Accordingly, St. Paul cannot reasonably argue that Marquee's discussion of the Nightclub Management Agreement and how it binds St. Paul and Cosmopolitan is a new matter. In fact, the Nightclub Management Agreement was raised and discussed extensively in Marquee's moving papers.

In fact, the bulk of St. Paul's arguments raised in the response brief relate to the *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. 2018) decision, which is the focal point of St. Paul's oppositions. St. Paul is simply attempting to take another unauthorized bite at the apple with further discussion of the *Colony* matter that should have been included in the oppositions.

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In short, St. Paul has provided no authority entitling it to file a response brief or surreply and failed to request leave of court to do so. There are new matters addressed in the replies that were not raised in the moving papers and/or St. Paul's oppositions thereto. Accordingly, National Union and Marquee respectfully request that the Court strike St. Paul's Response to Additional Arguments Raised on Reply in Connection with Defendants' Motion to Dismiss.

DATED: October 24, 2018

HEROLD & SAGER

By: */s/ Nicholas B. Salerno*

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)
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 **DEFENDANTS NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA AND ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S OBJECTION AND REQUEST TO STRIKE PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S RESPONSE TO ADDITIONAL ARGUMENTS RAISED ON REPLY IN CONNECTIONS WITH DEFENDNATS' MOTION TO DISMISS** was submitted electronically for filing and/or service with the Eighth Judicial District Court's Odyssey E-File and Serve System on **October 24, 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).

OBJ

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 **PLAINTIFF ST. PAUL'S OBJECTION AND REQUEST TO STRIKE DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S UNTIMELY REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: October 30, 2018 Time: 9:00 a.m. Dept.: XXVI

Aspen's Reply in Support of Its Motion to Dismiss Plaintiff's First Amended Complaint is untimely. Aspen is not merely late, it missed the filing deadline by thirty-nine (39) days! There is no conceivable excuse for this failure since Aspen's counsel was the one who served the Notice of Entry of Stipulation and Order to Extend Deadline to Respond to First Amended Complaint and Continue Briefing Schedules ("Stipulation and Order"). That Stipulation and Order provided that the deadline for the moving parties to file reply briefs was to be September 14, 2018, 30 days after service of opposition briefs. Defendants National Union and Marquee managed to timely file

reply briefs on or before September 14, 2018. Aspen did not file its reply until October 23, 2018, ***sixty-nine days*** after receiving St. Paul's opposition. Aspen's conduct is unconscionable. Its reply brief should be stricken.

Following the first round of motions to dismiss, St. Paul filed a First Amended Complaint. The parties entered into a stipulation to allow each party ample time to prepare briefs, which was entered as an Order of the Court. It was agreed that Defendants' motions to dismiss were due on or before June 25, 2018, sixty-one (61) days after the amended complaint was filed. Oppositions were due fifty-one days later, on August 15, 2018. The parties further agreed that replies to any oppositions would be due on September 14, 2018, giving National Union, Marquee and Aspen thirty (30) days in which to file a reply. Each party complied with each deadline – except Aspen which, inexplicably did not file its reply until October 23, one week before the hearing.

It is bad enough that Aspen simply ignored a deadline agreed by the parties and ordered by the court. What makes it even worse is that Aspen does not have the excuse that it was somehow unaware of this agreed deadline since it was Aspen itself that served a Notice of Entry of Stipulation and Order. A true and correct copy of that document is attached hereto as **Exhibit 1**. Also, one has to wonder what Aspen was thinking when it received electronic notification on September 14 that National Union and Marquee had filed their reply briefs that day.

The Court simply should not allow Aspen to make a mockery of the rules and the agreements of the parties. Any "no harm, no foul" argument that Aspen could, and likely will, make should be summarily rejected. The parties entered into an agreement, sanctioned by the Court, and Aspen should not be permitted to simply ignore such an agreement with impunity. St. Paul certainly could have made good use of additional weeks to prepare its oppositions, but it managed to file its oppositions timely. If the Court does not enforce the stipulated briefing schedule that was reduced to an Order, then truly the door is wide open for litigants to ignore with impunity any Order or any rule.

For these reasons, Plaintiff St. Paul Fire & Marine Insurance Company respectfully requests that the Court strike and not consider Defendant Aspen Specialty Insurance Company's Reply in Support of Motion to Dismiss.

Dated: October 26, 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

EXHIBIT 1

Electronically Filed
6/4/2018 9:32 AM
Steven D. Grierson
CLERK OF THE COURT

NEOJ
Michael M. Edwards, Esq.
Nevada Bar No. 6281
Nicholas L. Hamilton, Esq.
Nevada Bar No. 10893
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
E-mail: medwards@messner.com
nhamilton@messner.com
Attorneys for Aspen Specialty Insurance

DISTRICT COURT
CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1-25; inclusive, Defendants.	Case No. A-17-758902-C Dept. No. XXVI **NOTICE OF ENTRY OF STIPULATION AND ORDER TO EXTEND DEADLINE TO RESPOND TO FIRST AMENDED COMPLAINT AND CONTINUE BRIEFING SCHEDULES**

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NOTICE OF ENTRY OF STIPULATION AND ORDER TO EXTEND DEADLINE TO RESPOND TO FIRST AMENDED COMPLAINT AND CONTINUE BRIEFING SCHEDULES

PLEASE TAKE NOTICE that on June 1, 2018, a Stipulation and Order to Extend Deadline to Respond to First Amended Complaint and Continue Briefing Schedules was entered on the Court Docket. A copy is attached hereto.

DATED this 4th day of June, 2018.

MESSNER REEVES LLP

/s/ Michael Edwards

Michael M. Edwards, Esq.
Nevada Bar No. 6281
Nicholas L. Hamilton, Esq.
Nevada Bar No. 10893
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
Attorneys for Defendant Aspen Specialty Insurance Company

CERTIFICATE OF SERVICE

On this 4th day of June, 2018, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER TO EXTEND DEADLINE TO RESPOND TO FIRST AMENDED COMPLAINT AND CONTINUE BRIEFING SCHEDULES** to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

Ramiro Morales
William C. Reeves
MORALES, FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Tel: (702) 699-7822
Fax: (702) 699-9455
rmorales@mfrlegal.com
wreeves@mfrlegal.com
Attorneys for Plaintiff, St. Paul Fire & Marine Insurance Company

Andrew D. Herold, Esq.
Nicholas B. Salerno, Esq.
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Tel: (702) 990-3624
Fax: (702) 990-3835
aherold@heroldsagerlaw.com
nsalerno@heroldsagerlaw.com
Attorneys for National Union Fire Insurance Company of Pittsburgh PA & Roof Deck Entertainment, LLC d/b/a Marquee Nightclub

/s/ Lani Maile
Employee of MESSNER REEVES LLP

SAO
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. and ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

STIPULATION AND ORDER TO EXTEND DEADLINE TO RESPOND TO FIRST AMENDED COMPLAINT AND CONTINUE BRIEFING SCHEDULES

STIPULATION

This stipulation is entered into and by and between the following parties pursuant to E.D.C.R. 2.22 and 2.25: (1) Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"); (2) Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union"); (3) Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"); and (4) Aspen Specialty Insurance Company ("Aspen") (St. Paul, National Union, Marquee and Aspen are collectively referred to as the "Parties").

WHEREAS, on or about April 25, 2018, St. Paul filed and served its First Amended Complaint ("FAC") in this matter;

WHEREAS, pursuant to the Court's prior Order entered in this matter on March 21, 2018, National Union, Marquee and Aspen's deadline to respond to the FAC is May 29, 2018;

WHEREAS, due to scheduling issues, National Union and Marquee require additional time to file their responsive pleadings to the FAC;

WHEREAS, National Union, Marquee and/or Aspen anticipate they may file Motions to Dismiss the FAC;

WHEREAS, the Parties further agree that, in the event National Union, Marquee and/or Aspen file Motions to Dismiss in response to the FAC, the briefing schedule should be amended to account for upcoming conflicts amongst counsel;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for the Parties, that the deadline for National Union, Marquee and Aspen to file their responses to the FAC be continued to June 25, 2018;

IT IS FURTHER HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for the Parties, that any oppositions to Motions to Dismiss the FAC filed by National Union, Marquee and/or Aspen shall be filed by St. Paul on or before August 15, 2018;

IT IS FURTHER HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for the Parties, that replies to any opposition to Motions to Dismiss the FAC shall be filed by National Union, Marquee, and/or Aspen on or before September 14, 2018.

///

IT IS FURTHER HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for the Parties, that the hearing(s) on National Union and/or Marquee's Motions to Dismiss the FAC shall be heard on a mutually agreeable date in October of 2018 for which the Parties will submit a separate stipulation for the Court's consideration once established among the Parties.

Prepared and respectfully submitted by:

DATED: May 25, 2018

HEROLD & SAGER

By: _____

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

DATED: May _____, 2018

MORALES, FIERO & REEVES

By: _____

RAMIRO MORALES, ESQ.
Nevada Bar No. 007101
WILLIAM C. REEVES, ESQ.
Nevada Bar No. 008235
600 South Tonopah Drive, Suite 300
Las Vegas, NV 89106
Attorneys for Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY

IT IS FURTHER HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for the Parties, that the hearing(s) on National Union and/or Marquee's Motions to Dismiss the FAC shall be heard on a mutually agreeable date in October of 2018 for which the Parties will submit a separate stipulation for the Court's consideration once established among the Parties.

Prepared and respectfully submitted by:

DATED: May _____, 2018

HEROLD & SAGER

By: _____

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

DATED: May 25, 2018

MORALES, FIERO & REEVES

By: _____

RAMIRO MORALES, ESQ.
Nevada Bar No. 007101
WILLIAM C. REEVES, ESQ.
Nevada Bar No. 008235
600 South Tonopah Drive, Suite 300
Las Vegas, NV 89106
Attorneys for Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY

DATED: May 25, 2018

MESSNER REEVES LLP

By: Nicholas Hamilton

MICHAEL M. EDWARDS, ESQ.
Nevada Bar No. 6281
NICHOLAS L. HAMILTON, ESQ.
Nevada Bar No. 10893
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
Attorneys for Defendant ASPEN SPECIALTY INSURANCE COMPANY

ORDER

IT IS SO ORDERED this 30 day of May, 2018.

Honorable Gloria J. Sturman
District Judge, Department XXVI

PROOF 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:

PLAINTIFF ST. PAUL'S OBJECTION AND REQUEST TO STRIKE DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S UNTIMELY REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

Service was effectuated in the following manner:

_____ BY FACSIMILE:

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: October 26, 2018

Noemi Gonzalez

OPPS
MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT, ESQ.
Nevada Bar No. 8550
NICHOLAS L. HAMILTON, ESQ.
Nevada Bar No. 10893
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
E-mail: medwards@messner.com
rloosvelt@messner.com
nhamilton@messner.com
Attorneys for Defendant
Aspen Specialty 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 1-25; inclusive, Defendants.	Case No.: A-17-758902-C Dept. No.: XXVI **DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE REPLY IN SUPPORT OF MOTION TO DISMISS** **Date: October 30, 2018** **Time: 9:30 a.m.**

COMES NOW, Defendant ASPEN SPECIALTY INSURANCE COMPANY (hereinafter "Defendant") by and through its attorneys of record, of MESSNER REEVES LLP, and hereby submits its Opposition to Plaintiff's Motion to Strike Reply in Support of Motion to Dismiss.

Defendant's Opposition is based on the attached Memorandum of Points and Authorities, any and all pleadings on file herein, and any oral argument permitted at the hearing of this motion.

DATED this 29th day of October, 2018.

MESSNER REEVES LLP

MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT, ESQ.
Nevada Bar No. 8550
NICHOLAS L. HAMILTON, ESQ.
Nevada Bar No. 10893
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Attorneys for Defendant Aspen Specialty Insurance Company

MEMORANDUM OF POINTS AND AUTHORITIES

I. ST. PAUL'S MOTION SHOULD BE DENIED BECAUSE IT FAILED TO INCLUDE A NOTICE OF MOTION AND FAILED TO FILE AND SERVE A MEMORANDUM OF POINTS AND AUTHORITIES.

St. Paul's Motion to Strike is improper and need not be considered at all because it failed, as required, to contain a notice of motion. Under EDCR 2.20(b), "[a]ll motions must contain a notice of motion setting the same for hearing," but St. Paul's does not; it states it is an Objection and Motion to Strike, without including a notice of motion or clarifying whether it is seeking relief as a countermotion. Therefore, the motion may not be heard on this ground alone.

EDCR 2.20(f) states that "[a]n opposition to a motion which contains a motion related to the same subject matter will be considered as counter-motion" and that countermotions are heard at the same time as the original motion. However, St. Paul did not file an opposition with counter-relief here. It filed what is styled as an Objection and Motion to Strike, and thus does not fit under the rule to be heard as a countermotion either.

To the extent the court does consider St. Paul's Objection and Motion to Strike as a countermotion to be heard at the same time as Aspen's Motion to Dismiss, St. Paul's Motion to Strike must still be denied because it did not file and serve any memorandum of points and authorities with its Motion. EDCR 2.20(c) states that "[a] party filing a motion must also serve and file with it a memorandum of points and authorities in support of each ground thereof" and "[t]he absence of such a memorandum may be construed as an admission that the motion is not meritorious, as cause for the denial or as waiver of all grounds not so supported." Therefore, the Court may deny St. Paul's Motion on this independent basis too.

II. THE COURT HAS DISCRETION TO CONSIDER THE REPLY AND DENY PLAINTIFF' MOTION, AND ASPEN COUNTERMOVES FOR COURT APPROVAL TO ALLOW AND CONSIDER ITS REPLY.

To the extent the Court considers St. Paul's Motion to Strike as a countermotion to be heard at the same time as Aspen's Motion to Dismiss, the Court (i) has discretion to consider the Reply, and (ii) may consider this Opposition as a countermotion for approval of the filing and consideration of the reply under EDCR. 2.20(f) and(h).

The stipulation drafted by the other defendants, signed by the parties, and entered by the Court was done prior to the filing of Aspen's second Motion to Dismiss (directed at St. Paul's Amended Complaint). The stipulation largely concerned the two other defendants' motions to dismiss the initial complaint that had been decided with amendment ordered; Aspen's first Motion to Dismiss (the original complaint which was then ordered to be amended on the other defendants' motions) was still pending at the time amendment was ordered, and it had not filed its second motion to dismiss yet. An assistant at Aspen counsel's office received the parties' stipulation signed by the Court, and then appears to have filed the notice of entry as St. Paul points out.

The stipulation was drafted by other defendants, signed by an associate attorney for Aspen (who was replaced on this file in the past few months), and entered long ago at the beginning of June 2018. Aspen later filed its Motion to Dismiss the newly filed Amended Complaint on June 25, 2018. St. Paul filed its Opposition almost 2 months later on August 15, 2018. Aspen's Reply deadline was

calendared by its counsel's office pursuant to EDCR 2.20(h) instead of the stipulation, which requires a reply memorandum to be filed "no later than one week" before the hearing. In the interim, a new attorney for Aspen's counsel was assigned to the case, looked at the calendar deadline for the Reply one week before the hearing, and prepared accordingly.

Aspen did file its Reply within one week of the hearing under the EDCR 2.20(h) rule-based deadline as calendared, which St. Paul's Objection and Motion to Strike concedes at page 2, line 11. The timing of Aspen's Reply still affords the Court, and the Plaintiff, the rule-based allowed time to digest the information in the Reply, prepare for the hearing, and make a ruling on the merits and the law—the intent of EDCR 2.20(h)'s one-week advance deadline for the filing of a reply.

There was no intent by Aspen to undermine the stipulation or any ill will toward the court or any other party here, despite the extreme tenor of St. Paul's Motion to Strike. This was a calendaring error where the Reply still was filed within the otherwise normally applicable deadline, not a reply filed the morning of the hearing trying to surprise the court or parties. Indeed, St. Paul had almost two months to file its opposition, so a little more than a two-month period for the reply, filed sufficiently in advance of the hearing, is not so outlandish under the circumstances nor does it shock the conscience as St. Paul's papers so vehemently feign outrage.

The Court should not decide these important motions on anything less than the merits and the full law. The Court may use its discretion to allow for the filing and consideration of Aspen's Reply. EDCR 2.20(h) states that replies must not be filed late under the rule unless the court approves. Consequently, to the extent the Court deems the reply late, the Court may approve Aspen's reply being filed after the stipulation deadline in its discretion, and should do so here given the innocent circumstances and timing of the Reply sufficiently in advance of the hearing. A countermotion will be heard and decided at the same time set for the hearing of the original motion and no separate notice is required. EDCR 2.20(f). The court may therefore decide and hear this countermotion at the Tuesday October 30, 2018 hearing to the extent it entertains St. Paul's Objection and Motion to Strike.

There is little prejudice if any here to allowing the Reply, and while St. Paul argues Aspen should not be heard to argue lack of prejudice, it does not state what prejudice is actually present because there is none. This is not a case of intentional disregard of briefing schedules as St. Paul portrays it. This was also not the late filing of an opposition either. Nevada replies are normally based off the hearing date, not the timing of the Opposition, so again, there is little prejudice as a result of the calendaring mistake here, especially when St. Paul itself had months to file their papers too.

Were the court not to approve the filing or consideration of the Reply, the court proceedings here would only be unnecessarily magnified, and Aspen's Motion to Dismiss potentially may not be decided on the merits or law. For example, were the Court to disregard the law refuting St. Paul's Opposition that shows, under Nevada law, the one occurrence policy limit applies here meaning there was never a settlement offer within Aspen's $1 million policy limits and thus no viable claims based on the bad faith refusal to settle, the Court might then potentially allow nonviable claims to proceed against Aspen. Consequently, we would be right back before the Court on a Rule 12 motion for judgment on the pleadings after answers were filed arguing the very same issues and law that can, and should be resolved now. If, as Aspen believes, the law clearly demonstrates St. Paul's claims should be dismissed, it would be futile and a waste of time and resources to go through that exercise due to a calendaring error where the Reply was still filed a week before the hearing.

The Court may use its discretion to approve and allow the filing and consideration of Aspen's Reply when hearing and ruling upon Aspen's Motion to Dismiss the Amended Complaint. Allowing unlawful claims to proceed due to a minor calendaring oversight where the Court still had the reply one week before the hearing with no articulable prejudice would not serve the interests of justice here. Aspen did not proceed in bad faith, the Court has discretion to allow the reply to the extent it is deemed late, and Aspen's Reply should be approved and considered.

III. CONCLUSION

For the foregoing reasons and arguments, this Court should deny Plaintiff's Objection and Motion to Strike because it failed to include a notice of motion, is not an opposition seeking counter-

relief that can be heard at the same hearing, and because it failed to include a memorandum of points and authority. Alternatively, the Court should exercise its discretion and approve the filing and consideration of Aspen's Reply and deny Plaintiff's Motion to Strike, to the extent it entertains Plaintiff's papers as a countermotion to strike or otherwise.

DATED this 29th day of October, 2018.

