

IN THE SUPREME COURT OF THE STATE OF NEVADA

ST. PAUL FIRE & MARINE
INSURANCE COMPANY

Appellant,

v.

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

Respondents.

Supreme Court No: 81344

District Court Case No: A758902

Electronically Filed
Feb 19 2021 02:22 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

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Attorneys for Appellant

Chronological Index

Doc No.	Description	Vol.	Bates Nos.
1	Redacted Complaint	I	AA000001-AA000014
2	National Union Motion Dismiss	I	AA000015-AA000031
3	Declaration National Union	I	AA000032-AA000095
4	Marquee Motion Dismiss	I	AA000096-AA0000113
5	Declaration Marque	I	AA0000114-AA0000115
6	Exhibits Marquee Motion Dismiss	I	AA0000116-AA0000118
7	Aspen Motion Dismiss	I	AA0000119-AA0000136
8	Declaration Aspen	II	AA0000137-AA0000256
9	Marquee Response re Objection	II	AA0000257-AA0000261
10	St. Paul Objection Evidence National Union	II	AA0000262-AA0000265
11	St. Paul Objection Evidence Marquee	II	AA0000266-AA0000268
12	St. Paul Opposition to Marquee Motion Dismiss	II	AA0000269-AA0000282
13	St. Paul Opposition to National Union Motion Dismiss	II	AA0000283-AA0000304
14	National Union Reply Motion Dismiss	II	AA0000305-AA0000312

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

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

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

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

79	National Union Reply re MSJ	XIV	AA002777-AA002793
80	National Union Objection re Facts	XIV	AA002794-AA002816
81	Marquee Reply re MSJ	XIV	AA002817-AA002827
82	St. Paul Reply re Marquee Countermotion	XIV	AA002828-AA002839
83	Transcript 2019-10-15	XIV	AA002840-AA002894
84	SAO stay discovery	XIV	AA002895-AA002900
85	Finding, Conclusion, Order Granting National Union MSJ	XIV	AA002901-AA002919
86	Finding, Conclusion, Order Granting Roof Deck MSJ	XIV	AA002920-AA002936
87	Order Denying St. Paul MPSJ, Granting Aspen Countermotion	XIV	AA002937-AA002945
88	NOE Findings, Conclusions, Order Denying St. Paul MPSJ	XIV	AA002946-AA002956
89	NOE Findings, Conclusions, Order Granting National Union MSJ	XV	AA002957-AA002977
90	NOE Findings, Conclusions, Order Granting Roof Deck MSJ	XV	AA002978-AA002996
91	Aspen Renewed Motion MSJ	XV	AA002997-AA003025
92	Aspen Appendix MSJ	XV, XVI	AA003026-AA003341
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92	Aspen Appendix MSJ	XV, XVI	AA003026- AA003341
7	Aspen Motion Dismiss	I	AA000119- AA000136
65	Aspen Opposition MPSJ	XI, XII	AA002099- AA002310
45	Aspen Opposition Request to Strike	VI	AA001037- AA001043
91	Aspen Renewed Motion MSJ	XV	AA002997- AA003025
42	Aspen Reply 2nd Motion Dismiss	VI	AA001005- AA001018
77	Aspen Reply Countermotion MSJ	XIV	AA002738- AA002752
95	Aspen Reply Renewed MSJ	XVI	AA003385- AA003402
26	Aspens Declaration	IV	AA000502- AA000623

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

16	Marquee Reply Motion Dismiss	III	AA000379- AA000390
81	Marquee Reply re MSJ	XIV	AA002817- AA002827
59	Marquee Request Judicial Notice	VIII	AA001565- AA001568
9	Marquee Response re Objection	II	AA000257- AA000261
31	Marquee Supp Declaration	V	AA000767- AA000769
30	Marquee's Declaration	V	AA000741- AA000766
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62	National Union Declaration 2 MSJ	IX	AA001600- AA001664
63	National Union Exhibits MSJ	IX, X, XI	AA001665- AA002094
2	National Union Motion Dismiss	I	AA000015- AA000031
60	National Union MSJ	VIII	AA001569- AA001598
80	National Union Objection re Facts	XIV	AA002794- AA002816

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

66	Order Stay Discovery	XII	AA002311-AA002313
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68	St. Paul Declaration 1 MSJ	XII	AA002334-AA002336
34	St. Paul Declaration 2	V	AA000869-AA000877
71	St. Paul Declaration 2 MSJ	XII	AA002382-AA002388
53	St. Paul Declaration MPSJ	VII	AA001209-AA001365
38	St. Paul Errata	VI	AA000949-AA000951
73	St. Paul Exhibits MSJ	XII, XIII	AA002395-AA002650
52	St. Paul MPSJ against Aspen	VII	AA001185-AA001208
11	St. Paul Objection Evidence Marquee	II	AA000266-AA000268

10	St. Paul Objection Evidence National Union	II	AA000262- AA000265
94	St. Paul Opp Aspen Renewed MSJ	XVI	AA003345- AA003384
36	St. Paul Opposition Aspen 2nd Motion Dismiss	V	AA000893- AA000910
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72	St. Paul Response National Union Facts	XII	AA002389- AA002394
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20	St. Paul Statement Re Aspen Motion	III	AA000439- AA000441
18	Supplemental Declaration Marquee	III	AA000395- AA000397
19	Transcript [2018-02-13]	III	AA000398- AA000438
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78	Transcript 2019-10-08	XIV	AA002753- AA002776
83	Transcript 2019-10-15	XIV	AA002840- AA002894

CERTIFICATE OF SERVICE

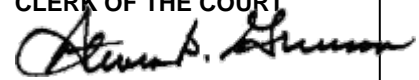
I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 18th day of February, 2021 the foregoing ***APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME VIII of XVI*** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance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

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

15 DISTRICT COURT

16 CLARK COUNTY, NEVADA

17 ST. PAUL FIRE & MARINE INSURANCE)
18 COMPANY,)

19 Plaintiffs,)

20 vs.)

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

28 Defendants.)

CASE NO.: A-17-758902-C

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF PLAINTIFF ST. PAUL
FIRE & MARINE INSURANCE
COMPANY'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST
DEFENDANT ASPEN SPECIALTY
INSURANCE COMPANY**

Date:
Time:
Dept.: XXVI

29 Plaintiff ST. PAUL FIRE & MARINE INSURANCE COMPANY ("Plaintiff"), by and
30 through its attorneys undersigned, hereby respectfully requests the Court take judicial notice,
31 pursuant to NRS 47.130 and 47.150, of the following facts, for the purposes of Plaintiff's Motion
32 for Partial Summary Judgment against Defendant Aspen Specialty Insurance Company:

33 1. The Special Verdict Form filed in open court on April 26, 2017 in that certain
34 action styled *David Moradi v. Nevada Property I LLC et al.*, Clark County District Court Case
35 No. A698824 (the "Underlying Action"), and the Judgment entered thereon. A true and correct

1 copy of this pleading is attached hereto as Exhibit 1.

2 Courts may take judicial notice of the contents of the court files in other lawsuits. *See*
3 *Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143,
4 145 (1981); *Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v.*
5 *Indian River Gila Community*, 626 F.3d 1059, 1075 (9th Cir. 2010).

6 2. The Complaint in the Underlying Action, filed on April 4, 2014. A true and correct
7 copy of the Complaint is attached hereto as Exhibit 2.

8 Courts may take judicial notice of the contents of the court files in other lawsuits. *See*
9 *Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143,
10 145 (1981); *Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v.*
11 *Indian River Gila Community*, 626 F.3d 1059, 1075 (9th Cir. 2010).

12 3. Transcript of Moradi Trial, April 4, 2017, pp. 161-162. True and correct copies of
13 these pages are attached hereto as Exhibit 3.

14 Courts may take judicial notice of the contents of the court files in other lawsuits,
15 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
16 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
17 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
18 (9th Cir. 2010).

19 4. Transcript of Moradi Trial, April 3, 2017, pp. 169-172. True and correct copies of
20 these pages are attached hereto as Exhibit 4.

21 Courts may take judicial notice of the contents of the court files in other lawsuits,
22 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
23 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
24 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
25 (9th Cir. 2010).

26 5. Transcript of Moradi Trial, April 10, 2017, pp. 172-177. True and correct copies of
27 these pages are attached hereto as Exhibit 5.

28 Courts may take judicial notice of the contents of the court files in other lawsuits,

1 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
2 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
3 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
4 (9th Cir. 2010).

5 6. Transcript of Moradi Trial, April 5, 2017, pp. 108-109. True and correct copies of
6 these pages are attached hereto as Exhibit 6.

7 Courts may take judicial notice of the contents of the court files in other lawsuits,
8 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
9 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
10 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
11 (9th Cir. 2010).

12 7. Transcript of Moradi Trial, April 13, 2017, p. 37. A true and correct copy of this
13 page is attached hereto as Exhibit 7.

14 Courts may take judicial notice of the contents of the court files in other lawsuits,
15 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
16 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
17 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
18 (9th Cir. 2010).

19 8. Transcript of Moradi Trial, April 5, 2017, pp. 195-196. True and correct copies of
20 these pages are attached hereto as Exhibit 8.

21 Courts may take judicial notice of the contents of the court files in other lawsuits,
22 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
23 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
24 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
25 (9th Cir. 2010).

26 9. Transcript of Moradi Trial, April 25, 2017, pp. 182-192. True and correct copies of
27 these pages are attached hereto as Exhibit 9.

28 Courts may take judicial notice of the contents of the court files in other lawsuits,

1 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
2 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
3 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
4 (9th Cir. 2010).

5 10. Transcript of Moradi Trial, April 21, 2017, pp. 118-119. True and correct copies of
6 these pages are attached hereto as Exhibit 10.

7 Courts may take judicial notice of the contents of the court files in other lawsuits,
8 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
9 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
10 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
11 (9th Cir. 2010).

12 11. Transcript of Moradi Trial, April 14, 2017, pp. 35-44. True and correct copies of
13 these pages are attached hereto as Exhibit 11.

14 Courts may take judicial notice of the contents of the court files in other lawsuits,
15 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
16 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
17 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
18 (9th Cir. 2010).

19 12. Transcript of Moradi Trial, April 12, 2017, p.m., pp. 11-15. True and correct
20 copies of these pages are attached hereto as Exhibit 12.

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1 Courts may take judicial notice of the contents of the court files in other lawsuits,
2 including transcripts of proceedings. *See Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920
3 (1980); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Mullis v. United States Bank. Ct.*, 828
4 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Indian River Gila Community*, 626 F.3d 1059, 1075
5 (9th Cir. 2010).

6 Dated: August 29, 2019

MORALES FIERRO & REEVES

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9 By: /s/Marc J. Derewetzky
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EXHIBIT 1

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY JUDGMENT

CASE NO. A-17-758902-C

AA001371

DISTRICT COURT
CLARK COUNTY, NEVADA

BY Linda Skinner
LINDA SKINNER, DEPUTY
3:48 pm

DAVID MORADI,

Plaintiff,

vs.

NEVADA PROPERTY 1, LLC, doing business
as "The Cosmopolitan of Las Vegas" and

ROOF DECK ENTERTAINMENT, LLC
doing business as "Marquee Nightclub"

Defendants.

Case No.: A698824
Dept. No.: XX

**SPECIAL VERDICT
FOR PLAINTIFF**

We, the jury in the above-entitled action, find the following special verdict on the following questions submitted to us.

Question 1: Did Mr. Moradi establish his claim for assault?

Yes ☒ No ☐

Question 2: Did Mr. Moradi establish his claim for battery?

Yes ☒ No ☐

Question 3: Did Mr. Moradi establish his claim for false imprisonment?

Yes ☒ No ☐

Question 4: Did Mr. Moradi establish his claim for negligence?

Yes ☒ No ☐

If you answered "Yes" to any of the Questions 1 through 4, please proceed to Question No. 5. If you answered "No" to all Questions 1 through 4, please sign and return the "General Verdict for Defendant" and do not answer any further questions.

A-14-008824-C
SJV
Special Jury Verdict
4844031



4

Question 5: Were the actions of the employees of the Marquee Nightclub a legal cause of injury or damage to David Moradi?

Yes ☒ No ☐

If your answer to Question 5 is "Yes," please proceed to Question No. 6. If your answer to Question 5 is "No," please sign and return the "General Verdict for Defendants" and do not answer any further questions.

Question 6: We find Plaintiff's damages as follows (include only damages arising out of the specific acts for which you answered "Yes" in Questions 1-4 above):

Past Loss of Earnings/Earning Capacity	\$ <u>23 million</u>
Future Loss of Earnings/Earning Capacity	\$ <u>79.5 million</u>
Past pain, suffering, anguish and disability	\$ <u>20 million</u>
Future pain, suffering, anguish and disability	\$ <u>38 million</u>

If your answer to Question 4 is "Yes," please proceed to Question 7. If your answer to Question 4 is "No," please proceed to Question 10.

Question 7: Do you find that David Moradi was comparatively negligent?

Yes ☒ No ☐

If your answer to Question 7 is "Yes," please proceed to Question 8. If your answer to Question 7 is "No," please proceed to Question 10.

Question 8: Was David Moradi's negligent conduct a legal cause of any injury or damage to himself?

Yes ☐ No ☒

1 *If your answer to Question 8 is "Yes," please proceed to Question 9. If your answer to*
2 *Question 8 is "No," please proceed to Question 10.*

3
4 **Question 9:** Using one hundred percent (100%) as the total combined negligence that
5 acted as a legal cause of damage to David Moradi, allocate the percentage of the total combined
6 negligence that you find to be attributable to David Moradi, the Cosmopolitan and the Marquee:

7 The Cosmopolitan and the Marquee _____ %

8 David Moradi _____ %

9 Total 100 %

10
11
12 **Question 10:** Do you find that an officer or managing agent of the Marquee acted with
13 oppression or malice in the conduct that caused David Moradi's damages?

14 Yes ✓ No _____

15
16 **Question 11:** Do you find that an officer or managing agent of the Marquee expressly
17 authorized or ratified an employee's malicious or oppressive conduct that caused David Moradi's
18 damages?