MESSNER REEVES LLP

MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT, ESQ.
Nevada Bar No. 8550
NICHOLAS L. HAMILTON, ESQ.
Nevada Bar No. 10893
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Attorneys for Defendant Aspen Specialty Insurance Company

PROOF OF SERVICE

St. Paul Fire & Marine Insurance Company v. Aspen Specialty Insurance Company
Case No.: A-17-758902-C

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed by Messner Reeves LLP, 8945 W. Russell Road, Suite 300, Las Vegas, Nevada 89148. I am readily familiar with Messner Reeves LLP's practice for collection and processing of documents for delivery by way of the service indicated below.

On October 29, 2018, I served the following document(s):

DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE REPLY IN SUPPORT OF MOTION TO DISMISS

on the interested party(ies) in this action as follows:

Ramiro Morales
William C. Reeves
MORALES, FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Tel: (702) 699-7822
Fax: (702) 699-9455
rmorales@mfrlegal.com
wreeves@mfrlegal.com
Attorneys for Plaintiff, St. Paul Fire & Marine Insurance Company

Andrew D. Herold, Esq.
Nicholas B. Salerno, Esq.
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Tel: (702) 990-3624
Fax: (702) 990-3835
aherold@heroldsagerlaw.com
nsalerno@heroldsagerlaw.com
Attorneys for National Union Fire Insurance Company of Pittsburgh PA & Roof Deck Entertainment, LLC d/b/a Marquee Nightclub

By Electronic Service. Pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused said documents(s) to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

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

An employee of Messner Reeves LLP

Electronically Filed
12/26/2018 10:08 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, vs. ASPEN SPECIALTY INSURANCE COMPANY, ET AL., Defendants.	CASE#: A-17-758902-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA J. STURMAN,
DISTRICT COURT JUDGE

TUESDAY, OCTOBER 30, 2018

RECORDER'S TRANSCRIPT OF PROCEEDINGS - See page 2

APPEARANCES:

For the Plaintiff:	WILLIAM C. REEVES, ESQ. MARC J. DEREWETZSKY, ESQ.
For the Defendants:	JENNIFER L. KELLER, ESQ. NICHOLAS B. SALERNO, ESQ. RYAN A. LOOSVELT, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

RECORDER'S TRANSCRIPT OF PROCEEDINGS CONTINUED

DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S REDACTED FIRST AMENDED COMPLAINT

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

NATIONAL UNION'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Las Vegas, Nevada, Tuesday, October 30, 2018

[Case called at 11:20 a.m.]

THE COURT: -- and that is page 14, St. Paul Fire & Marine and Aspen Specialty Insurance Company, 758902. Thanks. And all of these. And all of these. Whoa. Notebooks, notebooks, notebooks.

Everybody else come on up. It's nice to see everybody. See what we can get through here. I do have a question I need to confirm with you guys once we get all your appearances, because I think there's some confidentiality issues that we may have so I want to make sure I don't violate your -- whatever confidentiality agreements out there.

MR. REEVES: Makes sense, Your Honor.

THE COURT: So if we can get appearances then, Case 758902, and start over here [indicating] and work our way across the room.

MR. REEVES: William Reeves on behalf of plaintiff.

MR. DEREWETZSKY: Marc Derewetzky on behalf of plaintiff as well.

THE COURT: Thank you.

MS. KELLER: Good morning, Your Honor. Jennifer Keller appearing pro hac vice on behalf of National Union --

THE COURT: Welcome.

MS. KELLER: -- and Roof Deck Entertainment.

THE COURT: Thank you.

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

also for National Union and Marquee.

MR. LOOSVELT: Good morning, Your Honor. Ryan Loosvelt for Defendant Aspen.

THE COURT: Okay. I think you're the only one who hadn't yet shown up previously so welcome.

MR. LOOSVELT: Correct.

THE COURT: All right. So as I said I just want to make sure I understand because some of these terms are confidential, some of them aren't. As far as I know, the individual policy limits of each of the policies, that's not confidential. The only thing that's confidential is how much was paid to the underlying plaintiff to resolve his claim because it was a compromise of his verdict -- the verdict -- the jury verdict and so the amount paid to him is confidential. Am I correct?

MR. REEVES: That --

THE COURT: So I just --

MR. SALERNO: That's correct, Your Honor, and --

THE COURT: -- want to know what I have to avoid talking about.

MR. SALERNO: -- and the nightclub management agreement is confidential.

THE COURT: Okay. Okay.

MR. REEVES: At least portions of it are. We've made --

MR. SALERNO: But there's no -- there's nobody in court so I think we're free to talk about --

THE COURT: Right, again, but there'll be a record and I just

want to make sure I don't say something inadvertently that means we have to seal a transcript.

MR. SALERNO: Fair enough.

THE COURT: Okay, great. Thank you.

All right, so we've got all these motions and we start with the -- you've got -- Aspen's got a motion to dismiss. Roof Deck which is Marquee's -- we've got National Union, AIG and Aspen's motion to dismiss which is -- because they're kind of overlapping. Then we've got a National Union motion and then I've got a bunch of -- as I said, a bunch of other documents that I think are -- they're sealed that we're hanging onto that we've kept from all of the prior appearances to make sure we've got them.

So I think -- just want to make sure so that Ms. Shell can indicate in her minutes a disposition, if any, on specifically what's on. So Defendant Aspen Specialty Insurance Company's motion to dismiss Plaintiff St. Paul Fire & Marine's [sic] Insurance Company's redacted first amended complaint, Defendant Roof Deck Entertainment, LLC's motion to dismiss St. Paul Fire & Marine's first amended complaint and National Union's motion to dismiss plaintiff's complaint.

MR. REEVES: That's right, Your Honor --

THE COURT: There's three.

MR. REEVES: -- three motions.

THE COURT: Okay.

MR. REEVES: We truncate National Union, refer to them as AIG.

THE COURT: Yeah --

MR. REEVES: We truncate Roof Deck, refer them as Marquee. So --

THE COURT: So does it make more -- rather than argue these one at a time, because basically it's all the same issues, should we just have all of the three motions argued by the respective parties who brought them and then you can oppose all of three of them and then we can hear their --

MR. REEVES: It's at your discretion --

THE COURT: It's pretty much they're all the same issues.

MR. REEVES: -- and certainly that's one way to do it. You know, the -- from where I sit from plaintiff's perspective, there's a clean division between insurance companies versus --

THE COURT: The entity?

MR. REEVES: -- versus an operator --

THE COURT: Yeah.

MR. REEVES: -- versus an insured and so the -- for purposes of how we have divided it --

THE COURT: Right.

MR. REEVES: -- internally --

THE COURT: Okay.

MR. REEVES: -- Mr. Derewetzky's going to --

THE COURT: Certainly.

MR. REEVES: -- handle the insurance --

THE COURT: Okay.

MR. REEVES: -- issues, I'm here --

THE COURT: And like I said, we just have to make sure for Ms. Shell's purposes in Odyssey that whatever happens there's an outcome linked to each separate motion --

MR. REEVES: Agree.

THE COURT: -- but it just seemed like arguing all of the motions at one time and then arguing the oppositions -- and even if it's different counsel arguing them, I don't -- I have no problem with that, but it just seemed it would be easier to just argue the motions, argue the oppositions and then -- and do the replies.

MR. SALERNO: Your Honor, I --

THE COURT: Rather than one -- than one and one, one and one, one and -- it's just going to take forever.

MR. SALERNO: Your Honor, I do think the issues are distinct enough it might get confusing to do that. The Marquee issues are really quite different than the insurance issues.

THE COURT: So would you -- you suggest then the two insurance motions be argued and the Marquee motion be separate?

MR. SALERNO: At a minimum and there is a --

THE COURT: Okay. All right. Okay, that's what we'll do then.

MR. SALERNO: -- there are notable differences --

THE COURT: We will separate out the -- the Marquee motion, we'll do that one on its own because it's the issue of this entity. The two insurance motions which are Aspen and National Union or AIG,

we'll do those two together.

So who do you want to start with is -- as between the insurance issue and the operating issue, is there -- does it make more sense to take one of those first? I don't think that the outcome of one is dependent on --

MR. REEVES: I think it's your call. We got a lot of briefing before this Court --

THE COURT: Yeah.

MR. REEVES: -- so I'm --

THE COURT: So I'm just trying to figure out -- I don't think there's anything with respect to specifically Marquee -- I mean do we need to have that decided before we can get to the insurance issue?

MR. REEVES: No, they're distinct and separate and --

THE COURT: Yeah. I didn't --

MR. REEVES: -- separate tracks.

THE COURT: Yeah. I didn't think so. Okay. So I think that just it doesn't really matter which direction we take them in. So we'll start with Marquee then and do that one and then we'll move on to the insurance issues after that.

MR. SALERNO: Thank you, Your Honor. Your Honor, this is similar to the prior motion. Your Honor at the last motion to dismiss hearing wanted to better understand the relationship --

THE COURT: Yeah.

MR. SALERNO: -- of the various parties. At the time if you recall, St. Paul was not acknowledging that the nightclub management

agreement that we had attached to our papers was the operative agreement. They seem to have acknowledged that now. So hopefully we can get past what are the relationships and what is the agreement because those relationships are pretty fairly and in detail set out in the nightclub management agreement and the attached lease. So -- and we also then went through in detail in these renewed papers what those relationships are to set that out for the Court and be happy to answer any questions.

But the crux of the argument is that the nightclub management agreement includes subrogation waiver provision one that applies to all owner-insured policies, which St. Paul is an owner-insured policy and I'll explain why, and that the cause of action that St. Paul is attempting to subrogate to for express indemnity under the nightclub management only applies to claims that are not reimbursed by insurance which we don't have here. St. Paul is pursuing under theory of subrogation the claims that it paid under its policy so those are insurance-funded claims that the express indemnity provision by its express terms does not apply to.

What St. Paul has now come forward and said is that well wait a minute, my client, Cosmo, that I'm -- or, you know, my insured, Cosmo, who I'm subrogating to, they didn't agree to that subrogation waiver provision. And so I'll address that first and separately then the express indemnity aspect of that argument.

That fails at several levels. First of all, the subrogation waiver provision applies to all owner policies which are defined as all

owner-insured policies. And so the nightclub management agreement defines what is an owner-insured policy at provision 12.3 and that includes -- I don't know if Your Honor tracked all that from our moving papers because it's a little bit confusing, but when you look at provision 12.2.5, which is page 63 of the nightclub management agreement --

THE COURT: It's sealed. Page 65.

MR. SALERNO: Page 63, Your Honor --

THE COURT: Sorry, took me a little while to get that -- it was very securely delivered in a sealed --

MR. SALERNO: Yes.

THE COURT: -- envelope --

MR. REEVES: Do you have a copy of the agreement there, Your Honor?

THE COURT: Yeah, it was -- it was sealed. So yeah, I've got it. I managed to get it out.

MR. SALERNO: I have an extra copy if you'd like to reference --

THE COURT: No, I managed to get it out -- my sealed copy that's all nicely kept sealed --

MR. REEVES: When was it delivered to Your Honor?

THE COURT: I think this was the last time, wasn't it?

MR. SALERNO: Yeah is probably the first round we did a stipulation to seal it.

MR. REEVES: Yeah, I saw that it was sealed. I just was unclear --

THE COURT: Yeah, this was as of February 15th, 2018 we've --

MR. REEVES: I see.

THE COURT: -- we've kept it --

MR. REEVES: Okay.

THE COURT: -- in its sealed envelope ever since.

MR. SALERNO: Yes.

THE COURT: So yeah.

MR. SALERNO: Okay.

THE COURT: I mean portions of it were excerpted and -- but this is the actual full thing. I've opened it.

MR. SALERNO: Very good.

THE COURT: I've got it.

MR. SALERNO: Thank you, Your Honor. So page 63, provision 12.2.5. That provision talks about the insurance coverage maintained by the owner-insured parties. Says all insurance coverages maintained by operator shall be primary to any insurance coverage maintained by any owner-insured parties, and then it refers and defines that term as the owner policies.

So that is what defines the owner policies as the owner-insured parties. The owner-insured parties is defined above on that same page on 12.2.3. And you'll see that the owner-insured parties is defined to include the owner, which is Nevada Restaurants 1, you know, a related affiliated, the project owner, which is Cosmo, and the landlord and the tenant under the lease, et cetera; parents, subsidiaries,

affiliates. So the owner-insured parties under the express terms of the nightclub management agreement is not just Nevada Restaurant, it's also Cosmo by the interaction of these two provisions.

So the insurance maintained by the Cosmo is an owner's policy under the terms of the nightclub agreement to which the subrogation waiver provision applies. If there are any doubt just by the definition of the parties and the relationships of them, the lease agreement which is attached as Exhibit D to the nightclub management agreement requires that the Cosmo who is the landlord -- we lay this out in our papers.

Page 15 of Exhibit D, Your Honor, section 17.2? I know it's a little difficult to follow, my apologies. There's the insurance requirement between the landlord -- essentially between Cosmo and Nevada Restaurant and it says that tenant will carry and maintain all insurance required under section 12.1 of the RMA and will cause operator to carry and maintain all insurance required under section 12.2.

So here the tenant is required to carry the 12.1 provision which is the Nevada Restaurant requirement. Then it goes on and says landlord covenants and agrees that from and after the date of delivery of the premises from landlord to tenant and during the term, landlord will carry and maintain all insurance required under paragraph 1H.

So the landlord here is Cosmo. If you go to paragraph 1H of the lease agreement, which is on page 4 of the lease, it says landlord insurance and it says all insurance required to maintain -- obtained by owner under section 12.1 of the RMA, so you got multiple layers where

that argument fails because there -- within the definition of owner-insured policies and thus owner policies, and then when you go to the lease agreement, Cosmo was required to maintain the insurance that Nevada Restaurant was required to maintain so this is clearly the policy that Nevada Restaurants was required to procure and maintain under the nightclub management agreement.

So despite attempting to split hairs between these various provisions, their argument lacks merit. Plus they're claiming as an intended third-party beneficiary and an intended third-party beneficiary subject to the same terms and conditions to the contracting parties so it fails at multiple levels.

Then when you get to the claim itself beyond the subrogation waiver provision, under the express indemnity provision, the express indemnity only applies to unreimbursed losses. And they again try to split that same hair there and say but that's only as to policies which the owner is required to maintain and I've already explained why the St. Policy [sic] is a policy that the owner is required to maintain.

So under the express terms of the agreement by which they're subrogating, subrogation rights have been waived and the indemnity rights themselves expressly only apply to nonreimbursed losses which we don't have here.

They next try to bring a cause of action for contribution against Marquee by stepping into the shoes of their insured, Cosmo. There's several problems with that, Your Honor. Contribution, first of all, Your Honor, is not allowed in the state of Nevada when there is an express

indemnity provision governing the parties' rights, and we cited to the provisions 17.245 that say that. It's also in the case law in *Calloway* and other cases cited that when the parties have expressly contracted for indemnity rights there is no equitable contribution right available.

So that's under case law and statute. The Uniform Contribution Act also provides that when a party has engaged in intentional conduct, they cannot pursue contribution against another third party and we clearly have a situation here where the verdict found that Cosmo was jointly and severally liable for intentional conduct.

St. Paul's tried again to split those hairs and said yeah, but it was for a nondelegable duty, it was for vicarious liability. There's no such exception they -- and there's no such support for that finding. The jury verdict clearly says they're jointly and severally liable for intentional conduct and that's a binding finding.

THE COURT: Okay, and that was the --

MR. SALERNO: In the underlying action.

THE COURT: -- the jury didn't decide that, the court ruled that and the jury verdict reflected that court ruling.

MR. SALERNO: I don't think so, Your Honor.

THE COURT: I thought that was --

MR. SALERNO: They tried to get out by way of motion which was denied, but it all went to the jury and the jury found joint and several liability for both negligence and intentional conduct.

MR. REEVES: I don't -- I'll let you speak.

THE COURT: Yeah. Okay. I'm not --

MR. SALERNO: I'm not a hundred percent, but I don't think that's relevant anyways --

THE COURT: Yeah. None of us were there, so --

MR. SALERNO: -- but that's my understanding of what occurred. There's a binding finding of intentional conduct on the part of Cosmo which prevents a right to contribution.

THE COURT: That part I don't think is disputed.

MR. SALERNO: Okay.

THE COURT: I think my -- my question is just how we got there and if that matters.

MR. SALERNO: I don't think it matters and I don't --

THE COURT: Okay.

MR. SALERNO: -- know why it would.

THE COURT: Okay.

MR. SALERNO: And at a third level, Your Honor, contribution in Nevada requires that you extinguish a third party's liability for that and that -- there's nothing even close that's come to that in this matter so the cause of action for express indemnity fails under subrogation rights, contribution simply is not available. Thank you, Your Honor.

THE COURT: Okay. Thank you.

And who's taking that one? Okay.

MR. REEVES: I'll argue, Your Honor.

THE COURT: Okay.

MR. REEVES: Can you hear me from here or do you want me to come --

THE COURT: Yes -- yeah, no problem.

MR. REEVES: All right. Our argument is quite simple. Cosmopolitan is not a party to this agreement, not a signatory, and so that's where everything flows from that and that's the slight of hand -- that's why counsel had to walk you through all these different parts and provisions and things like that because if you go to page 1 -- and we provided the excerpt --

THE COURT: Right.

MR. REEVES: -- different times and you have the whole agreement in front of you and obviously we have invited you to review the agreement. And bear in mind this is a pre-answer motion and feels a lot like a motion for summary judgment relative to what's going on here.

THE COURT: Yeah, and we didn't actually talk about that so I -- we'll give counsel a chance to address just -- that was a question I had because we -- when we start with Nevada law on motions to dismiss -- somebody else earlier you may have been in here talked about the distinction between federal laws on motion to dismiss and state law on motions to dismiss and be very -- at this time. May change under the new rules, but at this time very different.

MR. REEVES: Understood. And when we're getting into all these things outside of the pleadings --

THE COURT: Yeah.

MR. REEVES: -- and where we're not dignifying the pleadings for we assume the truth of them, we assume the veracity of the

allegations, it gets very cumbersome. You've got --

THE COURT: And one of the initial arguments was you haven't given us the -- all the entire agreements so how can we -- how can your complaint go forward because you don't even have the agreements attached.

MR. REEVES: Well --

THE COURT: So we have them in their sealed form by suppression the parties both of the entire agreements.

MR. REEVES: Agreed.

THE COURT: Okay.

MR. REEVES: Agreed.

THE COURT: So we got them.

MR. REEVES: And so you'll see on the face page of the agreement you'll identify the parties. You won't see Cosmopolitan there. And that is the driver of everything because if Cosmopolitan is not a party to this agreement, then why are we talking about obligations that it owes? It may be the beneficiary of things under this agreement and the indemnity provision in particular, but as to duties and obligations that it brings, it owes, it's not present. And so that's why counsel is walking you through all these different provisions because he's trying to cobble together a scenario where Cosmopolitan, who is a silent party to all this, relative to the trial, certainly nondelegable duty. Certainly heard that and certainly the court reached that issue.