19 Yes ✓ No _____

20
21 *If you answered "Yes" to either Question 10 or 11, please also answer Question 12. If*
22 *you answered "No" to both Questions 10 and 11, please sign and return this special verdict, and*
23 *do not answer the last question.*

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Question 12: Do you choose to allow David Moradi to recover punitive damages?

Yes ☒ No ☐

If you answer to Question 12 is "Yes," there will be another phase of trial where you will hear additional evidence and instruction and then deliberate to decide the amount of punitive damages to be assessed. Do not award punitive damages now.

THIS IS OUR VERDICT.

Dated this 26 day of April, 2017.


FOREPERSON

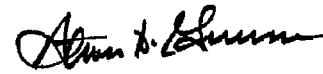
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EXHIBIT 2

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY JUDGMENT

CASE NO. A-17-758902-C

AA001376



CLERK OF THE COURT

COMP

RUTH L COHEN, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, Individually,

Plaintiff,

vs.

NEVADA PROPERTY 1, LLC, d/b/a "The
Cosmopolitan of Las Vegas:, ROOF DECK
ENTERTAINMENT, LLC, d/b/a "Marquee
Nightclub"), and DOES I through X, inclusive;
ROE CORPORATIONS I
through X, inclusive

Defendants.

CASE NO.: A-14-698824-C

DEPT NO.: XX

COMPLAINT

Jury Trial Demanded

**(Arbitration Exempt – Amount in
Controversy Exceeds \$50,000.00)**

Plaintiff, DAVID MORADI, individually, by and through his attorneys of record, Paul S.
Padda, Esq. of COHEN & PADDA, LLP, for his causes of action against Defendants complains
and alleges as follows:

///

///

I.

ARBITRATION EXEMPTION

1. Nevada Revised Statute ("N.R.S.") 38.250 requires that "[a]ll civil actions filed in district court for damages, if the cause of action arises in the State of Nevada and the amount in issue does not exceed \$50,000 per plaintiff, exclusive of attorney's fees, interest and court costs, must be submitted to nonbinding arbitration . . ."

2. This case is exempt from the arbitration program because "the amount in issue" (i.e. damages) for Plaintiff significantly exceeds \$50,000.00.

II.

JURISDICTION AND VENUE

3. This civil action is brought by Plaintiff pursuant to the statutory and common law of the State of Nevada. Venue is appropriate in this Court because all events giving rise to the present causes of action occurred in Clark County, Nevada. The amount in controversy in this case is well in excess of \$10,000.00.

III.

PARTIES

4. At all times mentioned herein, Plaintiff, DAVID MORADI ("David"), is an adult individual who is, and was, a resident of New York City, New York, County of Manhattan.

5. Defendant, NEVADA PROPERTY 1, LLC ("NP1"), is a corporation duly registered to transact business in Nevada. NP1 owns and operates a hotel and casino in Clark County, Nevada known as THE COSMOPOLITAN OF LAS VEGAS ("COSMOPOLITAN").

///

///

1 leave of Court to amend this Complaint to insert the true names and capacities of each DOE and
2 ROE Defendants when they have been ascertained.

3
4 IV.

5 FACTUAL ALLEGATIONS

6 9. On or about April 8, 2012, David, a well-educated and highly successful
7 businessman, was a patron at the Marquee Nightclub located in the Cosmopolitan. Upon
8 information and belief, the Cosmopolitan has an ownership/financial interest in the Marquee.

9
10 10. David, who was staying at the Wynn Hotel and was a frequent and valued guest
11 of that hotel, was at the Marquee to socialize with friends. Upon arriving at the Marquee, David
12 was immediately seated at "table 53," a special table generally reserved for V.I.P. guests.

13 11. After being seated at table 53, David gave the cocktail waitress his American
14 Express ("Amex") Centurion Card (commonly referred to as the "Black Card") and
15 identification. David and his friends socialized at table 53 for approximately three hours,
16 ordering expensive champagne. Presumably impressed with the quality of champagne ordered
17 by David and his friends, the cocktail waitress requested that she be permitted drink some of it.
18 A generous individual, David acceded to the waitress's request. The waitress, while continuing
19 to serve David's table, proceeded to consume several glasses of high-end champagne.
20

21
22 12. After a few hours, David requested the bill so he could leave and return to his
23 Room at the Wynn. After quite a long time, the cocktail waitress finally brought the bill, which
24 was approximately ten thousand dollars (\$10,000). After David signed the bill, which the
25 cocktail server had charged to David's black Amex card, she returned his card and identification
26 to him.
27

28 ///

1 13. As he was about to leave, David ordered an additional three drinks from the
2 cocktail waitress for his friends who were remaining at the table. David gave the cocktail
3 waitress three hundred dollars (\$300) in cash to pay for the three drinks, including additional
4 gratuity on top of what he had already paid with his Amex credit card. The cocktail waitress
5 returned with the drinks and provided them to David's friends. When David told the cocktail
6 waitress, who had consumed several drinks at this point and was presumably inebriated, that he
7 was leaving the Marquee, her demeanor suddenly changed. Hostile and belligerent, she
8 demanded that David give her his identification/Amex card again, despite the fact he had already
9 paid the bill in full and paid for the additional drinks in cash. David queried why she needed his
10 Amex card/identification again given that he had already paid his bill. In response, the cocktail
11 waitress threatened David that she would bring security to the table if he did not comply with her
12 demand. Concerned that the cocktail waitress was attempting to perpetrate a fraud on him,
13 David became uncomfortable and stated he was going to leave.

14 14. Shortly thereafter, two members of Marquee's security detail came to David's
15 table, along with a manager. The two Marquee security members and manager demanded David
16 give them his Amex card/identification. David explained he had paid the bill in full and that they
17 had no reason to demand his Amex card/identification a second time. At no time did the
18 Marquee security or management explain to David why they were requesting his Amex
19 card/identification.

20 15. When David said he was leaving, the Marquee security members and manager
21 said "ok," but did not leave David's table. When David began to walk away from the table, the
22 Marquee security members and manager followed him. David tried to turn right to exit, as he
23 had done on previous visits to the Marquee, but the Marquee security members and manager
24

1 physically stopped him and told him, "You have to go left." The Marquee security members and
2 manager continued to demand that David go left. David wanted to exit to the right as he had
3 done previously at the Marquee and he felt very threatened by the Marquee security members
4 and manager. This exchange happened approximately three times, at which point Marquee
5 security forcefully grabbed David, shook him, and forcibly pushed him to the left against his
6 will.
7

8 16. David was forced out of an unknown exit of the Marquee into a room between the
9 nightclub and the pool, which he believed to be a security room. Once in this room, the Marquee
10 security members threw David into a wall, head first, causing injuries to his head. After that, the
11 Marquee security members and manager picked David up and dragged him into the pool area
12 against his will. There, the Marquee security members and manager shoved David to the ground
13 causing his head to forcefully hit the concrete surface. The Marquee security members and
14 manager repeatedly hit and smashed David's head into the concrete and continually held his head
15 and right eye against the concrete with a high degree of pressure. After this violent attack, and
16 while still holding David's head against the concrete, the Marquee security staff and manager
17 repeatedly stated, "are you going to cooperate and give your I.D. back?" Believing he could be
18 killed, David agreed in order to end the violent attack.
19
20

21 17. When David was finally allowed to get up off the ground, he was highly
22 disoriented. He again explained to the Marquee security members and manager that he had paid
23 his bill and did not deserve this treatment. All the while, Marquee security staff and the manager
24 kept stating, "We need your I.D." Amidst the pandemonium, an unknown Marquee or
25 Cosmopolitan employee came up to David with a flashlight and, upon seeing visible injuries to
26 his head, asked him if he wanted to go to a hospital. David was still highly disoriented and
27
28

1 expressed his desire to leave fearing that if he stayed he could be attacked again. The Marquee
2 security staff and manager continued to hold David against his will for another 15 to 20 minutes
3 before he was finally escorted out of the property.

4 18. Upon feeling pain in his head, face, and body, David stopped in the restroom on
5 the way out of the Cosmopolitan and saw his injuries. Upon returning to the Wynn, the V.I.P.
6 host for the hotel became alarmed when he saw David's condition. Concerned about David's
7 well-being, the host arranged for one of the Wynn's drivers to take David to the Desert Springs
8 Hospital. Upon arriving at the hospital, David was immediately placed in a wheel chair due to
9 the possibility of a brain injury and internal bleeding from his head injuries. David underwent a
10 "CT scan" and was diagnosed with a concussion. David suffered numerous injuries, including
11 but not limited to, right eye and head swelling, right black eye, concussion, sore arms, sore
12 knees, sore neck, difficulty walking, headaches, difficulty concentrating, confusion,
13 disorientation, and anxiety.

14 19. A few days later, as his condition became more heightened, David sought
15 treatment from Las Vegas Neurosurgeon Dr. Derek A. Duke, M.D. Upon examining David,
16 Dr. Duke became concerned for David's well-being. Dr. Duke diagnosed David with a traumatic
17 brain injury.

18 20. Following the vicious and unprovoked attack by Marquee staff and
19 management, which originated after the inebriated cocktail waitress demanded David's Amex
20 card/identification after he had already paid his \$10,000 bill, he continues to suffer headaches,
21 confusion, memory problems, difficulty concentrating, anxiety and emotional distress.

22 ///

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22. By separate letters dated April 11, 2012, each of the Defendants was formally notified of their legal duty to preserve all video evidence relating to the events described in this Complaint.

FIRST CAUSE OF ACTION
ASSAULT AND BATTERY
(Against All Defendants)

24. Plaintiff lawfully and peacefully entered upon the property of the Cosmopolitan and Marquee. Plaintiff was willfully, maliciously and without just cause or provocation assaulted and battered by security guards/employees and/or agents of the Marquee Nightclub. This conduct was ratified, encouraged and countenanced by Cosmopolitan's employees/agents. Specifically, Plaintiff was grabbed, shaken, shoved against a wall where he hit his head, forced to the ground, had his head, face, and eye smashed into the concrete numerous times, and held forcefully against the ground. As a result of these acts, Dr. Derek A. Duke, M.D. diagnosed Plaintiff with a traumatic brain injury.

AA001383

1 an amount deemed appropriate to punish Defendants for their malicious, wrongful and egregious
2 conduct

3 26. That as a direct and proximate result of the actions of Defendants, and each of
4 them, Plaintiff has been injured in an amount well in excess of \$10,000.00.

5
6 VI.

7 **SECOND CAUSE OF ACTION**
8 **NEGLIGENCE**
9 **(Against All Defendants)**

10 27. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 26
11 above, and incorporates the same as though fully set forth herein.

12 28. Defendants at all times mentioned herein had a duty to maintain their premises in
13 a reasonably safe condition for the general public. Among those duties included the duty to
14 ensure that cocktail waitresses do not become inebriated and instigate false disputes with patrons,
15 that security personnel act in a reasonable manner in the performance of their duties and that
16 security personnel receive proper training in carrying out those duties. Defendants breached
17 their duty towards Plaintiff.

18 29. The attack suffered by Plaintiff and the injuries resulting therefrom were caused
19 solely and proximately by the negligence of Defendants without any contributory negligence on
20 the part of Plaintiff.

21 30. The negligence of Defendants consisted in gross misconduct and/or negligence by
22 personnel acting on behalf of Defendants resulting in significant injuries to Plaintiff. The gross
23 misconduct and/or negligence of Defendants' personnel constituted a dangerous condition.
24

25 31. Defendants had, or should have had, actual knowledge and notice of said
26 dangerous condition.
27
28

1 32. As a direct and proximate result of the negligence and carelessness of Defendants,
2 Plaintiff has suffered physical injuries including, but not limited to traumatic brain injury, head
3 pain, neck pain, arm pain, knee pain, headaches, bruising, swelling, confusion and anxiety. Said
4 injuries caused Plaintiff to suffer extreme physical pain and suffering and severe emotional
5 distress, and will continue to experience these conditions in the future resulting in damages,
6 resulting in damages in excess of \$10,000.00.
7

8 33. As a direct and proximate result of the negligence and carelessness of Defendants,
9 Plaintiff has been required to engage the services of physicians and medical treatment providers.
10 Plaintiff has incurred damages in a sum currently unascertainable, but well in excess of
11 \$10,000.00, which will continue to accrue, as future medical treatments are necessary.
12

13 34. As a direct and proximate result of the negligence and carelessness of Defendants,
14 Plaintiff has suffered lost wages/income and will continue to suffer lost wages/income into the
15 future in amounts exceeding \$10,000.00 in damages.
16

17 35. As a direct and proximate result of Defendants' negligence, Plaintiff has been
18 required to obtain the services of an attorney to prosecute this action. Plaintiff is entitled to an
19 award of attorney's fees and costs of suit incurred herein.
20

21 36. The acts, conduct and behavior of Defendants, and each of them, were performed
22 knowingly and intentionally, oppressively and maliciously, by reason of which Plaintiff is
23 entitled to punitive damages in a sum exceeding \$10,000.00 from each Defendant.
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VII.

THIRD CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(Against All Defendants)

37. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 36 above, and incorporates the same as though fully set forth herein.

38. The acts, conduct and behavior of Defendants, and each of them, were performed intentionally and recklessly, and actions taken by Defendants were extreme and outrageous, causing Plaintiff to suffer severe emotional distress, including but not limited to, traumatic brain injury, memory loss, severe lack of concentration, feelings of violation, physical pain and anxiety, by reason of which Plaintiff is entitled to punitive damages in a sum in excess of \$10,000.00.

39. As a direct and proximate result of the acts alleged in this Complaint, Plaintiff has been required to engage the services of physicians and medical treatment providers and other persons to care and treat him, resulting in damages well in excess of \$10,000.00. These damages will continue to accrue, as Plaintiff requires ongoing medical services.

40. As a further and proximate result of the conduct and behavior of Defendants, Plaintiff has suffered lost wages/income and will continue to suffer lost wages/income into the future, all to their detriment in an amount in excess of \$10,000.00.

VIII.

FOURTH CAUSE OF ACTION
FALSE IMPRISONMENT
(Against All Defendants)

41. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 40 above, and incorporates the same as though fully set forth herein.

1 42. Plaintiff lawfully and peacefully entered upon the property owned by Defendants.

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

7 44. Plaintiff was subjected to great indignities, humiliation and disgrace in being
8 assaulted, imprisoned, restrained against his will, battered, and detained. As a result of said
9 conduct, third parties were thereby made aware that Plaintiff was being intentionally restrained.

10 45. That as direct and proximate result of the actions of Defendants, and each of
11 them, Plaintiff has been injured in an amount in excess of \$10,000.00.
12

13 46. That the acts of Defendants, and each of them, were done willfully, with malice
14 and oppression and with conscious disregard for Plaintiff's rights and therefore, Plaintiff is
15 entitled to recover punitive damages in an amount deemed appropriate to punish the Defendants
16 for their wrongful and egregious conduct.
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1 **WHEREFORE**, Plaintiff, David Moradi, expressly reserving his right to amend this
2 Complaint at or before the time of trial on the actions stated herein to include all damages not yet
3 ascertained, prays for judgment against the Defendants, and each of them as follows:

- 4 1. For compensatory and pecuniary damages in an amount in excess of \$10,000.00;
- 5 2. For punitive damages in an amount in excess of \$10,000.00;
- 6 3. For Prejudgment interest from the time of service of this Complaint, as allowed
7 by NRS 17.130;
- 8 4. For attorneys' fees and costs of suit incurred herein; and
- 9 5. For such other and further relief as the Court may deem just and proper.

10
11
12 DATED this 4th day of April, 2014.

13
14 COHEN & PADDA, LLP

15 

16 RUTH L. COHEN, ESQ.

17 Nevada Bar No. 1782

18 PAUL S. PADDA, ESQ.

19 Nevada Bar No. 10417

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28 *Attorneys for Plaintiff*

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EXHIBIT 3

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY JUDGMENT

CASE NO. A-17-758902-C

AA001389

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1 publish, then.

2 **MR. RAVIPUDI:** Yeah.

3 Q. (By Mr. Ravipudi) If you go to page -- I
4 think it's 4 of it. Okay. And then kind of zoom in on
5 that transaction. Do you see that? I know there's
6 some redactions, but do you see it's the Marquee
7 restaurant, food and beverage, April 8, 2012?

8 A. Yes.

9 Q. And so this confirms that the payment was
10 actually made?

11 A. Yes.

12 Q. And did you ever call American Express and
13 ask that payment not be made?

14 A. No.

15 Q. Okay. Okay. And also present with you while
16 you were signing the bills on multiple occasions that
17 night was Tony Marcum?

18 A. Yes.

19 Q. Now, you've talked about Mr. Mata and the
20 security personnel who came to your table and asked for
21 your ID. Did Mr. Mata or any security personnel ever
22 give you an explanation as to why they wanted your
23 identification?

24 A. No.

25 Q. Okay. Did -- Shanna Crane, the hostess, did

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1 she ever give you any explanation as to why she wanted
2 your ID?

3 A. No.

4 Q. And why didn't you give Ms. Crane, the
5 hostess, your ID?

6 A. I just waited 30 to 40 minutes for her to
7 close out. It was very late at night, and I wanted to
8 go home.

9 Q. If -- did anybody at table -- while you were
10 at the table ask you for any signatures again?

11 A. No.

12 Q. Okay. If -- if Mr. Mata had explained to you
13 that -- why he needed -- that he needed another
14 signature or why he needed the ID, would you have
15 complied?

16 A. Yes.

17 Q. But you never received any explanation?

18 A. No.

19 Q. Okay. So after the demand was made for the
20 ID at the table by Mr. Mata and the security personnel,
21 what happened next?

22 A. I -- I said I'd like to leave. I --

23 Q. What did they say in response?

24 A. He said okay.

25 Q. Okay.

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EXHIBIT 4

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY JUDGMENT

CASE NO. A-17-758902-C

AA001392

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1 (Video played.)

2 **MR. RAVIPUDI:** Okay. Pause that.

3 Q. (By Mr. Ravipudi) So you saw yourself in that
4 video?

5 A. Yes.

6 Q. What was happening? Do you remember that?

7 A. I do remember that.

8 Q. Do you remember everything about it or some
9 of it?

10 A. I think I remember most of it.

11 Q. Okay. What happened?

12 A. I was taken by force, put into a choke hold.
13 I've seen this video. You've played it for me. It's
14 never easy to watch this.

15 But I was in a choke hold. I had security
16 all around me. And then when I've seen the video
17 before, it looked like somebody was coldcocking back
18 and hitting me right as my head is going into the door.
19 And so I'm going -- I thought this was a wall that --
20 the account I gave was this was a wall because that's
21 what I remembered. I went into this wall, which looks
22 like the steel doorjamb. And it looks like I was
23 moving at a pretty fast pace.

24 And then, when I hit that door, it felt like
25 my head exploded. It was the worst pain I've ever felt

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1 in my life. And then I didn't know when I gave my
2 account that somebody was back behind me coldcocking me
3 at the same time.

4 Q. Now, what did it feel like when the security
5 guards -- the security's arm was around your neck?

6 A. It was extremely scary. I had no control. I
7 couldn't do anything. I was just totally up to
8 whatever they wanted to do to me.

9 Q. Okay. And what happened after your head made
10 contact with that doorjamb? What happened to you?

11 A. It was just -- it was the worst pain in my
12 life. It was like my head exploded at that point.

13 Q. And how about with respect to -- I mean, do
14 you remember everything after that event?

15 A. After the -- after I was thrown into the
16 steel doorjamb and hit from behind, coldcocked from
17 behind, then I was taken out. I was slammed against
18 the concrete. My head was slammed against the
19 concrete. I was slammed multiple times with my head
20 again the concrete. And then I was held pinned against
21 the concrete. And I remember waking up and hearing,
22 "Are you going to cooperate now? Are you going to
23 cooperate now?"

24 Q. And what did you say?

25 A. I said, "Cooperate, yes. Don't -- just don't

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1 kill me."

2 Q. And during this time, were you conscious the
3 whole time?

4 A. No, I think I lost consciousness.

5 Q. Okay. And so had anything like this ever
6 happened to you before?

7 A. Never in my life. I was scared I was going
8 to die right there.

9 Q. Now, after they were yelling at you, saying
10 "Are you going to cooperate?" and you said you would,
11 did you give Mr. Mata your ID?

12 A. I remember getting up, being highly
13 disoriented, very dizzy, didn't really know where I was
14 anymore. And then I -- I -- I believe I did give him
15 back my ID at that point.

16 Q. And were you -- what did you say?

17 A. I think I used some curse words. I don't
18 know if I should use what I used there.

19 Q. You can tell the ladies and gentlemen of the
20 jury. What did you say?

21 A. I think I -- I said something like, "Are you
22 guys out of your fucking mind?"

23 Q. Okay. And after you gave the -- the security
24 and Mr. Mata your ID, what happened next?

25 A. I saw Mr. Mata's demeanor change a great

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1 deal. I -- his eyes got bigger. He looked scared.
2 And he said, "Sir, you head-butted me." And I said,
3 "Now you're calling me sir, after what you just did to
4 me?" And I could see he was scared.

5 Q. And what was your response when he said "you
6 head-butted me"?

7 A. I said, "Yeah, right. You're an idiot."

8 Q. And what did you tell him to do?

9 A. I believe -- I believe at that point --
10 you're asking me what I told him to do?

11 Q. Yeah. I mean --

12 A. I don't remember.

13 Q. Okay. And were there -- now, did you see any
14 marks on Mr. Mata's face?

15 A. No marks on his face.

16 Q. Okay. Did you ever tell security or Mr. Mata
17 to -- to look at the security -- at the security camera
18 footage?

19 **MR. DIAL:** Objection, Your Honor. Leading.

20 **THE WITNESS:** Okay. I remember --

21 **THE COURT:** Wait a second. It doesn't
22 require a yes -- an answer one way or the other. I'll
23 allow it. Overrule.

24 **THE WITNESS:** What was the question?

25 Q. (By Mr. Ravipudi) Did you ever ask security

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EXHIBIT 5

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
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AA001397

1 of viable threat.

2 Moreover, his other arm is being ratcheted
3 up, which forms him leaning in this direction. And
4 this individual is -- appears to be pushing this group
5 through. And there's -- there's a term of art we call
6 it. We call it stuffing. And what this does is it
7 forces the group to move quickly through an area. And
8 they cover this area within less than two seconds.

9 At this point here, we've got -- his right
10 arm is ratcheted up behind his back. Were you to come
11 back two frames, you would see that. You would see a
12 fist forming which is about to impact his head --

13 MS. CHANG: Can we back it up a bit, Mike.

14 THE COURT: Where you going back to?

15 THE WITNESS: Keep going. Stop right there.

16 MS. CHANG: That is at 4:38:52.567.

17 THE WITNESS: This just isn't any choke hold.
18 This is what we refer to as an armbar choke hold. The
19 arm forms a bar and is compressed against the throat.
20 Without getting into the various anatomical parts of
21 the throat, the throat. And because the armbar is
22 compressing there, there is no breathing room because
23 the neck is supposed to be in what is called the crook
24 of the arm. It's on the forearm.

25 In addition, this gentleman also has his

1 right arm cranked up behind him, while his other arm is
2 coming around his neck. When I pointed out the hand
3 before, what was important about that is it's not a
4 fist. As they approach the door with each frame, this
5 forms a clasp equal to a fist and then impacts the back
6 of the head. This gentleman here has him completely
7 ratcheted up and off balance.

8 Taken together, their weight is 200 pounds
9 plus, 2, 4, 600 pounds moving through this area at the
10 speed they did, they were not in control, as
11 demonstrated by the fact that they completely lost --
12 with this velocity, they lost the direction to come and
13 make this turn out that door, which in the frame too
14 you'll see.

15 BY MS. CHANG:

16 Q. Now, what opinion do you have with respect to
17 their choice of going through the Cloud Bar to take
18 this patron out?

19 MR. AICKLEN: Object. Foundation. Calls for
20 speculation to comment on somebody else's choices.

21 THE COURT: No, I think it's within the
22 scope. Overruled.

23 MR. AICKLEN: Thank you.

24 THE WITNESS: The Marquee Nightclub has
25 specific areas where, when, and when you have to

1 require to take someone to an -- out of the club.
2 They're called rally points. They're known by
3 different names. I think we talked about this day one
4 I was here.

5 This is not a rally point. This is not a
6 rally point because, most the times, this -- for two
7 reasons. It's not a rally point because this service
8 bar area is congested with other -- we'll call them
9 innocent bystanders, although they're employees. So
10 because it's congested, it's not a safe through
11 passage.

12 Additionally, the outside area is beyond the
13 scope of the surveillance of the nightclub. It's
14 surveilled by the casino. You want your rally points
15 where you can safely get to the destination and still
16 watch from your own surveillance room. You couldn't do
17 that from -- you couldn't do that from the surveillance
18 room.

19 BY MS. CHANG:

20 Q. Is this arm hold -- arm choke hold method
21 with the arm around the neck, is that the approved
22 way -- manner of detention that you teach your
23 students?

24 A. What I teach is don't ever do that.

25 Q. Why not?

1 A. Because once you place a person -- if you're
2 going to do it -- let's say you're going to do it, you
3 don't do it from a standing position. The reason is --
4 it's referred to as the survival reflex. As soon as
5 that throat starts squeezing, the person's going to
6 start kicking and wailing and doing whatever the hell
7 they could do to get out of that choke. If they lose
8 consciousness and you're still have them standing up in
9 a choke, the choke becomes a guillotine. Because at
10 that point -- excuse me -- a rope around his neck. And
11 literally now you're picking him up -- and as has
12 happened in other cases, where the dead body weight
13 just drops --

14 MR. AICKLEN: Objection. Beyond the scope.
15 Nonresponsive. And the --

16 THE COURT: Overruled.

17 THE WITNESS: So that's why you don't do it,
18 because you don't do it while they're standing. If
19 they're on the ground and you are doing ground work and
20 trying to control them, and the weight of their body is
21 now, with gravity, laying down, you can come around in
22 the crook of the neck, do a safe restraint around the
23 neck. If you are crazy enough to even try that, you
24 don't do it while standing.

25 As they're rushing through here, they have no

1 control over the direction that they're going, as we're
2 about to see. I advise in my classes this is a classic
3 maneuver. Unless you're looking to get fired, get in a
4 lawsuit, or something worse, you avoid this at all
5 costs. This is not military combat.

6 BY MS. CHANG:

7 Q. Based upon your training and experience and
8 the standard in the industry and what you teach your
9 students, is this -- would a head-butt justify this
10 type of maneuver?

11 A. Would a head-butt justify a armbar choke
12 around the neck?

13 Q. Correct.

14 A. No.

15 Q. All right. Let's continue then with this.

16 (Whereupon, video clip was played.)

17 BY MS. CHANG:

18 Q. Can you describe what we're seeing here.

19 A. Forward momentum. And we can stop right here
20 for a moment.

21 Q. And we're stopping at 4:38:53.033.

22 A. The hand is clasping. It's about to make
23 impact. Because they don't have any direction of
24 literally making that slight cant turn out that door,
25 whatever is in front, they're about like a car about to

1 hit a brick wall. As Mr. Moradi strikes, the inertia
2 of the weight still continues. The jury will see that
3 on their own. So the next frame or two, he's about to
4 impact the doorframe.

5 Q. Sir, before we play it, did you inspect that
6 doorframe?

7 A. Yes, I did.

8 Q. What is that door made of?

9 A. I'm not sure of the metal, but it looked like
10 steel. It's a solid steel door that's typically used
11 for fire doors. It's probably fire-rated. So it's a
12 heavy-duty steel-gauge door.

13 Q. All right. Let's continue, then.

14 (Whereupon, video clip was played.)

15 BY MS. CHANG:

16 Q. Okay. What are we seeing here?

17 A. Right now, he's making impact on the door.

18 Q. Let's stop at 4:38:53.300. And do we see the
19 fist?

20 A. We see the fist now striking the back of
21 Mr. Moradi's head.

22 Q. Based on your -- the standard in the
23 industry, did you see anything that Mr. Moradi did
24 while he was being in the arm choke hold through that
25 merited a punch in the back of the head?