THE COURT: And as we're talking about parties, can we talk -- maybe clarify one other thing because --

MR. REEVES: Yes, Your Honor.

THE COURT: -- for example, affidavits, they're all signed by TAO, the -- whoever is the representative of TAO --

MR. REEVES: It's managing member of --

THE COURT: On the management. So again, just to clarify --

MR. REEVES: Yes.

THE COURT: -- that's why they're in here and why we're seeing affidavits signed by some executive of TAO.

MR. REEVES: TAO speaks to Marquee speaks to the operator. That's accurate, Your Honor.

THE COURT: Okay.

MR. REEVES: So Cosmopolitan -- TAO doesn't speak to Cosmopolitan. It has a separate controlling group.

THE COURT: But even though TAO doesn't appear anywhere on here, they -- technically they are if -- because you're saying well Cosmo is not anywhere on this document.

MR. REEVES: Correct.

THE COURT: Okay. But since TAO is purporting to have all the information for Roof Deck, Roof Deck --

MR. REEVES: Roof Deck being Marquee.

THE COURT: -- is Marquee.

MR. REEVES: Not Cosmopolitan. That's where --

THE COURT: Roof Deck is Marquee and also then ultimately TAO.

MR. REEVES: Correct, Marquee --

THE COURT: That's how we get there.

MR. REEVES: -- Roof Deck and TAO, we can almost collapse them altogether. Cosmopolitan being completely separate.

THE COURT: Okay.

MR. REEVES: So that's the thrust of everything. You know, we're not distancing our self from the agreement. We found it odd that we're dealing with it in terms of introduction of it vis-à-vis a pre-answer motion and so for purposes of what we're doing here, respectfully pre-answer motion, this is a motion for summary judgment when we're going -- pouring through agreement, set that issue the side. If we're going to introduce the agreement and we're going to consider it, core issue, Cosmopolitan's not a party to it.

It is a signatory at the end where it says we will be bound as to a few provisions. And that's on --

THE COURT: Yeah.

MR. REEVES: -- page -- one other thing -- the lease is not signed, you'll note, that counsel relies on so it's -- that's a little cumbersome. This thing's paginated at the bottom --

THE COURT: Right.

MR. REEVES: -- 89.

THE COURT: Eighty-nine?

MR. REEVES: Eighty-nine.

THE COURT: Is it 89 or -- I think it's page 90 Bate stamped down in the lower right-hand --

MR. REEVES: See I don't have a Bate stamped copy so

there --

THE COURT: -- corner.

MR. REEVES: -- there in and of itself creates (indiscernible) and that's why I wanted to ask you --

THE COURT: Right, it's 89 --

MR. REEVES: -- because I don't have a Bate stamped copy. So you're looking at something I don't have.

THE COURT: Okay. Page 89 of the agreement itself.

MR. REEVES: Page 89 of the agreement.

THE COURT: Yeah, that's -- it's the project owner in that paragraph.

MR. REEVES: Fair enough. And I don't mean to suggest that you're looking at something that isn't the same as mine, but I'm not able to refer you to Bate stamp but --

THE COURT: Okay.

MR. REEVES: -- you will see we're not -- Cosmopolitan is not a signatory, didn't obligate itself to the insurance requirements, the waiver of subrogation and so if they're outside of the agreement, how on earth are we going to bind them to it? And so respectfully that's the thrust of the argument. We don't need to get any -- frankly any more complex than that.

Contribution? Well, if we're not a party the agreement, then we get contribution. So either we're in relative to enforcing the express indemnity or we don't get to enforce express indemnity and then we get contribution. It's kind of an either or scenario. We pled in the alternative

which you do when you're at the pleading stage. So --

THE COURT: And so counsel's argument that you don't get express indemnity and you've -- you've pled that but you're not going to get it, so you can't -- obviously then you can't claim contribution because you're -- at least that's what I --

MR. REEVES: If I don't get the indemnity, I get the contribution, so either I get the indemnity --

THE COURT: Seemed like he was arguing the opposite.

MR. REEVES: -- or I get the contribution. He's trying to say I don't get either.

THE COURT: Exactly. Yeah.

MR. REEVES: Understood. Relative to alternate pleading, relative to the ability to plead in almost the disjunctive, what we've done here is we seek to enforce the indemnity as a third-party beneficiary of it as terms of it. Alternatively, contribution, so if we don't get the benefit of enforcing it, if we're held to be outside of the agreement so we don't get the benefit of the indemnity, then we want contribution.

And bear in mind, Your Honor, and this -- just to provide context how did we get here. One way that we got here is Cosmo and Marquee were jointly defended, same lawyer. And there's a lot of side issues relative to that. Same lawyer, they never tested one another, they never looked to each other and said well what portion is yours versus what portion is mine. I've represented this Court that Cosmo was the silent one in all this, didn't have a footprint there, wasn't doing anything. It was Marquee that was running the show --

THE COURT: Right.

MR. REEVES: -- running the operation --

THE COURT: And that was my question about who actually found and what did they find --

MR. REEVES: Who actually what, Your Honor?

THE COURT: Who actually made the finding and what did they actually find with respect to --

MR. REEVES: There -- no findings between them.

THE COURT: Yeah, between the --

MR. REEVES: And that's what we're trying to do. See this was --

THE COURT: Yeah.

MR. REEVES: -- joint defense, one lawyer, never tested, so of course -- of course we're entitled to go and test the proportionate share between them. I suggest to you it's going to be zero to Cosmo and a hundred percent to Marquee --

THE COURT: So that's then my next question --

MR. REEVES: Yes, Your Honor.

THE COURT: -- because as I said I forgot to talk to Mr. Salerno about this, which is standard of -- on a motion to dismiss, *Buzz Stew*, any likelihood that you can find the facts, what is there factual or is this just entirely purely legal?

MR. REEVES: No, it's certainly factual. Was never tested.

THE COURT: I mean is there really any discovery to be done?

MR. REEVES: Was never tested in the underlying case.

THE COURT: Okay.

MR. REEVES: I'm representing to you that Cosmopolitan was the silent one, didn't have a presence there. Counsel wants to say they're joint and several. That begs the question. To be joint and several doesn't bear out your internal exposures between two parties that are held joint and several. So yes, factual issues predominate relative to --

THE COURT: Is that only contribution or would there also be factual issues to determine is it an enforceable indemnity agreement which is one result or is that purely legal?

MR. REEVES: The enforceability --

THE COURT: The contribution it seems like would be this factual --

MR. REEVES: Whether the parties are bound by it, legal. The net effect of being bound by it, factual.

THE COURT: Okay.

MR. REEVES: So on the front end in terms of whether it's in play, that's a legal issue --

THE COURT: But at this point do we determine you can proceed on your contribution claim and you're not going to be able to proceed on your indemnity claim because, you know, whatever, the court makes that finding. That seems to me like that would be a purely legal finding, express indemnity.

MR. REEVES: Well if -- to the extent this Court held that

Cosmopolitan doesn't get the benefit to enforce it, I suppose that would be a legal issue. To the extent this Court held that the indemnity provision does not respond to the claims, that's factual.

THE COURT: Because again I'm trying to get to what if any discovery is there on that issue to -- for the Court to determine between enforce -- enforceable express indemnity versus contribution, are there factual issues there?

MR. REEVES: Yes. Yes, Your Honor.

THE COURT: Okay. So okay.

MR. REEVES: So we would first go to the trial transcripts and ascertain what was litigated relative to that; those transcripts not being before this Court, the evidence. My suspicion is because of a joint defense that the respective roles of the parties was never developed in the underlying case.

THE COURT: Okay.

MR. REEVES: So we would depose representatives from Marquee to confirm they're in sole control, that they dictated everything, that they didn't look to Cosmopolitan relative to their operation of the club. With that information then we would come to this Court and say with this factual information we're now making our prima facie showing as to why we're entitled to indemnity so --

THE COURT: Thank you.

MR. REEVES: -- to answer your question.

THE COURT: Thank you.

MR. SALERNO: Thank you, Your Honor.

THE COURT: Mr. Salerno, again sorry about -- sorry about that. We didn't talk about -- this is a motion to dismiss, so --

MR. SALERNO: Sure. Your Honor, counsel attempts to conflate several legal concepts so I'll try to make these clear. When they say they're not a party to the contract and then they say they signed it, I think that's somewhat tongue-in-cheek. At page 89 of the nightclub management agreement, they are the project owner. The project owner is defined throughout this agreement and so is their insurance requirements and the relationship to those as I went through.

THE COURT: But there's -- project owner I appreciate and it's defined all the way through, but they didn't agree to the whole contract, they only agreed to what -- acknowledged and agreed to be bound solely with respect to the provisions of blah blah blah.

MR. SALERNO: They agreed to procure the insurance required under this agreement and that's why we went through the lease requirements which are attached in reference to this agreement and that's why we're here because of the insurance they procured. They claimed it's not subject to the subrogation requirements of this agreement which under the requirements of this agreement require that subrogation rights are waived.

And these are pure legal issues and this is not a motion for summary judgment, it's a motion to dismiss. We've cited the legal authority why it's appropriate when a complaint fails to include for the second time the actual operative agreement that they're basing their subrogation right on, we can come forward with that agreement and

that's what we've done. And Your Honor can and should decide these types of legal issues up front to avoid the waste of resources it would cost to develop discovery on simply irrelevant issues and that's why we're bringing it forward now.

To say that they're entitled to test the allocation because it wasn't done in the underlying action is simply wrong. Under this agreement, they're only -- the allocation of liability is only responsible to the extent it's not reimbursed by insurance. That's what these parties contracted for. So they're not entitled to test it now because it was all paid by insurance. The parties by agreement only agreed to allocate liability in a certain way if it wasn't paid by insurance and that's the whole point here.

And so the Uniform Contribution Act and the *Calloway* decision, the case law in Nevada that says it's not one or the other, it's not express indemnity and then if I'm wrong for some reason and it fails because it doesn't apply, I get to do contribution, it's we contracted for the allocation of liability in a certain way in an express agreement, under the nightclub management agreement here, and under this express indemnity provision we contracted and provided for, we don't get the other one too in case it doesn't apply of fails. That's not how it works.

So if you look at the *Calloway* decision it says that and the other cases we cite and you look at the Uniform Contribution Act it says that when -- when they've contracted for how to allocate, it's the contract that applies. You don't get the contribution claim when that fails because of the manner in which it was allocated. That's what we have

here. Here the parties expressly agreed that they would allocate it in a certain way and the key to that is that it had to not be reimbursed by insurance other -- and otherwise everybody walks away.

And so whether you think they're a party to the agreement because of the way the insurance was set up and the way they're referenced as a project owner and there's owner-insured policies is really not important because they're claiming they're coming forward as a beneficiary. Well as a beneficiary they don't obtain greater rights. They're still stepping into the contract to obtain the rights bargained for between the contracting parties. So they don't obtain greater rights than the contracting parties because they're coming in as a third-party beneficiary. That's black letter law in Nevada.

So Your Honor, it's just not an either or thing and it's appropriate for motion for dismiss standards because this should have been pled in the complaint and because it wasn't, it's before Your Honor now. So we would ask that we take the time to sort out these important legal distinctions that have to be addressed as a threshold matter before they can move forward.

And try to what they're saying re-litigate the underlying case? They want to call everybody and re-litigate contribution and indemnity when those rights have been waived?

THE COURT: Okay, so your position would be that it's -- this is purely legal. Whether we call this a motion to dismiss or a motion for summary judgment --

MR. SALERNO: Yeah.

THE COURT: -- ultimately it's a purely legal issue; there is nothing to be done. I mean the court either says you've got a claim under express indemnity because you're bound by this contract or you're not bound by this contract, you're not a party. You didn't sign it saying you would be bound by those provisions so you're not bound. Therefore your claim is contribution. Wouldn't you then have to do --

MR. SALERNO: Well no, it's not that you're not bound, they're claiming beneficiary status then. So they obtain no greater rights.

They are claiming entitlement to express indemnity because they're referenced in the indemnity provision. So they're bound by what that indemnity provides for. And they don't also get contribution when that indemnity doesn't provide for it because that's what they contracted for.

And these are pure legal issues. There's no statement of undisputed facts or disputed facts here for Your Honor to decide and weigh. It's simply this is the contract and what are the parties' legal standings under this -- these contracts and under the law when it comes to contribution and under the law when it comes to subrogation waiver.

THE COURT: Thanks.

MR. REEVES: Briefly respond, Your Honor?

THE COURT: No. I mean no.

MR. SALERNO: Thank you, Your Honor.

THE COURT: So now we have the two -- the other issues which are the St. Paul and the Aspen -- the Aspen and the AIG motions. So these are the insurance motions. Who's going to go first, AIG?

MS. KELLER: Your Honor, if we could -- I'd like to speak on behalf of National Union.

THE COURT: Okay.

MS. KELLER: So what plaintiff is asking the Court to do here is create judge-made law in Nevada since Nevada -- the Nevada Supreme Court has not recognized equitable subrogation between insurers and even the jurisdictions that do, like California, have never recognized a right to equitable subrogation as between excess carriers in different towers. In other words, excess carriers standing on the same footing.

The plaintiff knows this and so it's now asserting that its coverage is excess to that which we provided because it wants to say if our coverage is excess, then we have the same right to go after you that say in California and excess would have to go after a primary. But it's not. It's not -- they are both excess in different towers and the Marquee tower, Aspect was primary, National Union is excess. The Cosmopolitan tower, Zurich is primary, St. Paul is excess. And all the Court has to do is look at the fact that Cosmo was a named insured under the St. Paul policy and Marquee was the named insured under National Union. There's no court anywhere that's held that those excess carriers can go after one another for subrogation. There just isn't.

So what the Court is being asked to do is make two big leaps; one to establish the principle that the Nevada Supreme Court has not. And they can only find one case to cite to the Court, an unpublished opinion not of the Ninth Circuit but of a district court here in Nevada

which seemed to recognize the right of equitable contribution but not between excess carriers.

In that case, as the Court can see in California and in fact the district court here cited a California case on it, the *Firemans' Fund* case, it was an excess carrier asking for equitable subrogation from a primary. And you can see why that is, the primary essentially can hold excess carriers hostage but not the other way around when it comes to settlement.

So -- but that's been the rule. That's been the rule nationwide. They can't cite you one case standing for the proposition that they're asking the Court to do now. And even the one case they cite, it -- while it seems to support the right of equitable subrogation at least if an excess is going after a primary, it puts the kibosh on their other claim for contractual subrogation, for convention subrogation. The court says no, that's not recognized and they don't like that part so they say well the Court should ignore that part.

So based on an unpublished decision of a district court citing California law, they're asking this Court to blaze this new path. It seems to me that in a case like this where they're asking for two bodies of judge-made law, it shouldn't be the trial court doing it. Since they haven't stated a claim that is currently cognizable under Nevada law, I think this Court should deny -- should grant our motion and then if the Nevada Supreme Court wants to establish that new right of equitable subrogation between insurers, it can do so. And it could also consider at the same time whether it will become the only court in the land to allow

equitable subrogation between excess carriers in separate towers with co-extensive responsibilities. It should not be for this Court to do it. Plaintiff simply has not gotten there and it is consistently asking this Court to make these leaps.

Now this is of course purely a question of law. If the --

THE COURT: Okay, well what I don't understand is if you and Mr. Salerno are both defending -- representing National Union and Marquee, how are you doing that?

MS. KELLER: They have --

THE COURT: Because it seems to me and this was Mr. Salerno's argument is that these are totally separate legal theories, so --

MS. KELLER: They're separate legal theories, but they're not in conflict with one another.

THE COURT: Okay.

MS. KELLER: Marquee has not suffered a loss, neither has Cosmo because they were compensated by insurance. So they have no underlying bad faith action against the carriers. The carriers paid the money. They're not out anything. So we're not in conflict. But there were separate theories pled by plaintiff and we think as a matter of law those theories fail, and it is a matter of law for this Court to decide.

If counsel wants to continue to argue that they're excess, counsel should at minimum be required to give this Court a copy of its policy which it keeps hiding. And the reason that the Court -- that it hasn't produced it I think the inference is clear that if it does produce it, it'll -- that'll be the end of the case. So it -- because it will clearly show

that it is excess to Zurich in the Cosmopolitan tower, not standing above National Union in the Marquee tower. And we've diagramed that on page 10 of our motion to dismiss. It isn't refuted.

And when -- and a statement, a legal conclusion in the complaint doesn't bind this Court. If it were a factual assertion, it would. But it's a legal conclusion whether somebody is excess to another carrier and the Court decides that by looking at the policies. That's how the Court always decides that. So I think --

THE COURT: Well how do I decide it in your client's favor then when I haven't seen a policy and I don't know if you're right or you're wrong?

MS. KELLER: Well, we have provided ours. Now, I think defendant should be required to provide its own. It -- because the reason that they haven't is because the case would fail. This Court should not be expending a huge amount of judicial resources on a case where the threshold issue could kill the case because it's a legal issue --

THE COURT: Right, but my question is don't I -- I mean how can I do this on a motion to dismiss? Don't I have to say put them to -- you know, put them to test your theory that, you know, your -- produce your policy and show us where it is clear that you're not excess in the Cosmo tower.

MS. KELLER: Then I think a simple way to do that would be just continue this motion to dismiss, order the plaintiffs to provide a copy of the policy so the Court can make that determination, because otherwise what happens is all this litigation is kicked up for God knows

how long when it should be probably aborted at this stage. And if not aborted, it should be deferred to the Nevada Supreme Court to decide --

THE COURT: And again I understand that is -- this is why again on a motion to dismiss standard in Nevada that we have as currently stands, you -- what is there to be litigated versus what is just purely an issue of law? I mean what would we -- if we don't grant this is a motion to dismiss, you always have the right to bring a summary judgment motion at a later date. I mean that's always been the law. I mean denying a motion to dismiss doesn't mean there isn't going to ultimately be no facts out there that can support their case and they lose as a matter of law on a summary judgment. So --

MS. KELLER: It's -- true. We could proceed with litigation and proceed to incur expense and proceed to use up court's resources and then the Court could grant a summary judgment motion and then it will go to the Nevada Supreme Court --

THE COURT: Right.

MS. KELLER: -- but there isn't real reason to do that when this really is a pure question of law.

THE COURT: Okay. All right. Thank you.

Now -- yeah, Aspen.

MR. LOOSVELT: A lot of it applies to Aspen as well though Aspen's a primary, but in addition these not being recognized as causes of action Nevada state court here. It is a purely question of law and that's what Your Honor keeps saying as to what Aspen's policy limits are and that's really what a lot of the claims are based on so setting aside

that these aren't recognized in Nevada and you'd be making judge-made law.

THE COURT: Okay.

MR. LOOSVELT: Outside of that it's all based on largely whether or not Aspen refused settlements within policy limits and the law's pretty clear on how the -- each occurrence when it applies in the CGL coverage that that's the limit. There's been one occurrence here. St. Paul's not argued that there's been two occurrences. They just argue that there's two injuries, there's a bodily injury and then there's a false advertising and because the false imprisonment claim falls under there.

That's not how policies are construed and that's not the purpose of this policy. The -- one -- each occurrence because the limit is one million dollars regardless of the amount of injuries and those things that fall under that CGL coverage, and we think the law is pretty clear, and we do believe that is a purely legal question based on that in addition to the other things that the claims do fail against Aspen because that's largely what they're all based on if --

THE COURT: Right, so we've got the issue on what is Aspen really exposed to, one million or two million, maybe purely legal question in the end, but the issue about were there opportunities to settle this thing within policy limits --

MR. LOOSVELT: Well that's --

THE COURT: -- do we have to wait -- do discovery on the -- on were there opportunities to do -- to settle before we decide was it one

or two?

MR. LOOSVELT: Well, whether there's one or two is a legal question based on the policy and based on the case law --

THE COURT: But doesn't that control whether or not it was reasonable like say you got an offer to -- hypothetically speaking -- I don't know anything about this case. If some -- if another judge tried this thing. So hypothetically speaking, maybe there was an offer to settle for $1,999,000 --

MR. LOOSVELT: Well, there was an offer and it's alleged that there was an offer to settle for one and a half million --

THE COURT: Right.

MR. LOOSVELT: -- but nothing within Aspen's actual --

THE COURT: The one.

MR. LOOSVELT: -- policy limits. And that's the issue here and this is what magically appeared in the amended complaint that was absent in the first complaint they were talking about the $26 million -- the one million primary and the 25 million excess that was made and then we filed a motion, Your Honor ordered amendment, and then they saw wait, we got to come up with something else and that's when this whole theory of the aggregate limits apply.

But that is a legal question. That is not a factual one. It's a legal determination Your Honor can and should make because the law's pretty clear that the one million dollar occurrence limit applies and if that is true as we believe the case law shows, then there is no failure to settle within policy limits because there is no fact, alleged or otherwise,

that there was a settlement offer within that one million dollars and that's why this aggregate limit theory has appeared, you know, in the second round. And -- you know, so --

THE COURT: And so no need at, again, motion to dismiss stage where the question is, is there anything they could possibly go out there and discover on any legal theory --

MR. LOOSVELT: Well --

THE COURT: -- that would -- might give rise to a potential for recovery and ultimately you may be right and summary judgment is appropriate, but --

MR. LOOSVELT: There --

THE COURT: -- you're saying at this point with --

MR. LOOSVELT: One million dollars is the --

THE COURT: -- your client, no.

MR. LOOSVELT: -- policy limit which is a legal question. There is no fact alleged that there's a settlement offer within that one million dollars so that can be determined, yes.

THE COURT: Okay. Thank you.

MS. KELLER: And Your Honor, could I just add one thing --

THE COURT: Sure. And then --

MS. KELLER: -- to clarify something. The complaint does plead that National Union insures Marquee as its named insured and that St. Paul insures Cosmo as its named insured on an excess policy so the complaint does establish the two towers right there, even without the Court seeing the policy.

THE COURT: Okay. Okay, thanks. Thanks for clarifying.

Now on behalf --

MR. DEREWETZKY: Thank you, Your Honor. When Mr. Salerno was arguing the Marquee motion, he cited the management agreement and one of the provisions he cited was 12.2.5 on page 63 --

THE COURT: Yes.

MR. DEREWETZKY: -- and I may be mistaken, but I think this goes to the heart of the question that counsel just raised about who is excess to whom because this provision states, excuse me, all insurance coverages maintained by operator shall be primary to insurance coverage maintained by owner. Cosmo, owner; Marquee, operator. Our insurance, whatever that insurance is, whoever it insures, excess to their insurance.

THE COURT: But don't we have to first determine whether or not your client's bound by this agreement? Because Mr. Salerno -- I mean I beg your pardon. The argument is that they're not bound, that they -- and expressly in their acceptance provisions said nothing in paragraph 12.

MR. DEREWETZKY: Whether who's bound by it?

THE COURT: Back here on this -- on the signature page, Cosmo --

MR. DEREWETZKY: I think the question, Your Honor, is whether Marquee is bound by it because --

THE COURT: Okay.

MR. DEREWETZKY: -- this is a provision that deals with

insurance that's going to benefit Marquee.

THE COURT: Okay. So the -- when we get -- so even if for the purpose that's between Marquee and St. Paul, if the argument is wait a minute, we might still have a cause of action here because when Cosmo signed, they said very specifically in there and cherry picked the sections which they agreed to be bound by. Their signature line is really specific and really limited. So therefore Mr. Salerno's argument's going to fail because the operator -- the owner never agreed to be bound by section 12.

MR. REEVES: But Marquee did and the key is Marquee is the signatory to it, Marquee agreed to --

THE COURT: Okay, but --

MR. REEVES: -- coverages primary, Marquee --

THE COURT: Okay, yeah, so that's what I'm trying --

MR. REEVES: Yes.

THE COURT: -- trying to get to. So that does not defeat your argument because counsel has said look it's separate towers. Very clearly within the policies, the language of the policy is going to say, we assume -- nobody's seen your policy so we don't know, but the policy's going to say it is excess. And so therefore there's two separate towers and that's the legal theory that's out there which is when you've got separate towers, can you subrogate?

Your point being doesn't matter if we were not signatories to the insurance section, the operator was and the operator, being Marquee, says right in there any other insurance is going to be excess.

We're up front. We're number one. Anything else -- we don't care as between them and their insurance carrier whether they're excess or not. As between us -- as between our insurance carriers and their insurance carriers, we agree they'll be excess. Doesn't matter.

MR. DEREWETZKY: We'll be excess.

THE COURT: Correct. Exactly.

MR. DEREWETZKY: Yes.

THE COURT: I beg your pardon, that Marquee specifically says we don't care what as between Cosmo and its insurance carriers, who's excess and who -- and who's primary. We don't care. That doesn't matter to us. Always as between us and them, we're going to be primary, they're going to be excess.

MR. DEREWETZKY: Yes, and --

THE COURT: They specifically said that doesn't matter if your clients signed on that or not.

MR. DEREWETZKY: And we addressed this issue I think at length in our brief, Your Honor, and there are other reasons why we argue that we're excess and they're primary. But I'd like to take a minute to address the --

THE COURT: Okay.

MR. DEREWETZKY: -- the threshold issue of whether there can be a claim for subrogation under these circumstances. Assuming that we prevail on the argument that we're excess, counsel has acknowledged that there are cases where excess carriers subrogate against primary carriers and that would be our situation here.

There isn't a specific case by the Nevada Supreme Court under those facts, but we lay out in our briefing at length the history of subrogation in the State of Nevada starting with a case in 1915 called *Lafrankeenie [phonetic] versus Clark* at 39 Nevada 49 which says subrogation is simply a means by which equity works out justice between man and man. It is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties and the court's inclined rather to extend than restrict the principle. And adoption has been steadily growing and expanding in importance.

This is 1915, Your Honor. And the court went on to say subrogation applies to a great variety of cases and is broad enough to include every instance in which a party pays a debt for which another party is primarily liable.

Our argument here, Your Honor, is that we are paying -- we have paid a debt for which National Union is primarily liable and for which -- well, and for which National Union is primarily liable. This has been the law in the State of Nevada for over a hundred years. And if there's any question about that, you know, cases cited in -- cases that were decided in 2010 hold the same. The court has expressly stated that district courts have full discretion to fashion and grant equitable remedies. You have the authority to do this even if no other court in Nevada has ever done it, but there have been cases -- equitable subrogation cases in Nevada for years.

We cite in our brief and I have to mention this because counsel raised the issue of the *Maxwell* decision. There -- as counsel

noted, there are recent federal trial court decisions which have enforced the right of equitable subrogation in the insurance context in this situation, excess versus primary. And those are the *Colony* cases. There are two of them. I refer to them as *Colony 1* and *Colony 2*.

In one of the decisions, the court rejected the claim of contractual subrogation based on *Maxwell*. And let me go back to the *Canfora* case. The *Canfora* case was a contractual subrogation case in the context of medical benefits where the insurance -- well the insurer for the employer compensated the injured insured who then went and sued the tortfeasor, got a big recovery and they -- the insurer wanted to get the amount back of their medical lien.

The beneficiary cited *Maxwell* for the proposition that you don't have the right to contractual indemnity and here's what the Nevada Supreme Court said about *Maxwell* in the *Canfora* case: We have previously prohibited insurer from asserting a subrogation lien against medical payments of its insured as a matter of public policy. In *Maxwell versus Allstate Insurance*, we were concerned about the injured party recovering less than their full damages. However, we have held that where an insured receives full and total recovery, *Maxwell* and its public policy concerns are inapplicable.

In this case, there is no dispute that the insureds, Marquee and Cosmo, have been fully protected. They're -- they are -- they -- benefits were paid on their behalf. Certainly, *Maxwell* does not apply under these circumstances and the cases -- the federal district court cases are well-reasoned that equitable subrogation applies and there's

no reason not to extend that to contractual subrogation.

THE COURT: Okay. So counsel's argument that, you know, we really can't know until we've seen your policy which we don't have is what? Because of your argument that it doesn't matter because of 12.2.5 it's always going to be excess.

MR. DEREWETZKY: Counsel said they need the policy to show that we insured Cosmo and that we were excess to the Zurich policy. Your Honor said that that was the case based on what you read. What do we need the policy for? Plus we have the management agreement that says that we're excess regardless.

THE COURT: Right. So then what? What is there to discover because isn't this -- aren't you essentially saying purely legal issue, go ahead and decide it today, we don't need to do anything, it's purely legal, governed by the contracts that are here -- I guess, you know, technically outside the scope of the initial pleadings so I'm just trying to figure out what is -- what's left? What are we going to do under -- under a *Buzz Stew* analysis, what are we going to do?

MR. DEREWETZKY: In terms, Your Honor, of equitable subrogation, there is a dispute in the papers in the case about who has the superior equities --

THE COURT: Right, and this is the whole thing we talked about very early on which is well who actually made that determination that it was joint and several? I thought it was the court instructed the jury. I could be wrong. Like I said, none of us were there, somebody else tried this case. So I may be wrong about my understanding of how

the jury got to -- because how do you get a jury to decide what joint and several is? I don't understand it. How would a jury understand --

MR. DEREWETZKY: I don't have that information at hand, Your Honor, but I do know that --

THE COURT: So that's something we have to discover.

MR. DEREWETZKY: Yes, but I do know that there are allegations in the complaint and there's argument in the papers about superior equities, and at least in the very recently decided, again, federal district court opinion in *Fidelity & Deposit Company of Maryland versus Travelers Casualty* which is at 2018 Westlaw 4550397, the court said it could not make a determination on summary judgment as to who has the superior equities because it involves questions of fact and questions of disputed fact. So at the very minimum, if the cause of action for equitable contribution survives, it -- the case must go forward to determine at a minimum who had the superior equities.

THE COURT: Okay. Got it. Thank you.

MS. KELLER: Your Honor, the --

THE COURT: Yes.

MS. KELLER: -- the argument that somehow the lease agreement could control who was excess fails. It's a matter of black letter law that in actions between insurers regarding priority of coverage issues such as here, courts have found the provisions of an insurance policy control over the terms in the insured's contract and that's the -- we cited the *Travelers Casualty & Surety Company versus American Equity Insurance Company*, 93 Cal. App. 4th 1142, and we cited a couple of

other cases for that proposition.

You simply can't take an insurance policy and convert it into a different kind of policy via a lease agreement with someone else. You can't do it. And that -- so that fails.

So we're back to plaintiff pled that they insure Cosmo as the named insured and that they have an excess policy and they pled that National Union insures Marquee as its named insured excess policy. So you have two towers and you have two excess carriers going after each other.

The idea that we've had equitable subrogation in Nevada for years, not between insurance companies ever. It's always a third party tortfeasor and the insurance company, so it's a completely different situation.

It really would open up I think the courts to endless food fights between excess carriers -- everybody in every tower going after every other carrier saying well you're the reason it didn't settle, no you are, no you are, no you are. And if somebody is going to do that, again it should be the Nevada Supreme Court and one reason is -- and same reason that whenever you have judge-made law you want it to be done by the highest court because they can get briefing from everyone, including many amici curiae can come in and say we've researched this extensively and here's what we found. They're in a position to really seriously consider the pros and cons from everybody who might have an interest in it because it would be making new policy. It's a policy decision.

And in this case, for the Court to grant our motion to dismiss and defer that to the Nevada Supreme Court would make sense for another reason. There's no one here who's going to be injured in the interim. These are two insurance carriers fighting it out. There's not a paraplegic person who's being -- going without medical care, we're not in a situation where witnesses could die or memory's fade. This is a situation that is a legal issue only. And so that's another reason why I think the fact that plaintiff has not been able to state a claim under current Nevada law means that we should prevail.

THE COURT: Thank you.

Aspen.

MR. LOOSVELT: There was no opposition that the one million -- one million limit applies and that's notable because that's -- even if we were going to recognize these new causes of action, that's fatal to all the claims.

So, you know, the initial complaint stated equitable subrogation and then the amended complaint just did away with equitable. Sounds like that's what the focus is or maybe they're being alleged in the alternative. It's hard to tell, but under either they fail because of the legal -- purely legal question Your Honor could make based on the facts of what the settlement offers were and they were not within the policy limits.

Even were they -- even were Your Honor going to recognize an equitable subrogation claim, just looking at some of the elements, they're just lacking here. And it's -- it's is -- it's an equitable thing, it's to

do equity and, you know, do fairness to people and this is rights emanating from the insured and the -- one of the primary elements is did the insured suffer a loss? And they're trying to subrogate to that loss. Well the insured here didn't suffer a loss. The insured was fully indemnified in the post-verdict settlement, based on all the limits by the way which included the one million dollar policy limit.

THE COURT: Okay. But how can we say they didn't suffer a loss? There's a big judgment against them that was compromised and insurance did pay that --

MR. LOOSVELT: So there's --

THE COURT: -- but that -- don't they stand in the shoes of Cosmo?

MR. LOOSVELT: So --

THE COURT: They did that to protect their insured.

MR. LOOSVELT: There's a different element that kind of addresses that --

THE COURT: Okay.

MR. LOOSVELT: -- under that and that element is the insured had an existing assignable [phonetic] cause of action against the defendant that they could have asserted had they not been compensated so that's a completely separate element. One of the other elements is whether or not the insured itself actually suffered a loss. So after everything's done here and they've been paid, where is there loss? There is none. They're not out of pocket --

THE COURT: I think counsel is standing up because I don't

think he addressed the Aspen issues. So hang on --

MR. LOOSVELT: Sure, sure.

THE COURT: -- you'll get the last word and we'll let counsel address the Aspen issues because I think you --

MR. DEREWETZKY: I'm sorry, Your Honor, I got --

THE COURT: Yeah.

MR. DEREWETZKY: -- all excited and sat down.

THE COURT: Yeah. I think you're correct. You --

MR. DEREWETZKY: Yes. Thank you very much. You know first of all -- just trying to collect my thoughts really quickly, Your Honor. On this issue of whether any of the insureds suffered a loss, it's basic to subrogation law that the insured is not going to have been damaged because the insurance company will have paid on its behalf. And under the law of subrogation which we go into in great detail --

THE COURT: Right.

MR. DEREWETZKY: -- and the history and the evolution of subrogation, it's this fact that allows the insurance company to go and pursue the tortfeasor to get recovery. The insurance company's out of pocket. They get the rights from the insured to pursue the tortfeasor to get reimbursed. If there wasn't -- if there was actually a requirement that the insured had to be out of pocket, we'd never have a subrogation claim because the insurance company wouldn't have paid and that's -- I think that puts to rest that particular argument.

But let me address the policy limits issue in the Aspen policy because I think this is actually pretty clear. What Aspen is trying to

argue is that they have a -- an endorsement amending the common policy conditions that says 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.

I think we have to assume that the insurance company knew what it was doing when it drafted its policy and used the term coverage part as opposed to some other term within --

THE COURT: So the mere fact that ultimately the -- in the settlement Aspen paid -- hypothetically speaking, if Aspen only paid one million out of the ultimate settlement, that's not controlling because you still have to determine -- not controlling on the issue of did they have a settlement offer within their policy limits which they could have taken. Mere fact that when they negotiated a settlement, their contribution to that settlement may have been one million. That's not controlling on the question of whether or not they did in fact have an offer to settle that they could have settled for within their policy limits.

MR. DEREWETZKY: That's correct, Your Honor, but what I think is controlling is -- and the issue is whether there's a one million dollar limit or a two million dollar limit and we get down to this question of what's the coverage part?

There are several coverage parts in the Aspen policy. There's a general liability coverage part, there's a liquor liability coverage part and there are other coverage parts referred to within the policy.

In the general liability coverage part, there are two distinct coverages. There is bodily injury and property damage coverage and there's personal and advertising injury coverage.

Under bodily injury coverage, you have to have an occurrence for there to be coverage. An occurrence defined as an accident.

THE COURT: So I understand this and so but how does -- how do we need discovery on that?

MR. DEREWETZKY: I'm sorry?

THE COURT: How -- why would we need discovery on that? I mean is -- again is that just something the Court can say I think you're wrong, it's two million because he had both his injury because that was a big part of this thing was his damages -- the financial loss of due to his reputation his inability to run his hedge fund, allegedly. So the Court could just say I think that's two million and you've already said there was an offer for 1.75 therefore as a matter of law, you blew it.

MR. DEREWETZKY: Yes, but I think it's important for us to argue the legal question --

THE COURT: So what would -- but what would we look for in -- because again motion to dismiss, what would we be looking for at this stage of the litigation to say can you prove that?

MR. DEREWETZKY: Well --

THE COURT: Is there anything out there or is just a legal issue --

MR. DEREWETZKY: -- I think it's a legal question, Your Honor, and I think --

THE COURT: Okay.

MR. DEREWETZKY: -- you have to look at the policy and look at it closely in terms of what it is the policy says --

THE COURT: Then can it be determined on a motion to dismiss standard or does it need discovery?

MR. REEVES: If he's going to concede a 1.5 million dollar offer and you find two million --

THE COURT: Well, 1.75 --

MR. REEVES: -- then the answer would be yes, your -- you have what you need.

THE COURT: Okay.

MR. REEVES: They failed to settle the case.

THE COURT: Okay.

MR. REEVES: I mean to your point, relative to that concession. It's an allegation and if we're going to say open court that that concession is binding, then --

THE COURT: Okay. Thanks.

MR. LOOSVELT: I agree it is a legal question as to what the limit is and so he just talked about an endorsement for different coverage parts, all right? So but when we talk -- look at the CGL coverage part, there's A and B you have a section of bodily injury and you have a section of this personal advertising injury. All these CGL coverage parts are subject to the each occurrence limit of one million dollars. Doesn't matter the amount of injuries that result under that and that's what the case law shows and says.

So what you have here is a legal question of what applies is the one million or is the two million. Under the -- anything under the CGL we have an each occurrence limit of one million dollars.