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EXHIBIT 6

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
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AA001404

1 with me, you never did?

2 A. I don't dispute it.

3 Q. You even testified to the jury that you
4 specifically recall Mr. Mata referring to you as sir;
5 correct?

6 A. Yes, I do remember that.

7 Q. So you would have this jury believe that you
8 had been beaten to the point of unconsciousness and you
9 were disoriented, but you could actually remember being
10 referred to as sir?

11 A. I think once he realized what happened and
12 who he did this to, he was very scared. And I think
13 that was when his -- when his demeanor changed. And he
14 started calling me sir at that point because he was
15 very scared.

16 Q. So you would have the jury believe that any
17 prior interaction with Mr. Mata when he was talking to
18 you, he was impolite to you? Is that what you're
19 telling the jury?

20 A. He was a bit rude. He was very forceful that
21 he wanted me to do things his way. It wasn't cursing
22 or anything like that, but it was -- it was his way.
23 And if I wasn't complying, there was a price to pay.

24 Q. He was going to beat you up in front of
25 everybody?

1 A. No, they would take me in the back and beat
2 me up, where there's no cameras or they wouldn't
3 produce footage. That's where they'd do it.

4 Q. They didn't take you to the back; they took
5 you to a pool deck with a bar outside there.

6 A. Yes, and there's -- where is the video?

7 MR. RAVIPUDI: Argumentative, Judge. And
8 asked and answered.

9 THE COURT: No, I'll overrule.
10 BY MR. DIAL:

11 Q. They didn't take you out back anywhere, did
12 they?

13 A. I think that's out back. That was in the
14 back of the club. I don't know how he defined it, but
15 that's how I look at it.

16 Q. The -- one thing that you also do remember is
17 that on that night, right after your alleged beating,
18 Mr. Mata did confront you and say, "You head-butted
19 me"; right?

20 A. He had to come up with a cover-up.

21 Q. Oh, so he came up with that story
22 instantaneously right after he had you beaten --

23 A. It wasn't the first time he's done this.

24 Q. -- in front of all eyes?

25 Excuse me?

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EXHIBIT 7

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
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AA001407

1 they want to lay that foundation for him. This is --
2 this is not appropriate for this deposition.

3 **MR. SHPIRT:** And that brings us to that big
4 problem --

5 **THE COURT:** Well, that might be -- he may
6 have a point there. I don't -- all right. We're going
7 to come back to -- to this page and the next page. So
8 let's go on to -- let's get through it, and I can
9 evaluate whether I saw anything in here that would be a
10 response to it. The next thing I show is --

11 **MR. RAVIPUDI:** 82.

12 **MR. SHPIRT:** 82 through 83.

13 **THE COURT:** So that's -- I mean, what's --
14 what's your issue with this?

15 **MR. RAVIPUDI:** I mean, so I've asked
16 questions at the beginning trying to establish that
17 there's missing video. And now, when the question's
18 being asked, there's no video and so that's why you're
19 here. That's a counterdesignation by them. So, I
20 mean, if we're going to talk about all the missing
21 video, let's talk about all the missing video.

22 Otherwise, I just don't understand what the
23 context of this question is in this case.

24 **MR. SHPIRT:** But you already did. You
25 already allowed them to ask questions about did you see

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EXHIBIT 8

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
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AA001409

1 would -- oh. And so Mr. Moradi is actually a key man.
2 There's key man provisions at Anthion which say, hey,
3 this fund rises and falls with you. And that's
4 disclosed to the investors. That was in the offering
5 memorandums. And so if there's a health issue that
6 happens to a -- to the fund manager, Mr. Moradi, that
7 takes him out of running the fund, there's disclosures
8 in writing that say that's probably going to lead to
9 everybody abandoning the fund immediately, immediate
10 liquidation.

11 And so if Mr. Moradi was diagnosed in April
12 of 2012 with a moderate traumatic brain injury, that
13 disclosure requirement would happen immediately and
14 that fund would have ceased to exist probably within a
15 month. And so that's why Mr. Bibbings says, in his
16 expert opinion, this diagnosis would lead to the demise
17 of the fund and a barrier for him to return.

18 And Mr. Rogers doesn't disagree.

19 *(Video played.)*

20 "Q Do you have an opinion as to whether
21 Mr. Moradi had a duty to disclose his brain
22 injury?

23 "A My opinion is, yes, he would have a duty
24 to disclose that.

25 "Q Okay. And that is something that is

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1 material to investors; correct?

2 "A Yes.

3 "Q Because it affects his ability to
4 function?

5 "A Potentially, yeah."

6 **MR. RAVIPUDI:** So -- and that's why, under
7 all the laws, you have a duty to disclose all material
8 information. And these were the regulations cited to
9 by Mr. Bibbings.

10 And he explained that if you put two equal
11 managers side by side but one actually discloses the
12 brain injury, nobody's going to go with that person.
13 And I think that's the practical truth.

14 *(Video played.)*

15 "Q So then would you also agree that this
16 duty to disclose that Mr. Moradi has continues?

17 "A Yes.

18 "Q And so would you agree that that creates
19 a barrier to reentry for Mr. Moradi as a hedge
20 fund manager?

21 "A Yes."

22 **MR. RAVIPUDI:** So it's undisputed again among
23 all of the experts that this diagnosis of a brain
24 injury has barred Mr. Moradi from returning to the
25 world as a hedge fund manager.

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EXHIBIT 9

REQUEST FOR JUDICIAL NOTICE IN SUPPORT
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AA001412

1 she has treated people who have not had any organic
2 injury to the brain, but that's not Mr. Moradi. And so
3 the prognosis that Dr. Fong has for some of her
4 patients does not apply, tragically, to Mr. Moradi. So
5 this is all frontal lobe injuries that are consistent
6 with her testing.

7 So who has diagnosed Mr. Moradi with a brain
8 injury? Dr. Baldwin, Dr. Logan, Dr. Duke, Dr. Loong,
9 Dr. Shah, Dr. Lewis, Alina Fong, Paul Janda, William
10 Orrison, and Dr. Hirky. They're all offering testimony
11 and opinions and records consistent with a brain
12 injury.

13 Now, say that Dr. Duke, he diagnosed
14 Mr. Moradi with postconcussive syndrome. He didn't
15 tell Mr. Moradi he had a traumatic brain injury. But
16 according to Dr. Hutchinson, the defense expert, that
17 is a brain injury. And so all of these people are
18 people that the defense expert disagrees with. He
19 disagrees with everybody.

20 But -- okay. So were the actions of the
21 employees at the Marquee Nightclub a legal cause of
22 injury to Mr. Moradi? Absolutely unequivocally yes.

23 So then we get to compensatory damages. And
24 compensatory damages, there's two that are being
25 claimed in this case. There are past and future loss

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1 of earnings capacity. And that's called an economic
2 damage. And then there's physical pain, suffering,
3 anguish, and disability. That's what we call a
4 noneconomic damage.

5 Now, what's not contained in here are claims
6 for medical expenses for the past or future, something
7 that Mr. Moradi could have claimed but he's not
8 claiming in this case. So these are the two elements
9 that are being addressed here. And I want to talk
10 about them in part separately.

11 Economic damages.

12 So Mr. Moradi, it's been five years since
13 this injury. And he's got about 26 years if you go to
14 social security retirement age -- so age 67 -- of
15 employment. And you recall Mr. Moradi's trajectory.
16 There were lots of people who testified about it. In
17 fact, UCLA, then goes to Imperial Capital in Beverly
18 Hills, a distressed capital investment firm, then goes
19 to Soros, amazingly. During a very difficult time in
20 the markets, he was able to get a job at one of the
21 best hedge funds in the world and then rose from being
22 an analyst to a portfolio manager. Then ends up going
23 to Pequot, where he's a manager of a larger portfolio,
24 has a 30-something percent return over there and then
25 starts his own fund.

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AA001414

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1 And Anthion was an attainment for Mr. Moradi
2 and his dream, his goal, his passion. And during the
3 years that he was there -- in 2008, it was just a
4 partial year -- he was up over 34 1/2 percent before
5 April of 2012. That trajectory is unprecedented during
6 that time period. And, in fact, his benchmarks, as you
7 heard, the comparative index was HFRI equity market
8 neutral.

9 Now, remember, all of this came in not just
10 through my client, but through experts. We brought
11 Jack Schwager here. Jack Schwager and other experts
12 were testifying about this in addition to
13 Mr. Krigsfeld. No expert came and took the stand for
14 the defense addressing any of this.

15 And so here you've got Mr. Moradi getting
16 over 30-something percent while his competitors are at
17 negative 4 1/2 percent during that time period. That
18 is unprecedented and remarkable.

19 And you remember Joe Krigsfeld? He came in.
20 He's now 34 years old and a hedge fund manager for a
21 fund called Oberon Capital. But he was a senior
22 analyst for Mr. Moradi when he was about 25 years old,
23 just from 2008 to the beginning of 2009. But he'd
24 known David for a very long time. They'd interacted
25 with each other for about five years before he joined

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1 Anthion. And over that time, he had a great
2 opportunity to learn a lot about David.

3 And what he learned and what he testified
4 about was the speed that he could go through -- he
5 could have an idea in the telecom space and, within the
6 same day, have a very unique insight in, let's say, the
7 energy trade. And you could talk with him 24/7 about
8 the markets and about investment opportunities.

9 And so Mr. Krigsfeld said, "And I think David
10 had a really, really uncanny ability to process, take
11 good ideas that he either came up with, him, or feed
12 off of the research that an analyst like myself would
13 give and translate that into an actionable strategy or
14 reverse it if need be if the market conditions
15 changed."

16 Before April of 2012, Mr. Moradi was very
17 innovative, diligent, and flexible. He was able to
18 adapt to market conditions so that Anthion could run.
19 He was able to respond and analyze so much information
20 so that he could make good decisions. And he made so
21 many good decisions for Anthion before April of 2012.

22 And Mr. Krigsfeld goes on to explain, "It's
23 just Dave's ability to process just a vast amount of
24 information of stocks. And the market was so crazy at
25 that time. You had to -- but, you know, it was

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1 seven-days-a-week intensity. He never let a detail
2 slip. He never missed a beat. So I would say his
3 ability to really move quickly, think quickly and
4 process a lot of multiple variables across a lot of
5 different industries, that's why he was able to
6 succeed."

7 And so he described that -- David as a
8 best-in-breed manager, a rising star. There's no
9 reason why he wouldn't be in the upper echelon. So
10 then, though, in April of 2012, or after that, he
11 noticed a change. He noticed it in 2013. And what he
12 talked about was he took a trip to Menlo Park with
13 Mr. Moradi to look at an investment opportunity and
14 meet with the board.

15 And during that time, normally David leads
16 everything. But that time, David wasn't asking the
17 right questions. He didn't express and exhibit the due
18 diligence that Joseph was used to seeing. And so Joe
19 had to actually take over that meeting and pipe in and
20 ask all the right questions so that they could do their
21 due diligence. And that was unusual.

22 Mr. Krigsfeld also explained that, as a hedge
23 fund manager, portfolio manager, you have fiduciary
24 duties to disclose any health issues. And a health
25 issue like this would be something that would have to

1 be disclosed.

2 I don't know if you remember in opening
3 statement by the defense, they played a video of
4 Mr. Moradi from his deposition when they ask him to
5 describe Anthion. Mr. Krigsfeld watched that video.
6 And he recalled it as being essentially the
7 presentation answer that they would give to all
8 potential sophisticated investors. And watching it, it
9 was obvious to Mr. Krigsfeld that Mr. Moradi had
10 problems and he was rambling and he was incoherent.

11 *(Video played.)*

12 "Q Now, just from your perspective as an
13 individual, can a person with cognitive
14 impairments run a hedge fund?

15 "A I mean -- from my experience, I mean,
16 just -- I guess the way I would equate it is --
17 you know, I guess in our industry, it's -- you
18 know, a boxer has, you know, his hands as gloves.
19 You know, a pitcher has his arm. You know, in our
20 industry, it's your quick thinking. You know?
21 And so if -- if that's in some way compromised,
22 then I don't see how you can be -- you know, how
23 you can really be at Anthion, why an investor
24 would trust you."

25 **MR. RAVIPUDI:** And that's the difference in

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1 getting to that upper echelon and being a successful
2 hedge fund manager is that you have to have that
3 certain level of function and ability, that, if you're
4 one step behind, you're out of the business. And
5 Mr. Moradi is 21 steps behind after this injury.

6 And so just describing him after the
7 incident, he said, "In 2013, he was just kind of muted,
8 a low-octane version of himself, just less idea
9 generation. And just that intensity, that ability to
10 move quickly was just less. You could see it."

11 And remember Brendan McHugh? He didn't
12 testify here, but his deposition was read. And he said
13 that the success of Anthion depended squarely on
14 Mr. Moradi. His ability to perform drove the success
15 of Anthion in general and the success of the portfolio.
16 And it depended on the decision-making of Mr. Moradi.

17 So Mr. Schwager, I briefly mentioned him
18 before, but, I mean, he's a 40-year veteran in the
19 financial industry, world-famous author. All the hedge
20 fund -- famous hedge fund managers have read his books.
21 And he evaluated Mr. Moradi's pre- and posttraumatic
22 brain injury performance at Anthion. And he said it
23 was like two different traders. And he went on and
24 said that, you know, all of the things that Mr. Moradi
25 had issues with -- verbal processing speed,

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1 decision-making, cognitive flexibility -- if those are
2 impaired, those are all of the qualities that a
3 successful hedge fund manager needs in planning,
4 deciding what to implement or liquidate. All of these
5 decisions and all of these executive-type functioning
6 is the definition of what you need to run a hedge fund.

7 And then he looked at it. And he looked at
8 the performance of Anthion. And here in the green is
9 Anthion from start to the time of injury. And then you
10 have this interim volatility period followed by the
11 after, which he put in red. And so he said -- based on
12 his analysis of all of the records he said, "Hey, look,
13 preinjury up until April of 2012, this is very good
14 performance on the part of Anthion."

15 And then he compared it to the index HFRI,
16 the market-neutral index. And he too explained that
17 what you've got here is the difference between Anthion
18 and the market was significant overperformance before
19 the injury and significant underperformance after the
20 injury. And so Anthion has a total disintegration
21 postinjury.

22 And, now, this -- this -- and you'll recall
23 even Mr. Moradi talked about this while he was on the
24 stand. This is comparing both Anthion to the
25 market-neutral index, the benchmark. And what you see

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1 is other than at the very beginning of 2008, when
2 Anthion is going up and the market's going down -- the
3 benchmark's going down, you see a correlation between
4 Anthion and the benchmark. And it correlates all the
5 way through up until the time of the injury. There's a
6 downturn in Anthion, there's a downturn in the -- in
7 the benchmark. And so that tracking is something
8 that's expected and -- and predictable and something
9 that sophisticated investors are used to.

10 What they're happy to see, though, is
11 overperformance. And Anthion was outperforming
12 preinjury. And then what happens after is significant
13 volatility and then a plunge. And it's a plunge while
14 the benchmark is going up. It's a plunge while the
15 market is doing good overall. So this change in
16 performance, as Mr. Schwager said, you couldn't make up
17 a more extreme difference from performance before and
18 after.

19 So the question was asked:

20 "Q Do you believe that's the cause of the
21 fund failing, the negative performance
22 postincident?

23 "A In my opinion, that's clearly the cause
24 of the fund's demise. It's a combination of that
25 tremendous magnitude of unbroken -- of the

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1 unbroken loss; second, the fact that it occurred
2 during a favorable market; third, that it took a
3 fund which had been up cumulatively as near as
4 well -- well over 56 percent, to be exact, down to
5 a negative 10 percent. All of those things would
6 be the type of performance that would make it
7 very, very difficult for that fund to raise any
8 money."

9 So when asked:

10 "Q What do you think about Mr. Moradi's
11 performance postinjury? Is that like a top
12 10 percent portfolio manager?"

13 And Mr. Schwager said:

14 "A It's more like a bottom 10 percent, if
15 not worse."

16 So in explaining what was -- in meeting with
17 Mr. Moradi -- he's met with a lot of hedge fund
18 managers. And he's interviewed a lot of them. He says
19 there's a crispness, a decisiveness with these
20 individuals. And what he saw with Mr. Moradi was that
21 his answers were a bit amorphous, a bit hazy, a bit
22 slow, not sharp. And those types of things postinjury
23 is how he presented.

24 Now, Jay Rogers, this is the expert that was
25 hired by the defense. He obviously didn't take the

1 stand, but we played some of his video. And here's
2 some of the things he said.

3 *(Video played.)*

4 "Q Now, what about volatility market
5 conditions? Is there any evidence from any --
6 anything that volatility or market conditions was
7 the cause of the fund to fail?

8 "A No."

9 **MR. RAVIPUDI:** So what you have here is even
10 the defense expert has no explanation for the fund's
11 failure, no explanation other than the brain injury for
12 this failure. It's not volatility or market
13 conditions. The market's going up. The benchmark's
14 going up. That's not the reason for the fund's
15 failure. It's the -- and so the only conclusion is
16 it's the brain injury.

17 *(Video played.)*

18 "Q You said you read the deposition of
19 Dr. Hirky?

20 "A Yes.

21 "Q Who's she?

22 "A A psychiatrist, psychologist, one of
23 those kind of doctors, that was his counselor and
24 evaluated him.

25 "Q And you saw where Dr. Hirky identified

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EXHIBIT 10

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AA001424

1 and the only issue is whether the security officers
2 acted negligently, not why they acted negligently.

3 So --

4 THE COURT: I was going to say, I had this
5 issue come up recently. And, essentially, with it
6 being respondeat superior liability, court cases here
7 in Nevada, anyway, seem to indicate that -- that you
8 don't have a separate action for negligent hiring and
9 supervision -- I mean hiring, training, and
10 supervision.

11 MS. CHANG: While he might be correct under
12 the principles of the law, I think there is an argument
13 because Mr. Dial raised why would anyone --

14 MR. HENRIOD: Sorry.

15 THE COURT: That's all right.

16 MS. CHANG: It's kind of cool.

17 MR. HENRIOD: Welcome to Vegas.

18 MS. CHANG: -- that there is --

19 THE COURT: A little smoky music as you talk.

20 MS. CHANG: Jazz.

21 Why would it happen? Why -- this is bad
22 business. And an answer that Mr. Nichter gave and that
23 is one that we will argue is they did it because
24 they're not properly trained, not that they're
25 negligent for not properly training, but it's an answer

1 to the question of this is bad business. Yes, it is.
2 They clearly did not have any training that they should
3 have had on, like, M.A.C.H. 2 maneuvers or whatever.
4 That's apparent on -- from the snowball effect of what
5 happened. It also counters why this all happened.
6 But --

7 THE COURT: Well, I mean, we're talking about
8 having a separate action for a negligent hiring.

9 MS. CHANG: Correct. I agree with
10 Mr. Roberts --

11 THE COURT: I don't think I -- don't have any
12 problem -- I mean, that seems to be a legitimate point
13 to say that they did -- they did this, and this is bad
14 business practice because they didn't know better.

15 MS. CHANG: We agree there's not a separate
16 claim.

17 THE COURT: They weren't supervised and all
18 of that kind of stuff.

19 MR. ROBERTS: It would be our position that,
20 if we get to a punitive phase, perhaps this question
21 could be raised. However --

22 THE COURT: I'm going to tell you, I'm
23 already guessing that Mr. Dial is going to be saying
24 why in the world would a successful nightclub, with
25 clients amazingly, in my mind, spending well over

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EXHIBIT 11

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1 Okay.

2 **MR. SCHULTZ:** And I'm sorry. When I say
3 "withdraw," I'm referring to the liability portion. We
4 still may need these witnesses for the punitive phase.

5 **THE COURT:** I'm not -- if you need them, you
6 can re-- you can do -- subpoena them again.

7 **MR. SCHULTZ:** Well, no -- no, but I'm not --
8 I'm not re-- I'm not withdrawing if we had proper
9 service of a subpoena on them --

10 **THE COURT:** Oh.

11 **MR. SCHULTZ:** -- you know, to force me to
12 have to go out and subpoena them again. So I'm
13 withdrawing the subpoena for purposes of the liability
14 portion --

15 **THE COURT:** Okay. All right.

16 **MR. SCHULTZ:** -- of this trial.

17 **THE COURT:** I understand what you're saying.
18 That's fine.

19 Okay. Do we want to talk about the Cochrans
20 now?

21 **MS. CHANG:** Yes.

22 **THE COURT:** Okay. Did you guys file anything
23 on the Cochrans?

24 **MR. ROBERTS:** We did not, Your Honor. We got
25 their brief at 8:00 this morning. And we were already

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1 on the way down --

2 **THE COURT:** Okay. That's fine.

3 **MR. ROBERTS:** -- but we're prepared to
4 respond orally.

5 **THE COURT:** That's fine. I just didn't want
6 to have something that I was missing.

7 All right. Okay. I'm sorry. My computer is
8 not working very fast.

9 Do you want to add anything to your paperwork
10 before I have defendants comment on it? If so, I'll
11 give you a chance to do that.

12 **MS. CHANG:** I didn't know if Your Honor had
13 any tentative to guide us originally or to indicate
14 where you might be thinking. That tends to make
15 arguments shorter on one side or the other.

16 **THE COURT:** Okay. Well, all right. As I
17 have pondered this, I tentatively -- I see that the
18 points that you've raised put the reputation of the
19 Marquee into -- into issue. And I agree generally with
20 your view that -- you know, the -- that the purpose in
21 doing that is to suggest the Marquee would never do
22 anything like this. But I -- and in that regard, I'm
23 generally good with you questioning, whether it be
24 Mr. Abdalla or someone else at the Marquee, that there
25 has been other -- at least other allegations of

1 misconduct that have been made against the Marquee.

2 But I'm not inclined in the liability phase
3 to essentially have a mini trial in reference to the
4 Cochrans. I see this to some degree in the context of,
5 you know, a person who puts the -- you know, the
6 defendant putting their character for peacefulness or
7 whatever it may be on -- at issue, and the parties
8 having a right to come back and, you know, reference
9 things that may undermine that reputation but not
10 necessarily to open up a mini trial and get into the
11 intrinsic evidence at this point.

12 The Cochrans, I see as being relevant in
13 terms of the issue of punitives. My inclination at
14 this point is not -- is to allow that testimony,
15 though, only in the second part of the trial, assuming
16 we get past the issue of liability and compensatory
17 damages. So that's where I'm coming from if you want
18 to take some time to add or supplement your writing.

19 **MS. CHANG:** Your Honor, I think if -- Your
20 Honor indicated that a few weeks ago there would be
21 more of a pause on our part to say good plan or
22 acceptable plan, even though we believe we wanted to
23 establish a pattern of abuse and a pattern of these
24 systematic failures and a pattern of just beating
25 patrons.

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1 But when you combine -- and where it all came
2 full circle, I believe, is in the testimony and the
3 questions by Mr. Dial of Mr. Yim. From the very
4 beginning of this case, from the very start of
5 Mr. Dial's opening statement, he knew about the Cochran
6 case. He knew about all of the allegations that were
7 brought there. And, even so, he told this jury that it
8 is so unusual, why would they ever do that, the only
9 thing that's different is Mr. Moradi. We make so much
10 money because of one reason, because we never do this.
11 And he said there's never been any guest that has to be
12 taken down to a point where they claimed they were
13 injured. This was a very unusual circumstances.

14 That was repeated by Mr. Mata. And then what
15 was very unfair is combining the next two. When David
16 Moradi was on the stand, obviously, Mr. Moradi knows
17 about the Cochrans because they share the same
18 attorney, Mr. Padma. And so he's saying:

19 "A I know they've done it.

20 "Q And so you would have this jury believe
21 that the Marquee owned by the TAO Group just beats
22 VIP guests routinely and covers it up?"

23 And he said:

24 "A I think they realized afterwards I was a
25 VIP, but they shouldn't do this to a person that

1 spent \$1. And my instinct tells me they've done
2 this to many people."

3 "Q Your instinct tells you that if they
4 beat up a VIP, who knows what the heck they'd do
5 to somebody who's only spent a couple hundred
6 dollars; right?

7 "A Absolutely.

8 "Q And you expect the jury to believe that?

9 "A I 100 percent expect the jury to believe
10 that."

11 He then, with his full knowledge, asked

12 Mr. Yim:

13 "Q During his testimony, Mr. Moradi said he
14 believes that the Marquee routinely abuses guests
15 and then covers it up. Have you ever seen Marquee
16 abusing guests?

17 "A No.

18 "Q Have you ever heard or been involved in
19 any attempt to cover up?

20 "A No.

21 "Q How do you feel about that accusation?

22 "A Ridiculous. Absolutely ridiculous.

23 We're here to -- that would just end our
24 business."

25 Now, when you take all of those combined, it

1 is a fraud perpetuated to this Court. It is a fraud
2 that is based on a lie. And Your Honor has the
3 inherent powers through equitable powers and legal
4 powers that have been afforded to him under Nevada law
5 because this whole case, their entire defense is based
6 on something that they and we and Your Honor all knows
7 is a lie.

8 I talked to the Cochrans. I know -- we've
9 talked to Mr. Nguyen. We know what they do, and the
10 similarities are shocking. And I know Your Honor has
11 the power to keep it in or to keep it out. We have
12 spent so much time in this case. And, at least on this
13 side of the table, we believe this case should stand
14 for something. There is something terribly wrong
15 that's going on at the Marquee. And we hope to be able
16 to show that, if not in this phase, then in the second
17 phase.

18 But can -- is it right for the defense to be
19 able to come in here and just flagrantly lie? And we
20 say they cannot. And we say that we have the right to
21 be able to -- to right the wrong that has been
22 knowingly committed and to -- the only remedy is to
23 bring people in who will prove that everything that was
24 said is not true. And it -- you know, just for the
25 record -- and I didn't want to waste Your Honor's

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1 precious five pages that you gave me to recite all the
2 facts of the case -- but in the Cochrans' case, for
3 example, he's undergone two surgeries because of what
4 happened to him that night.

5 And he discusses -- Mr. Cochran is actually
6 the son of a sergeant in the Riverside Police
7 Department. His uncle is a lieutenant in the Riverside
8 Police Department. Mrs. Cochran works for the
9 Riverside Sheriff's Department. They've never been in
10 a nightclub before. They have two small children.
11 They don't even know what nightclub life is like.

12 But, basically, they were here because of a
13 Farmers Insurance celebration at the Marquee for the
14 toppers, the top salesmen for Farmers Insurance.
15 Mr. Cochran was a topper that year. He was one of the
16 men being celebrated. And when they came, there was a
17 scuffle right by them. But, for some reason, they were
18 taken down to the ground and they were led away.
19 Mr. Cochran was separated from his wife. He was taken
20 to a room where there were no cameras. And they
21 choke-held him until he almost passed out. And then
22 they bashed his head against a door, causing the door
23 to come open. The paramedics saw it, burst out
24 laughing, closed the door so they could continue. And
25 then they beat him.

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1 And he kept saying my -- my -- he kept
2 telling them to call the police. They said, "Are you
3 going to admit that you attacked us?" And then -- and
4 he cries when he talks about it. He said it has ruined
5 his entire life. I believe the Cochrans are now
6 separated because of the whole incident. And,
7 basically, he kept begging them to remove the
8 handcuffs. And he said, "I'm not fighting you. I'm
9 not fighting you." And they said, "We'll let you go if
10 you say that you were attacking us." And then they
11 continued -- they tightened it. And they said, "Now
12 will you? Now will you?"

13 So it continues. And it's the same type of
14 treatment. He said he was bounced off every wall. He
15 hit his head. They hit -- they kept applying the choke
16 hold. He had bruises all over. And they finally found
17 out that he was a guest there and that he was also part
18 of the Farmers group. And he then was let go. And
19 they asked him if he was going to press charges. And,
20 at that time, he said, "I just want to go home."