It doesn't matter like in the *Bisch* [phonetic] case when the Nevada Supreme Court recognized that it was this causal approach to what -- when an occurrence applies, that, you know, was this horrible thing where this little girl is being backed over back and forth, back and forth. It wasn't multiple injuries that determined multiple occurrences, it was one causal common event.

And that's this incident that happened at Marquee whether, you know, that resulted in him being falsely imprisoned and being beat up by the security guard if that's kind of what the allegations parse out, but it's that one common cause, it's that one occurrence and it's that one million dollar policy limit that applies to the CGL coverage which the bodily injury and the personal and false advertising is.

THE COURT: Okay. All right, great. Thanks. Fine.

MR. DEREWETZKY: Your Honor, I didn't get a chance to actually finish my argument because it has to do with this question that he just raised where they argue about occurrences and there are two different types of coverage under the CGL coverage part; one that doesn't require an occurrence, one that requires an offense. And the offense in this case is false imprisonment. We have an offense of false imprisonment for which there's a million dollar limit and we have an accident that caused bodily injury for which there's a million dollar limit. Hence two million dollars.

THE COURT: Okay.

MR. DEREWETZKY: Sorry.

THE COURT: The -- I'll take a look at this because this -- again, we're at the motion to dismiss stage, so now that we've opened the official envelope, there is arguably one thing that -- I mean Ms. Keller may be right that we may need the St. Paul policy either for summary judgment purposes or as a supplement to the motion to dismiss to make the legal determination because on that one I'm having a hard time understanding what -- you know, what are -- what's left? Why can't we do this at this stage? What do we need to litigate over?

Same thing with Aspen. Again, for motion to dismiss stage, I see those -- Mr. Salerno is correct, the two insurance issues although very different, very different, are distinct from the Marquee issue. So the question on the insurance policies is, you know, what do we need? If not granting a motion to dismiss, why are -- what are we proceeding on? Granting, denying, are we making a determination in their favor that the case -- that they win at this point in time?

The Marquee issue is to me it's very different and that's why I asked, you know, why are we having one set of counsel argue this because I appreciate counsel saying but these are not inconsistent. Really? Really?

MR. REEVES: One observation, Your Honor --

THE COURT: Okay. So I'll take it under consideration I'll let you know.

MR. REEVES: May I may one observation?

THE COURT: Sure, and they can have their closing word too.

MR. REEVES: Well we didn't file a motion so when, you know --

THE COURT: Right.

MR. REEVES: -- ordinarily when we adjudicate issues like this we have cross-motions and --

THE COURT: Right. And that's why -- that's why I'm saying --

MR. REEVES: -- each side is seeking relief and --

THE COURT: -- is are we essentially saying then at this stage if we're all agreeing it's a purely legal issue?

MR. REEVES: Yeah, I mean we'd almost like to be characterized as the moving party relative to -- you know, co-moving party.

THE COURT: Yeah.

MR. REEVES: So -- understood. Thank you, Your Honor.

THE COURT: So there is no motion for summary judgment pending on any of this. It's all motions to dismiss --

MR. REEVES: Understood, I'm just pointing a procedural regularity that we're --

THE COURT: It's --

MR. SALERNO: Your Honor --

THE COURT: Yeah.

MR. SALERNO: -- briefly, I'm not sure if Your Honor is -- wants to entertain supplemental briefing if you feel like you need St. Paul's policy. We'd be happy to do that --

THE COURT: You know, I'll let you know.

MR. SALERNO: Okay.

THE COURT: If I think that that's going to be a critical factor --

MR. SALERNO: Yeah.

THE COURT: -- such that, you know, it would be the --

MR. SALERNO: Yeah.

THE COURT: -- deciding thing and --

MR. SALERNO: And then --

THE COURT: -- there wouldn't be any other facts.

MR. SALERNO: -- to the extent Your Honor is prepared to rule, would like to have the record reflect that we did object to the surreply and requested to strike that, so for the record we would ask for your ruling on that as well.

MR. DEREWETZKY: And we objected to the late filed -- the two month late filed reply brief of Aspen and ask that it be stricken.

THE COURT: Okay.

MR. LOOSVELT: And we opposed it and counter-moved for approval of the reply.

THE COURT: Okay. All right. Thank you. So as I said, you know, I will look at that and determine if in fact there is anything additional needed or if really at this point in time with what we've got we're done, because I kind of think it's one or the other. So we'll be in touch.

MR. SALERNO: Thank you, Your Honor.

MR. LOOSVELT: Thank you, Your Honor.

MR. DEREWETZKY: Thank you, Your Honor.

THE COURT: Thanks very much for your time everybody. We'll be in recess. Thanks.

[Hearing concluded at 12:35 a.m.]

* * * * * *

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

Tracy A. Gegenheimer, CER-282, CET-282
Court Recorder/Transcriber

A-17-758902-C St. Paul Fire & Marine Insurance Company, Plaintiff(s)
vs.
Aspen Specialty Insurance Company, Defendant(s)

February 28, 2019 03:00 PM Minute Order

HEARD BY: Sturman, Gloria COURTROOM: RJC Courtroom 10D

COURT CLERK: Shell, Lorna

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

DEFENDANT ASPEN SPECIALTY INS. CO. S MOTION TO DISMISS .. PLAINTIFF ST PAUL FIRE AND MARINE INS. CO. S REDACTED FIRST AMENDED COMPLAINT .. DEFENDANT ROOF DECK ENTERTAINMENT LLC S MOTION TO DISMISS PLAINTIFF ST PAUL FIRE & MARINE INS. CO. S FIRST AMENDED COMPLAINT .. AND NATIONAL UNION S MOTION TO DISMISS PLAINTIFF S COMPLAINT

Defendant Aspen Specialty Ins. Co. s Motion to Dismiss Plaintiff St Paul Fire and Marine Ins. Co. s redacted First Amended Complaint; Defendant Roof Deck Entertainment LLC s Motion to Dismiss Plaintiff St Paul Fire & Marine Ins. Co. s First Amended Complaint; and National Union s Motion to Dismiss Plaintiff s Complaint came on for hearing on October 30, 2018. Having reviewed the transcript filed December 26, 2018 and taken the matter under advisement, the COURT HEREBY FINDS as follows:

With respect to the Roof Deck Motion to Dismiss, the Court raised the question of whether the standard of review for a Motion to Dismiss would change with the amendment of the Nevada Rules of Civil Procedure. COURT FINDS it is now clear from the Advisory Committee Notes to NRCP 12 that no change is anticipated Rule 12(b)(5) mirrors FRCP 12(b)(6). Incorporating the text of the federal rule does not signal intent to change existing Nevada pleading standards. COURT FURTHER FINDS Roof Deck s Motion introduces matters outside the scope of the initial pleadings and the issues related to the operating agreement in question are such that, under Nevada s rigorous pleading standards, it is not appropriate for disposition at the pleading stage. Nevada law provides that a complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief. Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). COURT THEREFORE ORDERED, Roof Deck s Motion to Dismiss DENIED.

Similarly, both the National Union and Aspen Specialty Ins. Co. Motions require the Court to go beyond the pleadings and ask this Court to analyze insurance policies without testing through discovery whether those policies are complete and that there are no missing amendments, exhibits, riders, or endorsements. Notably the declarations in support of the admissibility of the respective policies are brief, stating only that the exhibit is a true and correct copy with only premium information redacted, with no explanation of how the declarant determined the completeness of the policy. Further, both National Union and Aspen argue that the indemnity action must fail as a matter of law, but it seems that at least one piece of evidence necessary to evaluate these legal issues is missing from the record before the Court, I.e. the St Paul policy.

Nevada has not adopted the federal standard found in Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Both National Union and Aspen Specialty have provided evidence outside the initial pleadings, but argue that the issue before the court is purely a matter of legal interpretation and appropriate for disposition at the pleading stage. Based on the record before the Court at this time, the court cannot say there are no material questions of fact and the only issues remaining are purely questions of law. COURT THEREFORE ORDERED, Motions to Dismiss filed respectively by National Union and Aspen Specialty DENIED WITHOUT PREJUDICE to raise these issues in a Motion for Summary Judgment.

Counsel for Plaintiff is DIRECTED to provide Orders for signature by the Court within 30 days.

CLERK'S NOTE: Minute Order corrected to reflect "the court cannot say there are" rather than "there appears to be" in the last sentence of the findings./ls 02-28-19

A copy of this minute order was e-mailed, mailed, or faxed as follows: Nicholas Salerno, Esq. (nsalerno@heroldsagerlaw.com), Ryan Loosvelt, Esq. (rloosvelt@messner.com), and William Reeves, Esq. (702-699-9455)

ODM
Ramiro Morales [SBN 7101]
William C. Reeves [SBN 8235]
Marc. J. Derewetzky [SBN 6619]
MORALES FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Telephone: 702/699-7822
Facsimile: 702/699-9455

Attorneys for Plaintiff St. Paul
Fire and Marine Insurance Company

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE AND MARINE INS. CO., Plaintiff, vs. ASPEN SPECIALTY INS. CO, et al., Defendants.	Case No.: A758902 Dept.: XXVI ORDER RE: DEFENDANTS' MOTIONS TO DISMISS DATE: October 3, 2018 TIME: 9:30 a.m.

The Court, having considered the Motions to Dismiss filed separately by Defendants Aspen Specialty Ins. Co. ("Aspen"), Roof Deck Entertainment, LLC ("Roof Deck") and National Union Fire Ins. Co. of Pittsburgh, PA ("AIG") as to the First Amended Complaint ("FAC") filed by Plaintiff St. Paul Fire and Marine Insurance Company ("Travelers"), denied each of the motions for the reasons set forth in this Court's Minute Order, a copy of which is attached hereto as Exhibit A.

By virtue of this Order, Aspen, AIG and Roof Deck shall each file Answers to the FAC within ten (10) days of the issuance of this Order.

IT IS SO ORDERED.

Dated: June 26, 2019

DISTRICT COURT JUDGE

///

///

SUBMITTED BY:

MORALES FIERRO & REEVES

By 

William C. Reeves
MORALES FIERRO & REEVES
600 Tonopah Drive, Suite 300
Las Vegas, NV 89106
Attorneys for Plaintiff

Exhibit A

A-17-758902-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Insurance Tort **COURT MINUTES** **February 28, 2019**

A-17-758902-C St. Paul Fire & Marine Insurance Company, Plaintiff(s)
vs.
Aspen Specialty Insurance Company, Defendant(s)

February 28, 2019 **3:00 PM** **Minute Order**

HEARD BY: Sturman, Gloria **COURTROOM:** RJC Courtroom 10D

COURT CLERK: Lorna Shell

PARTIES PRESENT: None

JOURNAL ENTRIES

- DEFENDANT ASPEN SPECIALTY INS. CO.'S MOTION TO DISMISS PLAINTIFF ST PAUL FIRE AND MARINE INS. CO.'S REDACTED FIRST AMENDED COMPLAINT ..... DEFENDANT ROOF DECK ENTERTAINMENT LLC'S MOTION TO DISMISS PLAINTIFF ST PAUL FIRE & MARINE INS. CO.'S FIRST AMENDED COMPLAINT ..... AND NATIONAL UNION'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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A-17-758902-C

that a complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief. Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). COURT THEREFORE ORDERED, Roof Deck's Motion to Dismiss DENIED.

Similarly, both the National Union and Aspen Specialty Ins. Co. Motions require the Court to go beyond the pleadings and ask this Court to analyze insurance policies without testing through discovery whether those policies are complete and that there are no missing amendments, exhibits, riders, or endorsements. Notably the declarations in support of the admissibility of the respective policies are brief, stating only that the exhibit is a true and correct copy with only premium information redacted, with no explanation of how the declarant determined the completeness of the policy. Further, both National Union and Aspen argue that the indemnity action must fail as a matter of law, but it seems that at least one piece of evidence necessary to evaluate these legal issues is missing from the record before the Court, i.e. the St Paul policy.

Nevada has not adopted the federal standard found in Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Both National Union and Aspen Specialty have provided evidence outside the initial pleadings, but argue that the issue before the court is purely a matter of legal interpretation and appropriate for disposition at the pleading stage. Based on the record before the Court at this time, there appears to be no material questions of fact and the only issues remaining are purely questions of law. COURT THEREFORE ORDERED, Motions to Dismiss filed respectively by National Union and Aspen Specialty DENIED WITHOUT PREJUDICE to raise these issues in a Motion for Summary Judgment.

Counsel for Plaintiff is DIRECTED to provide an Order for signature by the Court within 30 days.

CLERK'S NOTE: A copy of this minute order was e-mailed, mailed, or faxed as follows: Nicholas Salerno, Esq. (nsalerno@heroldsagerlaw.com), Ryan Loosvelt, Esq. (rloosvelt@messner.com), and William Reeves, Esq. (702-699-9455)

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

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S ANSWER TO ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT

Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), for itself and for no other defendant, answers the First Amended Complaint ("FAC") of Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") as follows:

THE PARTIES

1. Responding to Paragraph 1 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

2. Responding to Paragraph 2 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

3. Responding to Paragraph 3 of the FAC, National Union admits the allegations.

4. Responding to Paragraph 4 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

5. Responding to Paragraph 5 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

FACTUAL ALLEGATIONS

6. Responding to Paragraph 6 of the FAC, National Union admits the allegations.

7. Responding to Paragraph 7 of the FAC, National Union responds that the complaint in the underlying action speaks for itself.

8. Responding to Paragraph 8 of the FAC, National Union responds that the complaint in the underlying action speaks for itself.

9. Responding to Paragraph 9 of the FAC, National Union responds that the complaint in the underlying action speaks for itself.

10. Responding to Paragraph 10 of the FAC, National Union responds that the complaint in the underlying action speaks for itself as to the parties named as defendants. As to the remaining allegations, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

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11. Responding to Paragraph 11 of the FAC, National Union admits that Moradi put forth testimony, documentation, and expert opinion in support of his allegations during the course of the underlying action. Except as so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

12. Responding to Paragraph 12 of the FAC, National Union admits that Moradi asserted a lost income claim for past lost wages and future lost wages in the underlying action. Except as so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

13. Responding to Paragraph 13 of the FAC, National Union admits that Moradi made legal arguments that Cosmopolitan had a "non-delegable duty" to keep patrons safe, including Moradi and the court in the underlying action issued an order finding vicarious liability on the part of Cosmopolitan for Marquee's actions. Except as so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

14. Responding to Paragraph 14 of the FAC, National Union admits the allegations.

15. Responding to Paragraph 15 of the FAC, upon information and belief, National Union admits that Marquee is an insured under Aspen Specialty Insurance Company ("Aspen") commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012. Except as so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

16. Responding to Paragraph 16 of the FAC, National Union responds that the Aspen policy speaks for itself.

17. Responding to Paragraph 17 of the FAC, National Union responds that the Aspen policy speaks for itself.

18. Responding to Paragraph 18 of the FAC, National Union responds that the Aspen policy speaks for itself.

19. Responding to Paragraph 19 of the FAC, National Union responds that the Aspen policy speaks for itself.

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20. Responding to Paragraph 20 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

21. Responding to Paragraph 21 of the FAC, upon information and belief, National Union denies the allegations.

22. Responding to Paragraph 22 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

23. Responding to Paragraph 23 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

24. Responding to Paragraph 24 of the FAC, National Union responds that the Aspen policy speaks for itself.

25. Responding to Paragraph 25 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

26. Responding to Paragraph 26 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

27. Responding to Paragraph 27 of the FAC, National Union admits that Aspen provided a joint defense to Cosmopolitan and Marquee in the underlying action through a single defense firm. Except as so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

28. Responding to Paragraph 28 of the FAC, National Union admits that Aspen initially retained the law firm of Kravitz Schnitzer & Johnson to represent Marquee and Cosmopolitan and later retained the law firm of Lewis Brisbois Bisgaard & Smith LLP to represent Marquee and Cosmopolitan. Except as so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

29. Responding to Paragraph 29 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

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30. Responding to Paragraph 30 of the FAC, National Union admits that Marquee is an insured under National Union Fire Insurance Company of Pittsburgh, Pa. Policy Number BE 25414413, effective October 6, 2011 to October 6, 2012. Except as so admitted, National Union denies the allegations.

31. Responding to Paragraph 31 of the FAC, National Union admits the allegations.

32. Responding to Paragraph 32 of the FAC, National Union denies the allegations.

33. Responding to Paragraph 33 of the FAC, National Union admits that Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") was an insured under the National Union policy. National Union further responds the National Union policy speaks for itself. Except as so admitted, National Union denies the allegations.

34. Responding to Paragraph 34 of the FAC, National Union admits that it was placed on notice of the underlying action. Except as so admitted, National Union denies the allegations.

35. Responding to Paragraph 35 of the FAC, National Union admits that it provided a joint defense to Cosmopolitan and Marquee in the underlying action through the law firm of Weinberg Wheeler Hudgins Gunn & Dial. Except as so admitted, National Union denies the allegations.

36. Responding to Paragraph 36 of the FAC, National Union admits the allegations.

37. Responding to Paragraph 37 of the FAC, National Union denies the allegations.

38. Responding to Paragraph 38 of the FAC, National Union admits that, during the course of the underlying action, National Union asserted the position that the total limit of the National Union policy to pay for settlement or judgment on behalf of both Cosmopolitan and Marquee was $25,000,000. National Union further admits that it asserted the position that its policy limit was excess to the total applicable limits of scheduled underlying insurance and any applicable other insurance providing coverage to Marquee and Cosmopolitan. Except as so admitted, National Union denies the allegations.

39. Responding to Paragraph 39 of the FAC, National Union admits that it asserted a position in the underlying action that the total limit of the National Union policy to pay for settlement or judgment on behalf of both Cosmopolitan and Marquee was $25,000,000. Except as

so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

40. Responding to Paragraph 40 of the FAC, upon information and belief, National Union admits the allegations.

41. Responding to Paragraph 41 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

42. Responding to Paragraph 42 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

43. Responding to Paragraph 43 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

44. Responding to Paragraph 44 of the FAC, National Union denies the allegations.

45. Responding to Paragraph 45 of the FAC, National Union denies the allegations.

46. Responding to Paragraph 46 of the FAC, National Union denies the allegations.

47. Responding to Paragraph 47 of the FAC, National Union denies the allegations.

48. Responding to Paragraph 48 of the FAC, National Union admits that on or around 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. National Union further admits the Offer of Judgment lapsed and no counter-offer was made. Except as so admitted, National Union denies the allegations.

49. Responding to Paragraph 49 of the FAC, National Union admits that, at the time the Offer of Judgment was pending, National Union had no obligation with regard to the Offer of Judgment as Aspen had not offered it policy limit. Except as so admitted, National Union denies the allegations.

50. Responding to Paragraph 50 of the FAC, National Union denies all the allegations.

51. Responding to Paragraph 51 of the FAC, National Union admits that Moradi made a settlement demand of $26,000,000 that was not accepted. The November 2, 2016 settlement demand letter speaks for itself. Except as so admitted, National Union denies the allegations.