21 And then he asked them, "Why didn't you just
22 call the police if you thought I had attacked you?
23 Because I wanted the police here." And they said, "We
24 choose not to bring charges against you."

25 Then Mr. Nguyen was a gentleman that,

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1 frankly, we didn't know that they were going to come
2 with this defense. But Mr. Nguyen was a person who
3 came much later and he -- in 2014. He had the crime of
4 committing -- of bringing a flask to a celebration.
5 When they saw the flask, they said he had to go. He
6 was leaving with his family. A bunch of security
7 officers separated him from his family and took him,
8 again, to a place where there were no cameras.

9 They choke-held him until he was about to
10 pass out. And they started beating him. And they also
11 said horrible things that I won't even say on the
12 record. And they -- oh, both Mr. Cochran and
13 Mr. Nguyen both, not even knowing each other, living
14 3,000 miles apart from each other, both said that both
15 the security officers took a picture of their IDs to
16 scare them and say "We know where you live."

17 And Mr. Nguyen photographed all of his
18 injuries and sent us all -- which we have supplied --
19 all the blood that was from that beating. And he was
20 let go only with the promise that he was not going to
21 pursue any of -- charges against them.

22 The similarity also is that, when you look at
23 the Cochrans' incident report, it looks just like
24 Mr. Moradi's except they're all listed under patron
25 misconduct, aggressive behavior, that they instigated

1 the problems. There are missing videotapes. There are
2 more videotapes for the Cochran incident, but, of
3 course, it doesn't show the room with no cameras where
4 he was taken to.

5 So I believe that, knowing all this, it makes
6 it even worse of what has been perpetuated in this
7 courtroom. We feel very passionately about it, Your
8 Honor. And we believe that them knowing that and
9 asking the questions they did, that the jury has been
10 tainted and Your Honor has been tainted. And we all
11 have been tainted by this cloud of falsehood.

12 And the -- the law and this trial should
13 always be about the truth. We stick to the truth. We
14 do not base this -- and there is something that's going
15 on in the Marquee. And maybe this trial will -- will
16 put an end to it. I hope so.

17 But I think I've said enough, Your Honor. I
18 think Your Honor has the power. I think that there has
19 to be some remedy that's stronger than just -- you saw
20 what happened when you allowed Mr. Schultz to ask
21 Mr. Yim about who's the head of operations.

22 "Q Do you know about the Cochran's?

23 "A No."

24 So that will get us nowhere with the Court
25 and --

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1 is, that they had three security guards, they had his
2 arm, they had a choke hold with one arm behind him, and
3 they slammed him into a door.

4 THE COURT: I mean, what video do you have of
5 this?

6 MS. CHANG: We have a video, which I could
7 show it now.

8 MR. RAVIPUDI: Exhibit 85.

9 MS. CHANG: It's Exhibit 85. And they are
10 first going to slam his door and it opens it. Then
11 they slam it to another door. And the paramedic laughs
12 and holds the door closed so they can keep slamming his
13 head against the door, so we'll show you --

14 THE COURT: All right. Go ahead and show me
15 the video.

16 MS. CHANG: So you're going to see one of the
17 doors open here. That's them, and they just slammed
18 his head. Now they're slamming that door -- him on
19 that door. And then this guy's going to hold it
20 closed.

21 And then they keep slamming him. In this
22 case they also put him in handcuffs. And they --
23 they're in that room with no camera. And then they're
24 going to bring him out in a little bit.

25 But as you can see from the reaction of these

1 guys, this is what they do.

2 MR. RAVIPUDI: So then they bring in -- they
3 say, Hey, time to fix him up. Go get your gear. And
4 then they go and get their medical equipment. Business
5 as usual.

6 This is a rally point.

7 MS. CHANG: So they're bringing their
8 equipment in.

9 And, Your Honor, while you're watching this,
10 I just want to point out that there's no case statute
11 or instruction that requires a prior adjudication.
12 What the jury pattern instruction --

13 THE COURT: I'm not suggesting that there is
14 an instruction that requires a prior adjudication. But
15 what I am saying is that I do have concerns in terms of
16 the -- you know, and I seen the video there. I'm going
17 to guess that the Marquee claims that they weren't
18 banging his head out on the door and that they -- the
19 head -- or whatever happened was appropriate in terms
20 of his conduct and his struggling and efforts to fight
21 the Marquee people.

22 Whether he's telling the truth or whether the
23 Marquee is telling the truth, that, again, comes into a
24 situation where we're -- you know, the Marquee has the
25 right to litigate this issue and to have it, then,

1 which was, you know, not justifiable in any way on its
2 own, and that, you know, there was a subsequent
3 cover-up by the Marquee in terms of that.

4 I'm not sure that that adds -- the additional
5 two events adds that much to the ultimate
6 reprehensibility of the act here itself to where I'm
7 concerned that the probative value of that outweighs
8 the real, real, real -- and the Supreme Court in Philip
9 Morris indicates -- the real, real potential that
10 this -- that the jury's going to be basing its damage
11 verdicts on the harm to these other individuals.

12 And, again, that gets back into the issues
13 that I spoke about this morning in reference to
14 potential more double -- double recovery.

15 MS. CHANG: I do believe --

16 THE COURT: And -- and the fact that it does
17 appear to involve different people, I have some
18 concerns in terms of whether this even properly fits
19 into the area of pattern.

20 So, you know, we're dealing, obviously, with
21 a very important issue, and I -- my feeling is that, in
22 this instance, the probative value is substantially
23 outweighed by the unfair -- unfair prejudice to where
24 I'm not inclined to let -- to let it in. So...

25 MS. CHANG: Do you want us to make our offer

1 of proof or do you think I already did?

2 THE COURT: Well, I mean, the video, you made
3 the offer of proof. You know --

4 MS. CHANG: It's disturbing, Your Honor,
5 isn't it?

6 MR. POLSENBERG: Your Honor, I'm not sure --

7 THE COURT: That's not where my, you know --
8 I'm, at this point in time, you know, needing to go and
9 going to go. But --

10 MR. ROBERTS: We would stipulate that the
11 filing of a written offer of proof would meet their
12 burden of preserving their arguments on this issue,
13 Your Honor. Okay. Sorry.

14 THE COURT: Written offer of --

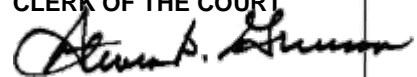
15 MR. POLSENBERG: No, no, no.

16 MR. ROBERTS: I've been overruled, Your
17 Honor.

18 MR. POLSENBERG: No, I don't think they need
19 a written offer of proof. It's quite clear what we're
20 talking about.

21 THE COURT: I'm sorry. Now you lost me.

22 MR. POLSENBERG: I overruled Mr. Roberts, who
23 said that they had to file a written offer of proof.
24 They don't need to do a written offer of proof. I
25 think they've got their record. And I've got my



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17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

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

Defendants.

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

HEARING REQUESTED

**DEFENDANT ROOF DECK
ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S MOTION
FOR SUMMARY JUDGMENT**

1 Comes now, Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub, by and
2 through its attorneys of record, and hereby moves for summary judgment of Plaintiff St. Paul Fire
3 & Marine Insurance Company's Fifth and Sixth Causes of Action in the First Amended Complaint.

4 This Motion is made and based upon the Memorandum of Points and Authorities,
5 Declarations of Nicholas B. Salerno and Bill Bonbrest in support thereof, the Appendix and all
6 attached Exhibits, all papers and pleadings on file with the Court in this action, and any argument
7 that may be heard at the hearing on this Motion.

8
9 DATED: September 12, 2019

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I.

INTRODUCTION

In the First Amended Complaint (“FAC”), St. Paul Fire & Marine Insurance Company (“St. Paul”) brings two purported subrogation claims—the Fifth and Sixth Causes of Action—against Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub (“Marquee”). However, neither cause of action can be maintained as a matter of law because subrogation claims for any loss paid by insurance have been waived.

The Nightclub Management Agreement (“NMA”) relied on by St. Paul in its flawed attempt to step into its insured Cosmopolitan’s shoes contains a “waiver of subrogation” provision: “All Owner Policies . . . shall contain a waiver of subrogation against . . . [Marquee].” (Declaration of Bill Bonbrest (“Bonbrest Decl.”), ¶ 6, Ex. 1.) And the relevant St. Paul insurance policy—which St. Paul refused to attach to the FAC or include in the motion to dismiss proceedings—also includes an endorsement precluding St. Paul from pursuing its subrogation claims against Marquee. Based on these express waiver provisions, St. Paul’s Fifth and Sixth Causes of Action against Marquee fail as a matter of law.

St. Paul’s Fifth and Sixth Causes of Action each independently fail on summary judgment for the following additional reasons:

- The Sixth Cause of Action for express indemnity fails because under the express terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan *only applies to losses not covered by insurance*. It is undisputed that Cosmopolitan did not sustain any uninsured losses.
- The Fifth Cause of Action for contribution fails under Nevada’s Uniform Contribution Act (NRS 17.255) because Cosmopolitan was found jointly and severally liable with Marquee for the intentional torts of assault, battery, and false imprisonment.
- The Fifth Cause of Action also fails because contribution is not an available remedy when the parties have entered a contract for express indemnity, such as under the NMA.

1 In light of the above, Marquee previously submitted a motion to dismiss St. Paul's claims
2 against Marquee in this matter. On February 28, 2019, the Court issued a minute order denying the
3 motion to dismiss on the premise such motion "introduces matters outside the scope of the initial
4 pleadings" relating to the operational agreement in question. St. Paul succeeded in its plan to
5 prolong unnecessarily this meritless lawsuit by selectively withholding from the FAC and the
6 motion to dismiss proceedings the core document referenced in its own pleadings. Nonetheless, the
7 motion to dismiss was denied without prejudice to raise the presented issues in a motion for
8 summary judgment.

9 Discovery has now established the true and correct copies of the NMA (the operational
10 agreement in question) that is relevant to a determination of the legal issues necessary to decide the
11 claims against National Union as a matter of law. Accordingly, Marquee hereby seeks summary
12 judgment of the Fifth Causes of Action for Contribution and the Sixth Cause of Action for Express
13 Indemnity.

14 II.

15 FACTUAL BACKGROUND

16 A. Underlying Action

17 This action arises out of an underlying bodily injury action captioned *David Moradi v.*
18 *Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case
19 No. A-14-698824-C ("Underlying Action"). (FAC ¶ 6.) Plaintiff David Moradi ("Moradi") alleged
20 that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan
21 Hotel and Casino to socialize with friends, when he was beaten by Marquee employees, whose
22 conduct was alleged to be ratified, encouraged and countenanced by the Cosmopolitan, resulting in
23 bodily injuries. (FAC ¶¶ 6-7.) Moradi filed a complaint against Nevada Property 1, LLC d/b/a The
24 Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee
25 Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery,
26 Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (FAC ¶¶ 8-10,
27 Exhibit A.) Moradi alleged that, as a result of his injuries, he suffered past and future lost

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1 wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit
2 A.)

3 Roof Deck Entertainment, LLC owns and operates the Marquee Nightclub. (FAC ¶ 4.)
4 Nevada Property 1, LLC owns and operates The Cosmopolitan of Las Vegas. (*Id.* ¶ 10.) Marquee
5 and Roof Deck Entertainment, LLC are the same entity. (*Id.* ¶ 4) Similarly, Nevada Property 1,
6 LLC and Cosmopolitan are the same entity. (*Id.* ¶ 10) Cosmopolitan is the owner of the subject
7 property where the Marquee Nightclub is located and leased the nightclub location to its subsidiary,
8 Nevada Restaurant Venture 1, LLC (“NRV1”). (FAC ¶ 10.) NRV1 entered into a written agreement
9 with Marquee to manage the nightclub. (FAC ¶ 10; Bonbrest Decl., Ex. 1.) Marquee is an insured
10 under the National Union policy. (FAC ¶ 30.) Cosmopolitan is an insured under the St. Paul policy.
11 (FAC ¶ 40; Declaration of Nicholas B. Salerno (“Salerno Decl.”), Ex. 2.)

12 During the course of the Underlying Action, Moradi asserted that Cosmopolitan, as the
13 owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced
14 exposure for breach of the non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)
15 Specifically, the Court held as a matter of law that the Cosmopolitan, as owner of the property, “had
16 a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security
17 officers...” and that Marquee and Cosmopolitan could be held jointly and severally liable. (RJN,
18 Ex. 3.)

19 After a five-week trial, the jury in the Underlying Action issued a special verdict on April
20 26, 2017 finding that Moradi established his claims for assault, battery, false imprisonment and
21 negligence against Marquee and Cosmopolitan jointly and that the actions of the employees of the
22 Marquee nightclub were a legal cause of injury or damage to Moradi and awarded compensatory
23 damages in the amount of \$160,500,000. (FAC, Ex. C.) After the verdict and during the punitive
24 damages phase of the trial, Moradi made a global settlement demand to Marquee and
25 Cosmopolitan. (FAC ¶ 66.) National Union, St. Paul and the other insurers accepted the settlement
26 demand and resolved the Underlying Action with the confidential contributions set forth in the FAC
27 filed by St. Paul under seal. (FAC ¶¶ 67-70.) The settlement was funded entirely by the various

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1 insurance carriers for the entities at issue as no defendant in the underlying case contributed any
2 money toward the settlement.

3 **B. St. Paul's Claims Against Marquee**

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

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

23 **C. Nightclub Management Agreement**

24 St. Paul's complaint asserts that “[p]er written agreement, Marquee was obligated to
25 indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action.”
26 (FAC ¶ 122.) St. Paul also alleges that “[p]er the terms of the written agreement, Marquee is also
27 liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the
28 express indemnity agreement.” (FAC ¶ 129.)

1 The written agreement referred to by St. Paul in the FAC is the NMA, dated April 21, 2010,
2 entered into between Marquee and NRV1 with regard to the Marquee Nightclub located within The
3 Cosmopolitan Hotel & Casino. (Bonbrest Decl., ¶¶ 3, 6, Ex. 1.) Cosmopolitan is identified as the
4 Project Owner in the Recitals section of the NMA and is also a signatory to the agreement both on
5 behalf of itself and NRV1, for which it is the Managing Member. (Bonbrest Decl., Ex. 1 at
6 T000064, T000152.)