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52. Responding to Paragraph 52 of the FAC, National Union admits that Aspen authorized a $500,000 Offer of Judgment on behalf of Marquee and Cosmopolitan in January 2017. National Union also admits that it asserted the position it had no obligation to offer money towards settlement until Aspen offered its full policy limit. Except as so admitted, National Union denies the allegations.

53. Responding to Paragraph 53 of the FAC, National Union admits that Moradi made a $26,000,000 settlement demand on March 9, 2017 that was not accepted. The March 9, 2017 settlement demand letter speaks for itself. National Union also admits that Marquee's personal counsel sent a letter to defense counsel requesting settlement of the underlying action within the insurers' policy limits. Except as so admitted, National Union denies the allegations.

54. Responding to Paragraph 54 of the FAC, National Union admits the allegations.

55. Responding to Paragraph 55 of the FAC, National Union admits that it issued a reservation of rights letter to Cosmopolitan with regard to the underlying action on or around March 21, 2017. Except as so admitted, National Union denies the allegations.

56. Responding to Paragraph 56 of the FAC, National Union responds that the motions it has filed with this Court speak for themselves.

57. Responding to Paragraph 57 of the FAC, National Union denies the allegations.

58. Responding to Paragraph 58 of the FAC, National Union admits that Cosmopolitan's coverage counsel sent a letter to National Union in response to National Union's reservation of rights letter. The letter sent by Cosmopolitan's coverage counsel speaks for itself.

59. Responding to Paragraph 59 of the FAC, National Union denies the allegations.

60. Responding to Paragraph 60 of the FAC, National Union admits the jury in the underlying action rendered a compensatory damages verdict against Marquee and Cosmopolitan for $160,500,000. The jury verdict form and the court's order speak for themselves.

61. Responding to Paragraph 61 of the FAC, National Union denies all allegations.

62. Responding to Paragraph 62 of the FAC, National Union admits that St. Paul sent correspondence to National Union requesting information pertaining to settlement negotiations in the underlying action. Except as so admitted, National Union denies the allegations.

63. Responding to Paragraph 63 of the FAC, National Union admits that it did not report Moradi's March 9, 2017 settlement demand to St. Paul. Except as so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

64. Responding to Paragraph 64 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

65. Responding to Paragraph 65 of the FAC, National Union admits that St. Paul sent a letter to National Union on or about March 29, 2017. The March 29, 2017 letter speaks for itself. Except as so admitted, National Union denies the allegations.

66. Responding to Paragraph 66 of the FAC, National Union admits the allegations.

67. Responding to Paragraph 67 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

68. Responding to Paragraph 68 of the FAC, National Union admits that it offered its policy limit towards settlement of the underlying action. Except as so admitted, National Union denies the allegations.

69. Responding to Paragraph 69 of the FAC, upon information and belief, National Union admits the allegations.

70. Responding to Paragraph 70 of the FAC, National Union admits that St. Paul sent correspondence to National Union regarding Moradi's settlement demand. St. Paul's correspondence to National Union speaks for itself. National Union also admits that St. Paul offered its policy limit towards settlement of the underlying action. Except as so admitted, National Union denies the allegations.

71. Responding to Paragraph 71 of the FAC, National Union admits that St. Paul reserved the right to seek reimbursement of its settlement contribution in the underlying action from Aspen, National Union and Marquee. Except as so admitted, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

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FIRST CAUSE OF ACTION

Subrogation – Breach of the Duty to Settle

(Against Aspen Only)

72. Responding to Paragraph 72 of the FAC, National Union reincorporates its responses to Paragraphs 1 through 71 as stated fully herein.

73. Paragraph 73 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

74. Paragraph 74 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

75. Paragraph 75 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

76. Paragraph 76 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

77. Paragraph 77 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

78. Paragraph 78 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

79. Paragraph 79 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

80. Paragraph 80 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient

information to admit or deny the allegations and therefore denies the allegations.

81. Paragraph 81 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

82. Paragraph 82 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

83. Paragraph 83 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

SECOND CAUSE OF ACTION

Subrogation – Breach of the Duty to Settle

(Against AIG Only)

84. Responding to Paragraph 84 of the FAC, National Union reincorporates its response to Paragraphs 1 through 83 as stated fully herein.

85. Responding to Paragraph 85 of the FAC, National Union responds that this is a legal contention to which no response is required. To the extent a response is required, National Union admits the implied covenant of good faith and fair dealing is implied under insurance policies and National Union has a duty to comply with same with regard to all insureds under its policy. Except as so admitted, National Union denies the allegations.

86. Responding to Paragraph 86 of the FAC, National Union responds that this is a legal contention to which no response is required.

87. Responding to Paragraph 87 of the FAC, National Union responds that this is a legal contention to which no response is required. To the extent a response is required, National Union denies that it breached any duty to settle the underlying action.

88. Responding to Paragraph 88 of the FAC, National Union denies the allegations.

89. Responding to Paragraph 89 of the FAC, National Union denies the allegations.

90. Responding to Paragraph 90 of the FAC, National Union denies the allegations.

91. Responding to Paragraph 91 of the FAC, National Union denies the allegations.

92. Responding to Paragraph 92 of the FAC, National Union admits that St. Paul agreed to contribute its policy limit to resolve the underlying action and reserved the right to seek reimbursement of same. Except as so admitted, National Union denies the allegations.

93. Responding to Paragraph 93 of the FAC, National Union denies the allegations.

94. Responding to Paragraph 94 of the FAC, National Union admits that St. Paul paid its policy limit towards settlement of the underlying action. Except as so admitted, National Union denies the allegations.

95. Responding to Paragraph 95 of the FAC, National Union denies the allegations.

THIRD CAUSE OF ACTION

Subrogation – Breach of the Aspen Insurance Contract

(Against Aspen Only)

96. Responding to Paragraph 96 of the FAC, National Union reincorporates its response to Paragraphs 1 through 95 as stated fully herein.

97. Paragraph 97 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

98. Paragraph 98 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

99. Paragraph 99 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

100. Paragraph 100 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

101. Paragraph 101 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient

information to admit or deny the allegations and therefore denies the allegations.

102. Paragraph 102 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

103. Paragraph 103 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

FOURTH CAUSE OF ACTION

Subrogation – Breach of The AIG Insurance Contract

(Against AIG Only)

104. Responding to Paragraph 104 of the FAC, National Union reincorporates its response to Paragraphs 1 through 103 as stated fully herein.

105. Responding to Paragraph 105 of the FAC, National Union denies the allegations.

106. Responding to Paragraph 105 of the FAC, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

107. Responding to Paragraph 107 of the FAC, National Union admits a $160,500,000 compensatory damages verdict was rendered against Cosmopolitan and Marquee in the underlying action. Except as so admitted, National Union denies the allegations.

108. Responding to Paragraph 108 of the FAC, National Union admits that St. Paul paid its policy limit towards settlement of the underlying action and reserved the right to seek reimbursement of same. Except as so admitted, National Union denies the allegations.

109. Responding to Paragraph 109 of the FAC, National Union denies the allegations.

110. Responding to Paragraph 110 of the FAC, National Union denies the allegations.

111. Responding to Paragraph 111 of the FAC, National Union denies the allegations.

FIFTH CAUSE OF ACTION

Statutory Subrogation – Contribution Per NRS § 17.225

(Against Marquee Only)

112. Responding to Paragraph 112 of the FAC, National Union reincorporates its

response to Paragraphs 1 through 111 as stated fully herein.

113. Paragraph 113 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

114. Paragraph 114 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

115. Responding to Paragraph 115 of the FAC, National Union admits the allegations therein.

116. Responding to Paragraph 116 of the FAC, National Union admits the allegations therein.

117. Paragraph 117 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

118. Paragraph 118 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union admits the court in the Underlying Action issued an order finding Cosmopolitan vicariously liable for Marquee's actions and Moradi's resulting damages. Except as so admitted, National Union lacks sufficient information to admit or deny the remaining allegations and therefore denies the allegations.

119. Paragraph 119 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

120. Paragraph 120 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

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SIXTH CAUSE OF ACTION

Subrogation – Express Indemnity

(Against Marquee Only)

121. Responding to Paragraph 121 of the FAC, National Union reincorporates its response to Paragraphs 1 through 120 as stated fully herein.

122. Paragraph 122 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

123. Paragraph 123 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

124. Paragraph 124 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

125. Paragraph 125 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

126. Paragraph 126 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

127. Paragraph 127 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

128. Paragraph 128 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

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129. Paragraph 129 of the FAC is not directed towards National Union and therefore no response is required. To the extent a response is required, National Union lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

SEVENTH CAUSE OF ACTION

Equitable Estoppel

(Against Carrier Defendants Only)

130. Responding to Paragraph 130 of the FAC, National Union reincorporates its response to Paragraphs 1 through 129 as stated fully herein.

131. Responding to Paragraph 131 of the FAC, National Union admits that it is a co-excess insurer with St. Paul and that its policy does not apply before St. Paul's policy. National Union also admits that it asserted St. Paul had an independent obligation to Cosmopolitan to settle the underlying action. National Union further responds that its motion to dismiss speaks for itself. Except as so admitted, National Union denies the allegations.

132. Responding to Paragraph 132 of the FAC, National Union denies the allegations.

133. Responding to Paragraph 133 of the FAC, National Union denies the allegations.

134. Responding to Paragraph 134 of the FAC, National Union denies the allegations.

135. Responding to Paragraph 135 of the FAC, National Union denies the allegations.

EIGHTH CAUSE OF ACTION

Equitable Contribution

(Against AIG Only)

136. Responding to Paragraph 136 of the FAC, National Union reincorporates its response to Paragraphs 1 through 135 as stated fully herein.

137. Responding to Paragraph 137 of the FAC, National Union admits that it is a co-excess insurer with St. Paul and that its policy does not apply before St. Paul's policy. Except as so admitted, National Union denies the allegations.

138. Responding to Paragraph 138 of the FAC, National Union denies the allegations.

139. Responding to Paragraph 139 of the FAC, National Union denies the allegations.

140. Responding to Paragraph 140 of the FAC, National Union denies the allegations.

141. Responding to Paragraph 141 of the FAC, National Union denies the allegations.

PRAYER FOR RELIEF

National Union denies that St. Paul is entitled to any relief whatsoever under its FAC and on that basis denies the prayer for relief numbers 1 through 10.

AFFIRMATIVE DEFENSES

National Union sets forth its separate and distinct defenses to apprise St. Paul of certain potentially applicable defenses to any and all claims. National Union reserves the right to reevaluate, restate or delete any defenses or to add any additional defenses. By listing any matter as a defense, National Union does not assume the burden of proving any matter upon which St. Paul bears the burden of proof under applicable law. Moreover, by setting forth the following affirmative defenses, National Union does not waive the right to assert additional defenses as the facts in this action develop.

FIRST AFFIRMATIVE DEFENSE

(Failure To State a Claim Upon Which Relief May Be Granted)

1. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claim is barred, in whole or in part, to the extent St. Paul's FAC fails to state a claim upon which relief can be granted against National Union.

SECOND AFFIRMATIVE DEFENSE

(Failure To Set Forth Facts Which Give Rise To A Claim)

2. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claim is barred, in whole or in part, to the extent St. Paul's FAC fails to set forth facts that give rise to a claim against National Union.

THIRD AFFIRMATIVE DEFENSE

(Policy Provisions Bar Claim)

3. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claim is barred, in whole or in part, by the terms, exclusions, conditions, definitions, declarations, endorsements and/or limitations contained in the policies issued by National Union, St. Paul, and/or Aspen.

FOURTH AFFIRMATIVE DEFENSE

(Laches)

4. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claim is barred, in whole or in part, to the extent the equitable doctrine of laches applies.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

5. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claim is barred, in whole or in part, to the extent the equitable doctrine of unclean hands applies.

SIXTH AFFIRMATIVE DEFENSE

(Waiver And Estoppel)

6. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claim is barred, in whole or in part, to the extent the equitable doctrines of waiver and estoppel apply.

SEVENTH AFFIRMATIVE DEFENSE

(Other Insurance)

7. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claim is barred, in whole or in part, to the extent it is contrary to applicable "other insurance" and/or "excess insurance" provisions in the policies issued by National Union and/or St. Paul.

EIGHTH AFFIRMATIVE DEFENSE

(Plaintiff Lacks Standing)

8. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claim is barred, in whole or part, to the extent St. Paul lacks standing to bring this action.

NINTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

9. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent St. Paul has failed to institute

a suit within the period of time required by any applicable statute of limitations and/or to the extent that such claims are otherwise time-barred.

TENTH AFFIRMATIVE DEFENSE

(Superior Equities)

10. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, by the doctrine of superior equities.

ELEVENTH AFFIRMATIVE DEFENSE

(Expected or Intended Injury)

11. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent St. Paul seeks damages arising out of claims for any injury or damage expected or intended by an insured and/or any purported additional insured or any of them.

TWELFTH AFFIRMATIVE DEFENSE

(Claim Handled in Accordance With Policy)

12. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred as the underlying claim was handled in accordance with the insurance policy issued by National Union.

THIRTEENTH AFFIRMATIVE DEFENSE

(Reasonable Handling of Claim)

13. As a separate and distinct affirmative defense, National Union acted reasonably and in good faith in handling the underlying action as to Cosmopolitan and/or any purported named or additional insured, and each of them.

FOURTEENTH AFFIRMATIVE DEFENSE

(Legal Cause)

14. As a separate and distinct affirmative defense, National Union alleges that the acts and/or omissions, if any, of National Union were not the legal cause for losses, damages or injuries alleged in St. Paul's FAC.

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FIFTHTEENTH AFFIRMATIVE DEFENSE

(Plaintiff's Own Conduct)

15. As a separate and distinct affirmative defense, National Union alleges that St. Paul's damages, if any, were caused by its own conduct.

SIXTHTEENTH AFFIRMATIVE DEFENSE

(Attorneys' Fees)

16. As a separate and distinct affirmative defense, National Union alleges that St. Paul's FAC fails to state a claim upon which an award of attorneys' fees can be granted.

SEVENTEENTH AFFIRMATIVE DEFENSE

(No Breach of Contract)

17. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent National Union has not breached any contract with or between National Union and St. Paul.

EIGHTEENTH AFFIRMATIVE DEFENSE

(No Breach of Contract)

18. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent National Union has not breached any contract with or between National Union and any purported insured.

NINETEENTH AFFIRMATIVE DEFENSE

(Estoppel)

19. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent that St. Paul has engaged in conduct and activities sufficient to constitute waiver or by the equitable doctrine of estoppel.

TWENTIETH AFFIRMATIVE DEFENSE

(No Insured)

20. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent they arise out of claims against any person or entity that is not an insured under the policy issued by National Union.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Volunteer)

21. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent that St. Paul acted as a volunteer in making any payments under its policy.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Contribution, Set-Off, Indemnification, and Apportionment)

22. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent National Union may be entitled to contribution, set-off, indemnification, apportionment, or other relief from St. Paul, and/or from any third party.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Failure to Cooperate)

23. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent any purported named or additional insured failed to assist and/or cooperate with National Union as required by the policy issued by National Union or as implied by law.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Exhaustion and/or Impairment of Limits)

24. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent the limits of liability of National Union's policy have been exhausted or impaired.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Intervening and Superseding Cause)

25. As a separate and distinct affirmative defense, National Union alleges that the injuries and/or damages for which St. Paul seeks damages were proximately caused by or contributed to by the acts of other persons and/or entities, and that said acts were an intervening and superseding cause of the injuries and damages, if any, of which St. Paul complains.

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TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

26. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent St. Paul failed to exercise reasonable care and diligence to avoid, mitigate, minimize and/or avoid damages allegedly sustained, and St. Paul may not recover for losses that could have been prevented by its reasonable efforts or expenditures, and any recovery against National Union must be reduced by the amount by which the damages incurred are a result of such failure.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Sole Proximate Cause)

27. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent the sole proximate cause of the damages, if any, sustained by St. Paul was due to the negligence, fault, acts or omissions of persons and/or entities other than National Union, for whose acts or omissions National Union is not legally responsible, and the liability of National Union, if any, is limited in direct proportion to the equitable share, if any, attributable to National Union.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Proper Allocation)

28. As a separate and distinct affirmative defense, National Union alleges that, to the extent National Union is found to have any obligation to reimburse St. Paul with regard to the underlying action, which National Union denies, there should be a proper allocation of the loss as between National Union, St. Paul, and any other potentially obligated parties or entities. Such allocation may result in no sums being allocated to National Union.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Amounts Recovered from Other Sources)

29. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred, in whole or in part, to the extent St. Paul and/or any insured will and/or has already recovered amounts from other sources, including but not limited to settlements with

other insurers or indemnitors, and National Union is entitled to reduce or offset amounts potentially recoverable, if any, from National Union.

THIRTIETH AFFIRMATIVE DEFENSE

(Limitation on Coverage)

30. As a separate and distinct affirmative defense, National Union alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent additional insured coverage, if any, under the policies issued by National Union and/or Aspen is limited and/or excluded by the terms of the policies issued by National Union and/or Aspen and/or otherwise does not apply to the damages at issue in the underlying action.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Failure to Set Forth Contract Terms)

31. As a separate and distinct affirmative defense, National Union's alleges that St. Paul's FAC fails to set forth with adequate particularity the terms, provisions, exclusions, conditions, or limitations of the policies allegedly triggering any duty on the part of National Union. National Union is therefore unable to set forth all potentially applicable defenses and reserves the right to later assert any additional theories or defenses, applicable terms, provisions, conditions, or limitation as may be discovered during this action.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Right To Assert Additional Defenses)

32. As a separate and distinct affirmative defense, National Union alleges that St. Paul's Complaint contains insufficient information to permit National Union to raise all appropriate defenses, and National Union therefore reserves its right to amend and/or supplement this Answer to assert additional defenses.

WHEREFORE, having fully responded to St. Paul's FAC, National Union respectfully requests judgment as follows:

1. That the Court dismiss all claims against National Union with prejudice;

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2. That the Court declare that St. Paul is not entitled to any order, damages, declaration, judgment, attorneys' fees, contribution, interest, or other relief whatsoever as against National Union;

3. That the Court award National Union its attorneys' fees and costs incurred in this action; and

4. That the Court award National Union such other and further relief as the Court deems just and proper.

DATED: 7/3/19

HEROLD & SAGER

By: _____

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*)
Jeremy W. Stamelman, 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 certify that I am an employee of HEROLD & SAGER and that on **July 10th, 2019**, I caused a true copy of the following document(s): **DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S ANSWER TO ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPAINT,** pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	PLAINTIFF
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (*Pro Hac Vice)* Email: jkeller@kelleranderle.com JeremyW. Stamelman, Esq. (*Pro Hac Vice Pending)* Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Eileen Monarez
Employee of HEROLD & SAGER

CERTIFICATE OF SERVICE BY MAIL

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

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB'S ANSWER TO ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT

Defendant Roof Deck Entertainment, LLC dba Marquee Nightclub ("Marquee"), for itself and for no other defendant, answers the First Amended Complaint ("FAC") of Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") as follows:

THE PARTIES

1. Responding to Paragraph 1 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

2. Responding to Paragraph 2 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

3. Responding to Paragraph 3 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

4. Responding to Paragraph 4 of the FAC, Marquee admits it is a Delaware limited liability company doing business in Nevada. Marquee also admits it contracted to operate the Marquee Nightclub in Las Vegas, NV. Except as so admitted, Marquee denies all such allegations.