7 While Cosmopolitan and NRV1 are related entities, Cosmopolitan and Marquee are separate
8 and unrelated entities and have separate towers of insurance. National Union and Aspen Specialty
9 Insurance Company are the direct insurers of Marquee while Zurich American Insurance Company
10 and St. Paul are the direct insurers of Cosmopolitan. (FAC ¶¶ 15, 30, 40, 69.) As set forth in the
11 NMA, Cosmopolitan is the Project Owner of the hotel casino and resort premises, including the
12 Marquee Nightclub venue. (Bonbrest Decl., Ex. 1 at T000064.) Cosmopolitan leased the premises
13 to its related entity, NRV1. (FAC ¶ 10.) In turn, NRV1 entered into the NMA in which Marquee
14 agreed to manage and operate the Marquee nightclub in the Cosmopolitan hotel. (Bonbrest Decl.,
15 Ex. 1 at T000064, T000087 – T000095.)

16 The NMA sets out the insurance requirements among the parties at Section 12. (Bonbrest
17 Decl., Ex. 1 at T000124 – T000126) Section 12.2.6 of the NMA includes a subrogation waiver
18 provision that precludes St. Paul's subrogation claims for express indemnity and contribution
19 against Marquee. Section 12.2.6 states:

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

23 (Bonbrest Decl., Ex. 1 at T000126) (emphasis added.)

24 Notably, the St. Paul policy also contains an endorsement entitled "Waiver of Rights of
25 Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to
26 waive its rights to recovery of payment for damages for bodily injury, property damage, or personal
27 injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of
28 recovery of such payment. (Salerno Decl., Ex. 2, at T000038.)

1 St. Paul attempts to subrogate against Marquee under the following express indemnity
2 provision in the NMA:

3 **13. Indemnity**

4 13.1 By [Marquee]. [Marquee] shall indemnify, hold harmless and defend
5 [NRV1] and its respective parents, subsidiaries and Affiliates and all of each of
6 their respective officers, directors, shareholders, employees, agents, members,
7 managers, representatives, successors and assigns ("Owner Indemnitees") from and
8 against any and all Losses to the extent incurred as a result of (i) the breach or
9 default by [Marquee] of any term or condition of this Agreement, or (ii) the
10 negligence or willful misconduct of [Marquee] or any of its owners, principals,
11 officers, directors, agents, employees, Staff, members, or managers ("[Marquee]
Representatives") **and not otherwise covered by the insurance required to be
maintained hereunder.** [Marquee's] indemnification obligation hereunder shall
include liability for any deductibles and/or self retained insurance retentions to the
extent permitted hereunder, and shall terminate on the termination of the Term;
provided however that such indemnification obligation shall continue in effect for a
period of three (3) years following the termination of the Term with respect to any
events or occurrences occurring prior to the termination of the Term.

12 13.2 By [NRV1]. [NRV1] shall indemnify, hold harmless and defend
13 [Marquee] and its respective parents, subsidiaries and Affiliates and all of each of
14 their respective officers, directors, shareholders, employees, agents, members,
15 managers, representatives, successors and assigns ("[Marquee] Indemnitees") from
16 and against any and all Losses to the extent incurred as a result of (i) the breach or
17 default by [NRV1] of any term or condition of this Agreement or (ii) the
18 negligence or willful misconduct of [NRV1] or any of its owners, principals,
officers, directors, agents, employees, members, or managers **and not otherwise
covered by the insurance required to be maintained hereunder.** [NRV1's]
indemnification obligation hereunder shall terminate on the termination of the
Term; provided, however, that such indemnification obligation shall continue in
effect for a period of three (3) years following the termination of the Term with
respect to any events or occurrences occurring prior to the termination of the Term.

19 (Bonbrest Decl., Ex. 1 at T000126 – T000127.) (Emphasis added.) Under Section 13 of the NMA,
20 any express indemnity obligation owed by Marquee to Cosmopolitan only applies to losses not
21 covered by insurance.

22 **III.**

23 **LEGAL STANDARDS**

24 Nevada Rules of Civil Procedure ("NRCP") 56(a) and (b) authorize the court to enter
25 summary judgment "upon all or any part" of the claims made by or against the moving party.
26 Summary judgment is appropriate when the pleadings and all other evidence before the court
27 demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to

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1 judgment as a matter of law. *Frederic and Barbara Rosenberg Living Trust v. MacDonald*
2 *Highlands Realty, LLC*, 427 P.3d 104, 109 (Nev. 2018); *Wood v. Safeway*, 121 Nev. 724 (2005).

3 While evidence is interpreted in favor of the non-moving party, the non-moving party must
4 “do more than simply show that there is some ‘metaphysical doubt’ as to the operative facts in
5 order to avoid summary judgment being entered in the moving party's favor.” *Wood*, 121 Nev. at
6 732 (quoting *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986)).
7 Accordingly, the non-moving party “must, by affidavit or otherwise, set forth specific facts
8 demonstrating the existence of a genuine issue for trial or have summary judgment entered against
9 him.” *Id.* (quoting *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110 (Nev. 1992)). This Motion
10 establishes that there is no genuine issue of material fact and Marquee is entitled to judgment as a
11 matter of law as to the claims asserted by St. Paul.

12 IV.

13 STATEMENT OF UNDISPUTED FACTS

No.	Undisputed Fact	Supporting Evidence
1.	This action arises out of an underlying bodily injury action captioned <i>David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.</i> , District Court Clark County, Nevada, Case No. A-14-698824-C (“Underlying Action”).	FAC ¶ 6
2.	In the Underlying Action, David Moradi (“Moradi”) alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was attacked by Marquee employees resulting in personal injuries.	FAC ¶¶ 6-7
3.	Moradi filed his complaint in the Underlying Action against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas (“Cosmopolitan”) and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub (“Marquee”) on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment.	FAC ¶¶ 8-10, Exhibit A.
4.	Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages.	FAC ¶ 9, Exhibit A.

No.	Undisputed Fact	Supporting Evidence
5.	During the course of the Underlying Action, Moradi asserted that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi.	FAC ¶ 13.
6.	The Court in the Underlying Action held as a matter of law that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers..." and that Marquee and Cosmopolitan could be held jointly and severally liable.	RJN, Ex. 3
7.	The Underlying Action went to trial and, on April 28, 2017, the jury returned a verdict in Moradi's favor and awarded compensatory damages in the amount of \$160,500,000.	FAC ¶ 60, Ex. C.
8.	After the verdict and during the punitive damages phase of the trial in the Underlying Action, Moradi made a global settlement demand to Marquee and Cosmopolitan	FAC ¶ 66.
9.	National Union, St. Paul and the other insurers accepted Moradi's settlement demand and resolved the Underlying Action, the specific contributions of which are confidential.	FAC ¶ 67-70.
10.	The April 21, 2010 NMA was entered into between Marquee and NRV1 with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino.	FAC ¶ 10; Bonbrest Decl., Ex. 1.
11.	Cosmopolitan leased the premises to its related entity, NRV1.	FAC ¶ 10
12.	Cosmopolitan is identified as the Project Owner in the Recitals section of the NMA.	Bonbrest Decl., Ex. 1, at T000064.
13.	Cosmopolitan is a signatory to the NMA both on behalf of itself and NRV1, for which it is the Managing Member.	Bonbrest Decl., Ex. 1, at T000152
14.	Cosmopolitan and NRV1 are related entities.	FAC ¶ 10
15.	Cosmopolitan and Marquee are separate and unrelated entities.	FAC ¶¶ 4, 10
16.	Cosmopolitan is the Project Owner of the hotel casino and resort premises, including the Marquee Nightclub venue.	Bonbrest Decl., Ex. 1, at T000064.
17.	NRV1 entered into the NMA in which Marquee agreed to manage and operate the Marquee nightclub in the Cosmopolitan hotel.	Bonbrest Decl., Ex. 1, at T000064 ; T000087 – T000095

No.	Undisputed Fact	Supporting Evidence
18.	<p>The NMA provides:</p> <p>1. <u>Definitions</u></p> <p>...</p> <p>“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.</p>	Bonbrest Decl., Ex. 1, at T000072
19.	<p>The NMA provides:</p> <p>12. <u>Insurance</u></p> <p>12.1 <u>[NRV1’s] Insurance.</u> During the Term of this Agreement, [NRV1] shall provide and maintain the following insurance coverage, at its sole cost and expense . . .:</p> <p>...</p> <p>12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage, with a combined single limit of not less than Two Million Dollars (\$2,000,000) for each occurrence, and at least Four Million Dollars (\$4,000,000) in the aggregate, including excess coverage; and</p> <p>12.1.3 Any coverage required under the terms of the Lease to the extent such coverage is not the responsibility of [Marquee] to provide pursuant to <u>Section 12.2</u> below.</p> <p>12.2 <u>[Marquee’s] Insurance.</u></p> <p>12.2.1 During the Term</p>	Bonbrest Decl., Ex. 1, at T000124 – T000126

No.	Undisputed Fact	Supporting Evidence
	<p>of this Agreement, [Marquee] shall provide and maintain the following insurance coverage (the "[Marquee] Policies"), the cost of which shall be an Operating Expense:</p>	
	<p>12.2.1.1 Commercial general liability insurance (occurrence form), including broad form contractual liability coverage, with minimum coverages as follows: general aggregate - \$4,000,000; products-completed operations aggregate - \$4,000,000 personal and advertising injury - \$5,000,000; liquor liability - \$1,000,000 with \$4,000,000 liquor liability annual aggregate each occurrence - \$2,000,000; . . . and medical expense (any one person) - \$5,000;</p>	
	<p>12.2.1.2 Excess liability insurance (follow form excess or umbrella), liquor liability, commercial general liability, automobile liability and employers liability), with minimum coverages as follows: each occurrence - \$25,000,000; aggregate - \$25,000,000;</p>	
	<p>...</p>	
	<p>12.2.3 Except with respect to workers compensation and the employee practices liability insurance, [NRV1], [Cosmopolitan], the landlord and tenant under the Lease, Hotel Operator, their respective parents, subsidiaries and Affiliates, and their respective officers, directors, officials, managers, employees and agents (collectively "Owner Insured Parties"), shall all be named as additional insureds on all other [Marquee] Policies.</p>	
	<p>...</p>	
	<p>12.2.5 All insurance coverages maintained by [Marquee] shall be primary to any insurance coverage maintained by any Owner Insured Parties (the "Owner Policies"), and any such Owner Policies shall be in excess</p>	

No.	Undisputed Fact	Supporting Evidence
	<p>of, and not contribute towards, [Marquee] Policies. The [Marquee] Policies shall apply separately to each insured against whom a claim is made, except with respect to the limits of the insurer's liability.</p> <p>12.2.6 All Owner Policies and [Marquee] Policies shall contain a waiver of subrogation against the Owner Insured Parties and [Marquee] and its officers, directors, officials, managers, employees and agents and the [Marquee] Principals. The coverages provided by [NRV1] and [Marquee] shall not be limited to the liability assumed under the indemnification provisions of this Agreement.</p>	
20.	<p>The NMA provides:</p> <p>13. <u>Indemnity</u></p> <p>13.1 By [Marquee]. [Marquee] shall indemnify, hold harmless and defend [NRV1] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("Owner Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [Marquee] of any term or condition of this Agreement, or (ii) the negligence or willful misconduct of [Marquee] or any of its owners, principals, officers, directors, agents, employees, Staff, members, or managers ("[Marquee] Representatives") and not otherwise covered by the insurance required to be maintained hereunder. [Marquee's] indemnification obligation hereunder shall include liability for any deductibles and/or self retained insurance retentions to the extent permitted hereunder, and shall terminate on the termination of the Term; provided however that such indemnification obligation shall</p>	Bonbrest Decl., Ex. 1, at T000126 – T000127

No.	Undisputed Fact	Supporting Evidence
	<p>continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.</p> <p>13.2 By [NRV1]. [NRV1] shall indemnify, hold harmless and defend [Marquee] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns (“[Marquee] Indemnitees”) from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [NRV1] of any term or condition of this Agreement or (ii) the negligence or willful misconduct of [NRV1] or any of its owners, principals, officers, directors, agents, employees, members, or managers and not otherwise covered by the insurance required to be maintained hereunder. [NRV1’s] indemnification obligation hereunder shall terminate on the termination of the Term; provided, however, that such indemnification obligation shall continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.</p>	
21.	<p>The NMA provides:</p> <p>20. <u>Third Party Beneficiary</u></p> <p>Except as otherwise expressly provided herein, the Parties acknowledge and agree that [NRV1] may assign, delegate or jointly exercise any or all of its rights and obligations hereunder to or with any one or more of the following: [Cosmopolitan], Hotel Operator, Casino Operator and/or their Affiliates, or any successors thereto (collectively “Beneficiary Parties”). All such Beneficiary Parties to whom certain rights and obligations of [NRV1] have been assigned shall, to the extent of such assigned, delegated or shared rights and obligations, be an express and intended third-party beneficiary of this Agreement. Without limiting the generality of the foregoing, Beneficiary Parties shall have the right</p>	Bonbrest Decl., Ex. 1, at T000141

No.	Undisputed Fact	Supporting Evidence
	to enforce the obligations of [NRV1] to the extent of the rights and obligations assigned to, delegated to or shared with the Beneficiary Party by [NRV1]. Except as provided above, nothing in this Agreement, express or implied, shall confer upon any person or entity, other than the Parties, their authorized successors and assigns, any rights or remedies under or by reason of this Agreement.	
22.	<p>The NMA provides:</p> <p>28. <u>Attorneys' Fees</u></p> <p>In the event of a dispute between the Parties concerning the enforcement or interpretation of this Agreement, the prevailing party in such dispute, whether by legal proceedings or otherwise, shall be reimbursed immediately by the other party to such dispute for reasonably incurred attorneys' fees and other costs and expenses. In the event it becomes necessary for any party to retain legal counsel for the representation of its rights hereunder in or in connection with the bankruptcy of another party, such party, if successful therein, shall be reimbursed immediately by the party in bankruptcy for reasonably incurred attorneys' fees and other costs and expenses.</p>	Bonbrest Decl., Ex. 1, at T000144
23.	Marquee is an insured under National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("National Union Policy")	FAC ¶ 30; Declaration of Richard C. Perkins in Support of National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment, Ex. 1.
24.	Cosmopolitan is an insured under St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group ("St. Paul Policy")	FAC ¶ 40; Salerno Decl., Ex. 2.