5. Responding to Paragraph 5 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

FACTUAL ALLEGATIONS

6. Responding to Paragraph 6 of the FAC, Marquee admits the allegations contained therein.

7. Responding to Paragraph 7 of the FAC, Marquee responds that the complaint in the Underlying Action speaks for itself.

8. Responding to Paragraph 8 of the FAC, Marquee responds that the complaint in the Underlying Action speaks for itself.

9. Responding to Paragraph 9 of the FAC, Marquee responds that the complaint in the Underlying Action speaks for itself.

10. Responding to Paragraph 10 of the FAC, Marquee responds that the complaint in the Underlying Action speaks for itself as to the parties named as defendants. Marquee admits that it entered into a written agreement with Nevada Restaurant Venture 1, LLC regarding the management of the Marquee Nightclub. As to the remaining allegations, Marquee currently lacks

sufficient information to admit or deny the allegations and therefore denies all such allegations.

11. Responding to Paragraph 11 of the FAC, Marquee admits that Moradi put forth testimony, documentation, and expert opinion in support of his allegations during the course of the Underlying Action. Except as so admitted, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

12. Responding to Paragraph 12 of the FAC, Marquee admits that Moradi asserted a lost income claim for past lost wages and future lost wages in the Underlying Action. Except as so admitted, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

13. Responding to Paragraph 13 of the FAC, Marquee admits that Moradi made legal arguments that Cosmopolitan had a "non-delegable duty" to keep patrons safe, including Moradi, and the court in the Underlying Action imposed vicarious liability on the part of Cosmopolitan for Marquee's actions. Except as so admitted, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

14. Responding to Paragraph 14 of the FAC, Marquee admits the allegations contained therein.

15. Responding to Paragraph 15 of the FAC, Marquee admits that it is an insured under Aspen Specialty Insurance Company ("Aspen") commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012. Except as so admitted, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

16. Responding to Paragraph 16 of the FAC, Marquee responds that the Aspen policy speaks for itself.

17. Responding to Paragraph 17 of the FAC, Marquee responds that the Aspen policy speaks for itself.

18. Responding to Paragraph 18 of the FAC, Marquee responds that the Aspen policy speaks for itself.

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19. Responding to Paragraph 19 of the FAC, Marquee responds that the Aspen policy speaks for itself.

20. Responding to Paragraph 20 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations contained therein and therefore denies all such allegations.

21. Responding to Paragraph 21 of the FAC, Marquee admits that Aspen paid its policy limit. Except as so admitted, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

22. Responding to Paragraph 22 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

23. Responding to Paragraph 23 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

24. Responding to Paragraph 24 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

25. Responding to Paragraph 25 of the FAC, Marquee admits Cosmopolitan tendered the Underlying Action to Marquee for defense and indemnity. Except as so admitted, Marquee denies all such allegations.

26. Responding to Paragraph 26 of the FAC, Marquee admits that it tendered the Underlying Action to Aspen under the Aspen policy. Except as so admitted, Marquee denies all such allegations.

27. Responding to Paragraph 27 of the FAC, Marquee admits that Aspen provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a single defense firm. Except as so admitted, Marquee denies all such allegations.

28. Responding to Paragraph 28 of the FAC, Marquee admits that Aspen initially retained the law firm of Kravitz Schnitzer & Johnson to represent Marquee and Cosmopolitan and later retained the law firm of Lewis Brisbois Bisgaard & Smith LLP to represent Marquee and Cosmopolitan. Except as so admitted, Marquee denies all such allegations.

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29. Responding to Paragraph 29 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

30. Responding to Paragraph 30 of the FAC, Marquee admits that it is an insured under National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012. Except as so admitted, Marquee lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

31. Responding to Paragraph 31 of the FAC, Marquee responds that the National Union policy speaks for itself.

32. Responding to Paragraph 32 of the FAC, Marquee admits that National Union paid its policy limit after the verdict in the Underlying Action. Except as so admitted, Marquee lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

33. Responding to Paragraph 33 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

34. Responding to Paragraph 34 of the FAC, Marquee admits that National Union was placed on notice of the underlying action. Except as so admitted, Marquee lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

35. Responding to Paragraph 35 of the FAC, Marquee admits that National Union provided a defense to Cosmopolitan and Marquee in the Underlying Action through the law firm of Weinberg Wheeler Hudgins Gunn & Dial. Except as so admitted, Marquee denies all such allegations.

36. Responding to Paragraph 36 of the FAC, Marquee admits the allegations contained therein.

37. Responding to Paragraph 37 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

38. Responding to Paragraph 38 of the FAC, Marquee admits that National Union asserted that its policy limit to pay for any settlement or judgment on behalf of Cosmopolitan and Marquee in the Underlying Action was $25,000,000. Except as so admitted, Marquee lacks

sufficient information to admit or deny the allegations and therefore denies the allegations.

39. Responding to Paragraph 39 of the FAC, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

40. Responding to Paragraph 40 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

41. Responding to Paragraph 41 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

42. Responding to Paragraph 42 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

43. Responding to Paragraph 43 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

44. Responding to Paragraph 44 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

45. Responding to Paragraph 45 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

46. Responding to Paragraph 46 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

47. Responding to Paragraph 47 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

48. Responding to Paragraph 48 of the FAC, Marquee admits that on or around 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 and the offer lapsed. Except as so admitted, Marquee denies all such allegations.

49. Responding to Paragraph 49 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

50. Responding to Paragraph 50 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

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51. Responding to Paragraph 51 of the FAC, Marquee admits that Moradi made a settlement demand of $26,000,000 on November 2, 2016 that was not accepted. Moradi's November 2, 2016 settlement demand letter speaks for itself. Except as so admitted, Marquee denies all such allegations.

52. Responding to Paragraph 52 of the FAC, Marquee admits that Aspen authorized a $500,000 Offer of Judgment on behalf of Marquee and Cosmopolitan in January 2017. Marquee admits National Union took the position that it had no obligation to offer money towards settlement until Aspen offered its full policy limit. Except as so admitted, Marquee denies all such allegations.

53. Responding to Paragraph 53 of the FAC, Marquee admits that Moradi made a $26,000,000 settlement demand on March 9, 2017 that was not accepted. Moradi's March 9, 2017 settlement demand letter speaks for itself. Marquee also admits that its personal counsel wrote to defense counsel requesting that the underlying action be settled within the insurers' policy limits. Except as so admitted, Marquee denies all such allegations.

54. Responding to Paragraph 54 of the FAC, Marquee admits the allegations contained therein.

55. Responding to Paragraph 55 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

56. Responding to Paragraph 56 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

57. Responding to Paragraph 57 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

58. Responding to Paragraph 58 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

59. Responding to Paragraph 59 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

60. Responding to Paragraph 60 of the FAC, Marquee admits the jury in the Underlying Action rendered a compensatory damages verdict against Marquee and Cosmopolitan for $160,500,000. The jury verdict form and the court's order speak for themselves.

61. Responding to Paragraph 61 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

62. Responding to Paragraph 62 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

63. Responding to Paragraph 63 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

64. Responding to Paragraph 64 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

65. Responding to Paragraph 65 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

66. Responding to Paragraph 66 of the FAC, Marquee admits the allegations contained therein.

67. Responding to Paragraph 67 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

68. Responding to Paragraph 68 of the FAC, Marquee admits that National Union tendered its policy limit towards settlement of the Underlying Action. Except as so admitted, Marquee denies all such allegations.

69. Responding to Paragraph 69 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

70. Responding to Paragraph 70 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

71. Responding to Paragraph 71 of the FAC, Marquee currently lacks sufficient information to admit or deny the allegations and therefore denies all such allegations.

FIRST CAUSE OF ACTION

Subrogation – Breach of the Duty to Settle

(Against Aspen Only)

72. Responding to Paragraph 72 of the FAC, Marquee reincorporates its responses to Paragraphs 1 through 71 as stated fully herein.

73. Paragraph 73 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

74. Paragraph 74 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

75. Paragraph 75 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

76. Paragraph 76 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

77. Paragraph 77 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

78. Paragraph 78 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

79. Paragraph 79 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

80. Paragraph 80 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

81. Paragraph 81 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

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82. Paragraph 82 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

83. Paragraph 83 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

SECOND CAUSE OF ACTION

Subrogation – Breach of the Duty to Settle

(Against AIG Only)

84. Responding to Paragraph 84 of the FAC, Marquee reincorporates its responses to Paragraphs 1 through 83 as stated fully herein.

85. Paragraph 85 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

86. Paragraph 86 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

87. Paragraph 87 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

88. Paragraph 88 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

89. Paragraph 89 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

90. Paragraph 90 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or

deny the allegations and therefore denies the allegations.

91. Paragraph 91 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

92. Paragraph 92 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

93. Paragraph 93 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

94. Paragraph 94 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

95. Paragraph 95 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

THIRD CAUSE OF ACTION

Subrogation – Breach of the Aspen Insurance Contract

(Against Aspen Only)

96. Responding to Paragraph 96 of the FAC, Marquee reincorporates its responses to Paragraphs 1 through 95 as stated fully herein.

97. Paragraph 97 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

98. Paragraph 98 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

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99. Paragraph 99 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

100. Paragraph 100 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

101. Paragraph 101 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

102. Paragraph 102 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

103. Paragraph 103 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

FOURTH CAUSE OF ACTION

Subrogation – Breach of The AIG Insurance Contract

(Against AIG Only)

104. Responding to Paragraph 104 of the FAC, Marquee reincorporates its responses to Paragraphs 1 through 103 as stated fully herein.

105. Paragraph 105 of the FAC is not directed to Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

106. Paragraph 106 of the FAC is not directed to Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

107. Paragraph 107 of the FAC is not directed to Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or

deny the allegations and therefore denies the allegations.

108. Paragraph 108 of the FAC is not directed to Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

109. Paragraph 109 of the FAC is not directed to Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

110. Paragraph 110 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

111. Paragraph 111 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

FIFTH CAUSE OF ACTION

Statutory Subrogation – Contribution Per NRS § 17.225

(Against Marquee Only)

112. Responding to Paragraph 112 of the FAC, Marquee reincorporates its responses to Paragraphs 1 through 111 as stated fully herein.

113. Responding to Paragraph 113 of the FAC, Marquee responds that this is a legal contention to which no response is required. To the extent a response is required, Marquee denies the allegations.

114. Responding to Paragraph 114 of the FAC, Marquee admits that St. Paul's payment towards the post-verdict settlement discharged Cosmopolitan's liability in the Underlying Action. Except as so admitted, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

115. Responding to Paragraph 115 of the FAC, Marquee admits the allegations therein.

116. Responding to Paragraph 116 of the FAC, Marquee admits the allegations therein.

117. Responding to Paragraph 117 of the FAC, Marquee denies the allegations therein.

118. Responding to Paragraph 118 of the FAC, Marquee admits the court issued an order finding that Cosmopolitan was vicariously liable for Marquee's actions and Moradi's damages. Except as so admitted, Marquee denies all allegations contained therein.

119. Responding to Paragraph 119 of the FAC, Marquee denies the allegations therein.

120. Responding to Paragraph 120 of the FAC, Marquee denies the allegations therein.

SIXTH CAUSE OF ACTION

Subrogation – Express Indemnity

(Against Marquee Only)

121. Responding to Paragraph 121 of the FAC, Marquee reincorporates its responses to Paragraphs 1 through 120 as stated fully herein.

122. Responding to Paragraph 122 of the FAC, Marquee admits that its written agreement with Nevada Restaurant Venture 1, LLC contains an indemnity provision which speaks for itself. Except as so admitted, Marquee denies the allegations therein.

123. Responding to Paragraph 123 of the FAC, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

124. Responding to Paragraph 124 of the FAC, Marquee admits the allegations contained therein.

125. Responding to Paragraph 125 of the FAC, Marquee denies all such allegations.

126. Responding to Paragraph 126 of the FAC, Marquee denies all such allegations.

127. Responding to Paragraph 127 of the FAC, Marquee denies all such allegations.

128. Responding to Paragraph 128 of the FAC, Marquee denies all such allegations.

129. Responding to Paragraph 129 of the FAC, Marquee denies all such allegations.

SEVENTH CAUSE OF ACTION

Equitable Estoppel

(Against Carrier Defendants Only)

130. Responding to Paragraph 130 of the FAC, Marquee reincorporates its responses to Paragraphs 1 through 129 as stated fully herein.

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131. Paragraph 131 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

132. Paragraph 132 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

133. Paragraph 133 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

134. Paragraph 134 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

135. Paragraph 135 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

EIGHTH CAUSE OF ACTION

Equitable Contribution

(Against AIG Only)

136. Responding to Paragraph 136 of the FAC, Marquee reincorporates its responses to Paragraphs 1 through 135 as stated fully herein.

137. Paragraph 137 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

138. Paragraph 138 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

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139. Paragraph 139 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

140. Paragraph 140 of the FAC is not directed towards Marquee and therefore no response is required. To the extent a response is required, Marquee lacks sufficient information to admit or deny the allegations and therefore denies the allegations.

PRAYER FOR RELIEF

Marquee denies that St. Paul is entitled to any relief whatsoever under its FAC and on that basis denies the prayer for relief numbers 1 through 10.

AFFIRMATIVE DEFENSES

Marquee sets forth its separate and distinct defenses to apprise St. Paul of certain potentially applicable defenses to any and all claims. Marquee reserves the right to reevaluate, restate or delete any defenses or to add any additional defenses. By listing any matter as a defense, Marquee does not assume the burden of proving any matter upon which St. Paul bears the burden of proof under applicable law. Moreover, by setting forth the following affirmative defenses, Marquee does not waive the right to assert additional defenses as the facts in this action develop.

FIRST AFFIRMATIVE DEFENSE

(Failure To State a Claim Upon Which Relief May Be Granted)

1. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or in part, to the extent St. Paul's FAC fails to state a claim upon which relief can be granted against Marquee.

SECOND AFFIRMATIVE DEFENSE

(Failure To Set Forth Facts Which Give Rise To A Claim)

2. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or in part, to the extent St. Paul's FAC fails to set forth facts that give rise to a claim against Marquee.

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THIRD AFFIRMATIVE DEFENSE

(Third-Party Plaintiff Lacks Standing)

3. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or part, to the extent St. Paul lacks standing to bring this action.

FOURTH AFFIRMATIVE DEFENSE

(Laches)

4. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or in part, to the extent the equitable doctrine of laches applies.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

5. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or in part, to the extent the equitable doctrine of unclean hands applies.

SIXTH AFFIRMATIVE DEFENSE

(Waiver And Estoppel)

6. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or in part, to the extent the equitable doctrines of waiver and estoppel apply.

SEVENTH AFFIRMATIVE DEFENSE

(Breach Of Contract)

7. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or in part, to the extent the events alleged in St. Paul's FAC arise from St. Paul and/or Cosmopolitan's breach of contract.

EIGHTH AFFIRMATIVE DEFENSE

(Failure To Perform Obligations/Conditions)

8. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or in part, to the extent Cosmopolitan failed to perform all conditions/obligations under any written agreement entered into by or between Marquee and/or Cosmopolitan.

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NINTH AFFIRMATIVE DEFENSE

(Contract Provisions Bar Claim)

9. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or in part, by the terms, conditions, definitions, and/or limitations contained in any contract entered into by or between Marquee and/or Cosmopolitan.

TENTH AFFIRMATIVE DEFENSE

(Policy Provisions Bar Claim)

10. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claim is barred, in whole or in part, by the terms, exclusions, conditions, definitions, declarations, endorsements and/or limitations contained in the policy issued by St. Paul.

ELEVENTH AFFIRMATIVE DEFENSE

(Mitigation Obligation)

11. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or in part, to the extent St. Paul has failed to mitigate, minimize or avoid any damages allegedly sustained, and any recovery against Marquee must therefore be reduced by the amount by which the damages incurred are a result of that failure.

TWELFTH AFFIRMATIVE DEFENSE

(Contract is Void, Voidable, and/or Unenforceable)

12. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or part, to the extent any contract allegedly triggering any duty on the part of Marquee is void, voidable, and/or unenforceable.

THIRTEENTH AFFIRMATIVE DEFENSE

(Claims Resolved and/or Released)

13. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or in part, to the extent some or all of the claims asserted in the instant matter were resolved and/or released and/or settled in the underlying action.

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FOURTEENTH AFFIRMATIVE DEFENSE

(Direct and Proximate Result)

14. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or in part, to the extent that damages suffered by St. Paul, if any, were the direct and proximate result of the conduct of parties, persons, corporations and/or entities other than Marquee, and that the liability of Marquee, if any, is limited in direct proportion to the equitable share, if any, actually attributable to Marquee.

FIFTHTEENTH AFFIRMATIVE DEFENSE

(Recovery Offset)

15. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or in part, to the extent that amounts potentially recoverable, if any, against Marquee must be reduced or offset by recoveries St. Paul has already obtained or does obtain from other sources.

SIXTEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

16. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent St. Paul has failed to institute a suit within the period of time required by any applicable statute of limitations and/or to the extent that such claims are otherwise time-barred.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Failure to Perform all Conditions and Obligations)

17. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent that St. Paul and/or Cosmopolitan failed to perform all conditions/obligations under the contract allegedly triggering any duty on the part of Marquee.

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EIGHTHTEENTH AFFIRMATIVE DEFENSE

(Legal Cause)

18. As a separate and distinct affirmative defense, Marquee alleges that the acts and/or omissions, if any, of Marquee were not the legal cause for losses, damages or injuries alleged in the FAC.

NINETEENTH AFFIRMATIVE DEFENSE

(Mistake, Fraud, and/or Misrepresentation)

19. As a separate and distinct affirmative defense, Marquee alleges that to the extent there is a mutual mistake and/or unilateral mistake, which was known and/or fraud or misrepresentation in the entering of the contract allegedly triggering any duty on the part of Marquee, Marquee requests the court to reform the contract allegedly triggering any duty on the part of Marquee, barring St. Paul's claims.

TWENTIETH AFFIRMATIVE DEFENSE

(Failure of Consideration)

20. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent there is a failure of consideration as to the contract allegedly triggering any duty on the part of Marquee.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Frustration of Purpose)

21. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent performance under the contract allegedly triggering any duty on the part of Marquee has become frustrated.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Impossible or Impractical)

22. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent performance under the contract allegedly triggering any duty on the part of Marquee is impossible or impractical.

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TWENTY-THIRD AFFIRMATIVE DEFENSE

(Lack of Consideration)

23. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent there is a lack of consideration as to the contract allegedly triggering any duty on the part of Marquee.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Res Judicata, Collateral Estoppel, Judicial Estoppel, and/or Issue Preclusion)

24. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred or limited, in whole or in part, to the extent the doctrines of res judicata, collateral estoppel, judicial estoppel, and/or issue preclusion apply.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Failure to Set Forth Contract Terms)

25. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's FAC fails to set forth with adequate particularity the terms, provisions, exclusions, conditions, or limitations of the contract allegedly triggering any duty on the part of Marquee. Marquee is therefore unable to set forth all potentially applicable defenses and reserves the right to later assert any additional theories or defenses, applicable terms, provisions, conditions, or limitation as may be discovered during this action.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Volunteer)

26. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or in part, to the extent that St. Paul acted as a volunteer in making any payments under its policy.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Acts or Omissions of Other Parties – Action Barred)

27. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or in part, to the extent that the injuries or damages of which St. Paul complains were proximately caused by or contributed to by the acts of other persons and/or

entities and that said acts were an intervening and superseding cause of the injuries and damages, if any, of which St. Paul complains.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Proper Allocation Requirement)

28. As a separate and distinct affirmative defense, Marquee alleges that, to the extent Marquee is found to have any obligation to reimburse St. Paul with regard to the underlying action, which Marquee denies, there should be a proper allocation of the loss as between Marquee, St. Paul, and any other potentially obligated parties or entities. Such allocation may result in no sums being allocated to Marquee.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Plaintiff's Own Wrongdoing)

29. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's claims are barred, in whole or in part, to the extent such claims arise out of St. Paul's own acts of wrongdoing.

THIRTIETH AFFIRMATIVE DEFENSE

(Right To Assert Additional Defenses)

30. As a separate and distinct affirmative defense, Marquee alleges that St. Paul's Complaint contains insufficient information to permit Marquee to raise all appropriate defenses, and Marquee therefore reserves its right to amend and/or supplement this Answer to assert additional defenses.

WHEREFORE, having fully responded to St. Paul's FAC, Marquee respectfully requests judgment as follows:

1. That the Court dismiss all claims against Marquee with prejudice;

2. That the Court declare that St. Paul is not entitled to any order, damages, declaration, judgment, attorneys' fees, contribution, interest, or other relief whatsoever as against Marquee;

3. That the Court award Marquee its attorneys' fees and costs incurred in this action; and

4. That the Court award Marquee such other and further relief as the Court deems just and proper.

DATED: 7/3/19

HEROLD & SAGER

By: _____

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*)
Jeremy W. Stamelman, Esq.
(*Pro Hac Vice*)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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

CERTIFICATE OF SERVICE

I certify that I am an employee of HEROLD & SAGER and that on **July 10th, 2019**, I caused a true copy of the following document(s): **DEFENDANT ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB'S ANSWER TO ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPAINT,** pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	PLAINTIFF
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (*Pro Hac Vice)* Email: jkeller@kelleranderle.com JeremyW. Stamelman, Esq. (*Pro Hac Vice Pending)* Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Eileen Monarez
Employee of HEROLD & SAGER

ANS
MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT, ESQ.
Nevada Bar No. 8550
NICHOLAS L. HAMILTON, ESQ.
Nevada Bar No. 10893
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
E-mail: medwards@messner.com
rloosvelt@messner.com
nhamilton@messner.com
Attorneys for Defendant
Aspen Specialty 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 1-25; inclusive, Defendants.	Case No.: A-17-758902-C Dept. No.: XXVI **DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW, Defendant ASPEN SPECIALTY INSURANCE COMPANY (hereinafter "Defendant") by and through its attorneys of record, of MESSNER REEVES LLP, and hereby submits its Answer to Plaintiff's First Amended Complaint as follows:

THE PARTIES

1. Answering Paragraph 1 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, this answering Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies the same.

2. Answering Paragraph 2 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, this answering Defendant admits that it is an insurance company or other business entity authorized to do business in the States of Nevada.

3. Answering Paragraph 3 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. Further, this paragraph contains allegations which are not directed at this answering Defendant, and therefore, no response is required. To the extent this paragraph requires an answer, this answering Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies the same.

4. Answering Paragraph 4 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and expert opinion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

5. Answering Paragraph 5 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and expert opinion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

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FACTUAL ALLEGATIONS

6. Answering Paragraph 6 of Plaintiff's First Amended Complaint, this answering Defendant states that Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same

7. Answering Paragraph 7 of Plaintiff's First Amended Complaint, this answering Defendant states that the allegations in the Underlying Action speak for themselves, Defendants denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

8. Answering Paragraph 8 of Plaintiff's First Amended Complaint, this answering Defendant admits the complaint in the Underlying Action appears to have been filed on April 4, 2014 and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

9. Answering Paragraph 9 of Plaintiff's First Amended Complaint, this answering Defendant states that the allegations in the Underlying Action speak for themselves, Defendants denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

10. Answering Paragraph 10 of Plaintiff's First Amended Complaint, this answering Defendant states that the allegations and complain in the Underlying Action speak for themselves, Defendants denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

11. Answering Paragraph 11 of Plaintiff's First Amended Complaint, this answering Defendant states that the allegations in the Underlying Action speak for themselves, Defendants denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient

information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

12. Answering Paragraph 12 of Plaintiff's First Amended Complaint, this answering Defendant states that the allegations in the Underlying Action speak for themselves, Defendants denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

13. Answering Paragraph 13 of Plaintiff's First Amended Complaint, Defendant states the court rulings speak for themselves, denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

14. Answering Paragraph 14 of Plaintiff's First Amended Complaint, Defendant states the court rulings speak for themselves, denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

15. Answering Paragraph 15 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

16. Answering Paragraph 16 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

17. Answering Paragraph 17 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

18. Answering Paragraph 18 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

19. Answering Paragraph 19 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

20. Answering Paragraph 20 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, states Plaintiff misconstrues the policy, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

21. Answering Paragraph 21 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for

itself, denies the allegations to the extent inconsistent therewith, states Plaintiff misconstrues the policy, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

22. Answering Paragraph 22 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, states Plaintiff misconstrues the policy, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

23. Answering Paragraph 23 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, states Plaintiff misconstrues the policy, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

24. Answering Paragraph 24 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

25. Answering Paragraph 25 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

26. Answering Paragraph 26 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the tender speaks for

itself, denies the allegations to the extent inconsistent therewith, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

27. Answering Paragraph 27 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

28. Answering Paragraph 28 of Plaintiff's First Amended Complaint, Defendant denies wrongdoing is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

29. Answering Paragraph 29 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, states Plaintiff misconstrues the policy, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

30. Answering Paragraph 30 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

31. Answering Paragraph 31 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and Defendant is otherwise without

sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

32. Answering Paragraph 32 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same

33. Answering Paragraph 33 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

34. Answering Paragraph 34 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

35. Answering Paragraph 35 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

36. Answering Paragraph 36 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

37. Answering Paragraph 37 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

38. Answering Paragraph 38 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

39. Answering Paragraph 39 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the policy speaks for itself, denies the allegations to the extent inconsistent therewith, and Defendant is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

40. Answering Paragraph 40 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

41. Answering Paragraph 41 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

42. Answering Paragraph 42 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

43. Answering Paragraph 43 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

44. Answering Paragraph 44 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. Further, this answering Defendant specifically denies that the diagrams identified in paragraph accurately depicts the Aspen's coverage or Aspen's Policy in this matter. Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

45. Answering Paragraph 45 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

46. Answering Paragraph 46 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

47. Answering Paragraph 47 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies the allegations as they are directed at it and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

48. Answering Paragraph 48 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

49. Answering Paragraph 49 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

50. Answering Paragraph 50 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

51. Answering Paragraph 51 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

52. Answering Paragraph 52 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

53. Answering Paragraph 53 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

54. Answering Paragraph 54 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

55. Answering Paragraph 55 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

56. Answering Paragraph 56 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

57. Answering Paragraph 57 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

58. Answering Paragraph 58 of Plaintiff's First Amended Complaint, Aspen admits that it tendered its policy limits for use in settlement of the underlying litigation which was accepted by the parties. As to the remaining allegations, this answering Defendant is without sufficient

information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

59. Answering Paragraph 59 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

60. Answering Paragraph 60 of Plaintiff's First Amended Complaint, this answering Defendant states that verdict and order speak for themselves, Defendant denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

61. Answering Paragraph 61 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

62. Answering Paragraph 62 of Plaintiff's First Amended Complaint, this answering Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

63. Answering Paragraph 63 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

64. Answering Paragraph 64 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

65. Answering Paragraph 65 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

66. Answering Paragraph 66 of Plaintiff's First Amended Complaint, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

67. Answering Paragraph 67 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the tender speaks for itself, denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

68. Answering Paragraph 68 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the tender speaks for itself, denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

69. Answering Paragraph 69 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant states the tender speaks for itself, denies the allegations to the extent inconsistent therewith, and Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

70. Answering Paragraph 70 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is

without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

71. Answering Paragraph 71 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

FIRST CAUSE OF ACTION

Subrogation – Breach of the Duty to Settle (Against Aspen Only)

72. Answering Paragraph 72 of Plaintiff's First Amended Complaint, this answering Defendant incorporates and re-alleges the responses to paragraphs 1 through 71 as though fully set forth herein.

73. Answering Paragraph 73 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

74. Answering Paragraph 74 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

75. Answering Paragraph 75 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

76. Answering Paragraph 76 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

77. Answering Paragraph 77 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

78. Answering Paragraph 78 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

79. Answering Paragraph 79 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

80. Answering Paragraph 80 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

81. Answering Paragraph 81 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is

required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

82. Answering Paragraph 82 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

83. Answering Paragraph 83 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and denies the remaining allegations contained therein.

SECOND CAUSE OF ACTION

Subrogation – Breach of the Duty to Settle (Against AIG Only)

84. Answering Paragraph 84 of Plaintiff's First Amended Complaint, this answering Defendant incorporates and re-alleges the responses to paragraphs 1 through 83 as though fully set forth herein.

85. Answering Paragraph 85 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

86. Answering Paragraph 86 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

87. Answering Paragraph 87 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

88. Answering Paragraph 88 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

89. Answering Paragraph 89 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

90. Answering Paragraph 90 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

91. Answering Paragraph 91 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

92. Answering Paragraph 92 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is

required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

93. Answering Paragraph 93 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

94. Answering Paragraph 94 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

95. Answering Paragraph 95 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same

THIRD CAUSE OF ACTION

Subrogation – Breach of the Aspen Insurance Contract (Against Aspen Only)

96. Answering Paragraph 96 of Plaintiff's First Amended Complaint, this answering Defendant incorporates and re-alleges the responses to paragraphs 1 through 95 as though fully set forth herein.

97. Answering Paragraph 97 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is

without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

98. Answering Paragraph 98 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

99. Answering Paragraph 99 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

100. Answering Paragraph 100 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

101. Answering Paragraph 101 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

102. Answering Paragraph 102 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

103. Answering Paragraph 103 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and denies the remaining allegations contained therein.

FOURTH CAUSE OF ACTION

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

104. Answering Paragraph 104 of Plaintiff's First Amended Complaint, this answering Defendant incorporates and re-alleges the responses to paragraphs 1 through 103 as though fully set forth herein.

105. Answering Paragraph 105 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

106. Answering Paragraph 106 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

107. Answering Paragraph 107 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

108. Answering Paragraph 108 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient

information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

109. Answering Paragraph 109 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

110. Answering Paragraph 110 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

111. Answering Paragraph 111 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

FIFTH CAUSE OF ACTION

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

112. Answering Paragraph 112 of Plaintiff's First Amended Complaint, this answering Defendant incorporates and re-alleges the responses to paragraphs 1 through 111 as though fully set forth herein.

113. Answering Paragraph 113 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

114. Answering Paragraph 114 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

115. Answering Paragraph 115 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

116. Answering Paragraph 116 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

117. Answering Paragraph 117 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

118. Answering Paragraph 118 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

119. Answering Paragraph 119 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is

required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

120. Answering Paragraph 120 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

SIXTH CAUSE OF ACTION

Statutory – Express Indemnity (Against Marquee Only)

121. Answering Paragraph 121 of Plaintiff's First Amended Complaint, this answering Defendant incorporates and re-alleges the responses to paragraphs 1 through 120 as though fully set forth herein.

122. Answering Paragraph 122 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

123. Answering Paragraph 123 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

124. Answering Paragraph 124 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient

information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

125. Answering Paragraph 125 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

126. Answering Paragraph 126 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

127. Answering Paragraph 127 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

128. Answering Paragraph 128 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

129. Answering Paragraph 129 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

SEVENTH CAUSE OF ACTION

Equitable Estoppel (Against Carrier Defendants Only)

130. Answering Paragraph 130 of Plaintiff's First Amended Complaint, this answering Defendant incorporates and re-alleges the responses to paragraphs 1 through 129 as though fully set forth herein.

131. Answering Paragraph 131 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies same.

132. Answering Paragraph 132 and 132(a) – (c) of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraphs call for a legal conclusion and, therefore, no response is required. To the extent the paragraphs require an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

133. Answering Paragraph 133 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

134. Answering Paragraph 134 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, Defendant denies any wrongdoing and is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

135. Answering Paragraph 135 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion and, therefore, no response is

required. To the extent this paragraph requires an answer, Defendant denies the allegations as it pertains to Defendant and is otherwise without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and, therefore, denies same.

EIGHTH CAUSE OF ACTION

Equitable Contribution (Against AIG Only)

136. Answering Paragraph 136 of Plaintiff's First Amended Complaint, this answering Defendant incorporates and re-alleges the responses to paragraphs 1 through 135 as though fully set forth herein.

137. Answering Paragraph 137 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

138. Answering Paragraph 138 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

139. Answering Paragraph 139 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

140. Answering Paragraph 140 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient

information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

141. Answering Paragraph 141 of Plaintiff's First Amended Complaint, this answering Defendant states that this paragraph calls for a legal conclusion, and therefore, no response is required. To the extent this paragraph requires an answer, Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies same.

AFFIRMATIVE DEFENSES

1. Plaintiff's First Amended Complaint and each and every cause of action against Defendant fails to state a claim upon which relief can be granted, fails to state sufficient facts giving rise to a claim against Defendant, and/or Defendant is entitled to judgment on the pleadings as a matter of law.

2. Plaintiff's claims are barred in whole or in part by the terms, provisions, exclusions, conditions, definitions, declarations, limitations and/or endorsements in Defendant's policy.

3. Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands.

4. Plaintiff's claims are barred by the statute of limitations and/or repose.

5. Plaintiff's claims are barred by the doctrine of laches.

6. Plaintiff's claims are barred by the doctrine of waiver.

7. Plaintiff's claims are barred by the doctrine of estoppel.

8. Plaintiff's claims are barred because Plaintiff acted as a volunteer in making any payments.

9. Plaintiff's claims are barred in whole or in part to the extent Defendant is entitled to set-off, apportionment, indemnification, contribution, or other relief from Plaintiff, other defendants, or third parties.

10. Plaintiff's claims are barred to the extent Defendant's policy limits have been exhausted or impaired.

11. Plaintiff's claims are barred to the extent Plaintiff failed to mitigate its damages, if any.

12. Plaintiff's claims are barred in whole or in part to extent Plaintiff and/or any insured will or has recovered amounts from other sources, including but not limited to settlements or other payments, and Defendant is entitled to offset any potentially recoverable damages.

13. Plaintiff's claims are barred to the extent Plaintiff lacks standing.

14. Plaintiff's claims are barred to the extent its claims are contrary to the provisions, terms, conditions, exclusions, limitations and/or endorsements in and to Defendant's policy.

15. Plaintiff's claims are barred because the underlying claims were handled in accordance with Defendant's insurance policy.

16. Plaintiff's claims are barred because Defendant acted reasonably and in good faith in handling the underlying action as to any named insured and additional insured.

17. Plaintiff's claims are barred because its damages, if any, were caused by its own conduct.

18. Plaintiff's claims are barred in whole or in part because Defendant has not breached any contract.

19. If Plaintiff herein suffered or sustained any loss, injury, damage or detriment, the same was proximately caused and contributed to by the conduct, acts, omission, activities, and/or misconduct of Plaintiff, other defendants, and/or third parties.

20. Plaintiff's claims are barred to the extent it seeks damages arising out of claims for injury or damage expected or intended by an insured and/or any additional insured.

21. Plaintiff's claims are barred to the extent it seeks damages arising out of claims against any person or entity that is not an insured under Defendant's policy.

22. Plaintiff's claims are barred to the extent any named insured or additional insured failed to assist or cooperate with Defendant as required by the applicable polices, law, or otherwise.

23. Plaintiff's claims are barred to the extent the sole proximate cause of Plaintiff's damages, if any, was due to the fault, acts or omissions, negligence, recklessness, or intentional conduct of persons or entities other than Defendant for whom Defendant has no control or legal responsibility.

24. Plaintiff's claims are barred to the extent additional insure coverage, if any, under the applicable policies is limited or excluded by the terms thereof or otherwise does not apply.

25. To the extent Defendant is found liable, which Defendant disputes, there should be an allocation of the alleged loss between the obligated parties to this action, including Plaintiff and the other defendants, in proportion to the respective fault and legal responsibility of all other parties, person and entities, their agents, servants and employees who contributed to and/or caused any such injury and/or damages.

26. Plaintiff's claims are barred to the extent the doctrine of superior equities applies.

27. Plaintiff's claims are barred because Defendant was not the legal cause of Plaintiff's damages, if any.

28. The damages complained of in Plaintiff's First Amended Complaint, if any, were the result of an intervening superseding cause over which Defendant had no control.

29. Plaintiff has failed, refused and neglected to take reasonable steps to mitigate his alleged damages, if any, thus barring or diminishing Plaintiff's recovery herein.

30. This answering Defendant hereby incorporates by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as though fully set forth herein.

31. Plaintiff's claims are barred to the extent Plaintiff, insureds, and/or additional insureds breached the policies, failed to perform, and/or acted in bad faith.

32. Plaintiff's claims are barred because, to the extent the policy language is ambiguous, if at all, the reasonable and objective construction thereof precludes Plaintiff's recovery against Defendant.

Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available to responding party after reasonable inquiry upon the filing of this answering Defendant's Answer to Plaintiff's First Amended Complaint, and, therefore, this answering Defendant reserves the right to amend its Answer to allege additional affirmative defenses, if subsequent investigation so warrants.

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff take nothing by virtue of the First Amended Complaint on file herein;
2. For dismissal and/or judgment in Defendant's favor on all claims against it;
3. That Defendant be awarded its attorneys' fees and costs of suit incurred to defend this action; and,
4. For any such other and further relief as this Court deems just and proper.

DATED this 15 day of July, 2019.

MESSNER REEVES LLP

MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT
Nevada Bar No. 8550
NICHOLAS L. HAMILTON
Nevada Bar No. 10893
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
Attorneys for Defendant Aspen Specialty Insurance Company