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No.	Undisputed Fact	Supporting Evidence
25.	Marquee was a named insured on the Aspen and National Union Policies, while Cosmopolitan was a named insured under the St. Paul Policy and a primary policy issued by Zurich American Insurance Company.	FAC ¶¶ 15, 24, 30, 33, 40-41.
26.	Cosmopolitan was an additional insured under the policies issued by Aspen and National Union.	FAC ¶¶ 15, 24, 30, 33, 40-41.
27.	St. Paul policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery of such payment.	Salerno Decl., Ex. 2, at T000038

V.

ST. PAUL'S FIFTH AND SIXTH CAUSES OF ACTION FOR SUBROGATION ARE BARRED BY THE SUBROGATION WAIVER PROVISIONS CONTAINED IN THE NIGHTCLUB MANAGEMENT AGREEMENT AND ST. PAUL'S POLICY

St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated to the rights of Cosmopolitan for contribution and express indemnity against Marquee. (FAC ¶¶ 116 and 126.) However, pursuant to Section 12.2.6 of the NMA, all policies issued to NRV1, Marquee, and Cosmopolitan are required to contain a waiver of subrogation for any claims against each other. In accordance with this requirement, the St. Paul policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery for such payment. (Salerno Decl., Ex. 2, at T000038.)

Waiver of subrogation provisions have been universally enforced. *See Davlar Corp. v. Superior Court*, 53 Cal.App.4th 1121, 1125 (1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 26 Cal.App.4th 1194 (1994) (waiver of rights for damages covered by insurance barred insurer's subrogation suit.); *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 169 Cal.App.4th 415 (2008) (holding tenant's failure to obtain the full amount of liability insurance required by lease did not preclude enforcement of subrogation waiver); *Commerce & Indus. Ins. Co. v. Orth*, 254 Or.

1 226 (1969) (holding insurer waived its subrogation rights against various contractors); *Touchet*
2 *Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 119 Wn.2d 334, 342 (1992)
3 (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, 2016 WL 4425095,
4 *7 (D.N.M. Feb. 29, 2016) (finding subrogation waivers serve important public policy goals, such
5 as “encouraging parties to anticipate risks and to procure insurance covering those risks, thereby
6 avoiding future litigation, and facilitating and preserving economic relations and activity.”)
7 (Citation omitted.) Pursuant to the express indemnity provision in the NMA, the parties agreed that
8 Marquee, NRV1 and Cosmopolitan would waive any claims against each other that were paid with
9 insurance proceeds.

10 The intent to waive subrogation rights for losses covered by insurance is clear as a matter of
11 law. Pursuant to Section 12.2.6 of the NMA, Cosmopolitan and Marquee mutually agreed that all
12 insurance policies issued to them would contain a waiver of subrogation of the insurers’ rights
13 against Cosmopolitan and Marquee. Thus, the clear and unambiguous intent of Cosmopolitan and
14 Marquee was to waive subrogation rights against each other for any losses paid by insurance
15 proceeds. To find otherwise would be inconsistent with the terms of the NMA and St. Paul’s
16 waiver of subrogation provision.

17 Undoubtedly, St. Paul will assert, as it did in opposition to the motion to dismiss, that the
18 subrogation waiver requirements of the NMA and the St. Paul policy do not apply because
19 Cosmopolitan, as the Project Owner, only agreed to be bound with respect to certain provision of
20 the NMA, which did not include the subrogation waiver provision contained in 12.2.6 of the NMA.
21 This argument fails because it ignores that Section 17.2 of the Lease attached as Exhibit D to the
22 NMA delegated NRV1’s insurance requirements under the NMA to Cosmopolitan. Section 17.2 of
23 the Lease provides that Cosmopolitan shall procure “all insurance required to be obtained by”
24 NRV1 under Section 12.1 of the NMA. (Bonbrest Decl., Ex. 1, at T000172, T000183.) Even if
25 Section 12.1 of the NMA was not one of the provisions of the NMA to which Cosmopolitan
26 expressly agreed to be bound, Cosmopolitan expressly assumed NRV1’s obligation to provide the
27 insurance required by Section 12.1 of the NMA in Section 17.2 of the Lease. Accordingly,

28 ///

1 Cosmopolitan assumed the obligation to procure insurance that complied with all of the terms of
2 Section 12, including the waiver of subrogation obligation set out in Section 12.2.6.

3 It is clear from the express terms of the NMA that the St. Paul policy, which was procured
4 by Cosmopolitan pursuant to the requirements of the NMA, is subject to the waiver of subrogation
5 provision. Section 12.2.6 of the NMA provides that the waiver of subrogation requirement applies
6 to both "Operator Policies" and "Owner Policies." "Operator Policies" are defined as Marquee's
7 insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance maintained by
8 any "Owner Insured Parties." (Bonbrest Decl., Ex. 1, at T000078, T000080, T000126.) Section
9 12.2.3 of the NMA defines "Owner Insured Parties" to include the Owner (NRV1), the Project
10 Owner (Cosmopolitan), the landlord and tenant under the Lease (also Cosmopolitan and NRV1),
11 their respective parents, subsidiaries, affiliates, and other related persons and entities. (Bonbrest
12 Decl., Ex. 1, at T000126.) Cosmopolitan need not expressly agree to the subrogation waiver
13 provision when the unambiguous language of the NMA establishes that the subrogation rights were
14 waived and Cosmopolitan assumed the obligation to procure the Owner Insured Parties' insurance
15 requirements set out in Section 12.2.6 of the NMA. Accordingly, despite St. Paul's contentions
16 otherwise, the waiver of subrogation clause in the NMA expressly applies to Cosmopolitan's
17 insurance requirements, including the policy issued by St. Paul, which mandated that
18 Cosmopolitan's policies include a waiver of subrogation against Marquee. Where, as here, it is
19 undisputed that the loss at issue was funded by insurance proceeds, St. Paul's subrogation claims
20 for contribution and express indemnity contained in the Fifth and Sixth Causes of Action fail as a
21 matter of law given it steps into Cosmopolitan's shoes and Cosmopolitan and St. Paul waived any
22 subrogation rights.

VI.

**ST. PAUL'S SIXTH CAUSE OF ACTION FOR EXPRESS INDEMNITY ALSO FAILS
BECAUSE MARQUEE'S INDEMNITY OBLIGATION APPLIES ONLY
TO LOSSES THAT ARE NOT COVERED BY INSURANCE**

26 In the FAC, St. Paul alleges without support that Marquee accepted Cosmopolitan's
27 contractual indemnity tender. (FAC ¶ 25.) Even if this allegation were true, it does not save St.
28 Paul's claim because Marquee's acceptance of Cosmopolitan's tender does not change the fact that,

1 pursuant to the terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan
2 only applies to losses not covered by insurance. It is undisputed that the settlement in the
3 Underlying Action was paid by Marquee and Cosmopolitan's insurers. Cosmopolitan did not
4 sustain any uninsured losses. As such, Marquee owes no express indemnity to Cosmopolitan and
5 by extension, St. Paul, whose rights are no greater than Cosmopolitan's rights.

6 Pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify, hold harmless and
7 defend NRV1 and its parents, subsidiaries and affiliates (including Cosmopolitan), from and against
8 losses to the extent incurred as a result of the breach or default by Marquee of any term or condition
9 of the Agreement, or the negligence or willful misconduct of Marquee that is not otherwise covered
10 by the insurance required to be maintained under the Agreement. (Bonbrest Decl., Ex. 1, at
11 T000126) (Emphasis added.) The NMA further defines "losses", in pertinent part, as "liabilities,
12 obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of
13 a Person not reimbursed by insurance." (Bonbrest Decl., Ex. 1, at T000072) (Emphasis added.) St.
14 Paul's failure to accurately cite the indemnity provision in the NMA, including the underlined
15 portion of the provision, is crucial as it clearly defeats St. Paul's claim.

16 Nevada courts strictly construe indemnity obligations and will enforce them in accordance
17 with the terms of the contracting parties' agreement. *See United Rentals Hwy. Techs. v. Wells*
18 *Cargo*, 128 Nev. Adv. Op. 59 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev.*
19 *Co., Inc.*, 127 Nev. 331 (2011); *Contreras v. American Family Mut. Ins. Co.*, 135 F.Supp.3d 1208,
20 1231 (D.Nev. 2015); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F.Supp.2d 1262,
21 1268 (D.Nev. 2008) ("It is well settled that a court should enforce a contract as it is written, should
22 not create a new contract by rewriting unambiguous terms, and has no power to create a new
23 contract.") As explained by the Nevada Supreme Court in *United Rentals*:

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

27 *Id.* at 229.

28 ///

1 The exclusion of insurance payments from the definition of “losses” in Section 1 of the
2 NMA and the inclusion of the phrase “and not otherwise covered by the insurance required to be
3 maintained hereunder” in the indemnity provision set out in Section 13.1 expressly limit any
4 purported indemnity obligation by Marquee to uninsured losses. When construing the waiver of
5 subrogation provision in Section 12.2.6 with the mutual indemnity provisions in Section 13 of the
6 NMA, the intent of the parties to the agreement is clear in limiting their respective indemnity
7 obligations to losses paid out-of-pocket by the respective indemnitees rather than any loss paid by
8 their insurers. Cosmopolitan’s defense in the underlying action and its joint and several liability for
9 the verdict and resulting settlement were paid for by insurance. (FAC ¶¶ 67 - 70.) Thus, there is no
10 uninsured loss for which Cosmopolitan could pursue indemnity against Marquee. Stated another
11 way, as Cosmopolitan has no losses that were not reimbursed by insurance, Cosmopolitan has no
12 right to indemnity from Marquee. Accordingly, St. Paul has no valid subrogation claim for express
13 indemnity and, therefore, the Sixth Cause of Action against Marquee fails as a matter of law.

14 VII.

15 ST. PAUL’S FIFTH CAUSE OF ACTION FOR STATUTORY SUBROGATION FOR 16 CONTRIBUTION PURSUANT TO NRS 17.225 (UNIFORM CONTRIBUTION ACT) 17 ALSO FAILS AS A MATTER OF LAW DUE TO THE FINDING THAT 18 COSMOPOLITAN WAS LIABLE FOR THE INTENTIONAL 19 TORTS OF ASSAULT, BATTERY, AND 20 FALSE IMPRISONMENT

19 St. Paul’s statutory subrogation claim for contribution fails as there is no right of
20 contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury.
21 NRS 17.255.¹ In the Underlying Action, Cosmopolitan was found jointly and severally liable with
22 Marquee on all of Moradi’s asserted claims, including the intentional tort claims for assault, battery,
23 and false imprisonment. (FAC ¶¶ 13-14, Ex. C.) Given Cosmopolitan was found by the jury to be
24 jointly liable with Marquee for intentional tort claims that contributed to Moradi’s injury, such a
25 finding precludes Cosmopolitan (and St. Paul) from pursuing contribution from Marquee.

26
27 ¹ Worth noting is that any claim for contribution would also be barred by a determination of good faith
28 settlement pursuant to NRS 17.245.

VIII.

**ST. PAUL'S FIFTH CAUSE OF ACTION FOR STATUTORY SUBROGATION FOR
CONTRIBUTION PURSUANT TO NRS 17.225 (UNIFORM CONTRIBUTION ACT)
ALSO FAILS AS A MATTER OF LAW BECAUSE A CLAIM FOR
CONTRIBUTION IS NOT AVAILABLE WHEN THE
PARTIES HAVE CONTRACTED FOR
EXPRESS INDEMNITY**

Pursuant to NRS 17.265, when a tortfeasor has a right to indemnity from another tortfeasor, there is no right to contribution under the Uniform Contribution Act. *See also, Calloway v. City of Reno*, 113 Nev. 564, 578 (1997) ("implied indemnity theories are not viable in the face of express indemnity agreements.") As set forth above, the NMA contains an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was covered by insurance. Given the existence of Cosmopolitan's contractually defined right to indemnity from Marquee, it has no statutory or equitable right to contribution under the Uniform Contribution Act pursuant to NRS 17.265. St. Paul will likely assert, as it did in opposition to the motion to dismiss, that the contribution claim is permitted because it is an alternative theory of recovery to the express indemnity claim. Such an argument, however, is a red herring, when a contribution theory of recovery is not permitted because the parties have entered a contract for express indemnity. Given the contract for express indemnity, Cosmopolitan has no statutory claim for contribution under NRS 17.265 as a matter of law.

IX.

MARQUEE IS ENTITLED TO RECOVER ATTORNEYS' FEES FROM ST. PAUL

Section 28 of the NMA provides that, in the event of a dispute regarding the enforcement or interpretation of the agreement, the prevailing party shall be reimbursed for reasonably incurred attorneys' fees and other costs and expenses. (Bonbrest Decl., Ex. 1, at T000144.) Given St. Paul's claims against Marquee fail as a matter of law, Marquee's motion for summary judgment should be granted and the Court should award Marquee its attorneys' fees and costs as the prevailing party under the terms of the NMA.

Notwithstanding the prevailing party provision in the NMA, NRS 18.010(2)(b) also provides grounds for the Court to award Marquee its attorneys' fees. Pursuant to NRS 18.010(2)(b),

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

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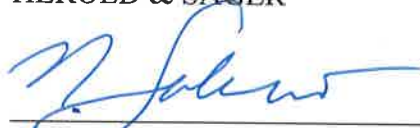
CONCLUSION

Based on the foregoing, the Court should grant Marquee's Motion for Summary Judgment and award its attorneys' fees and costs.

DATED: September 12, 2019

HEROLD & SAGER

By:



Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
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KELLER/ANDERLE LLP
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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 declare under the penalty of perjury of the State of Nevada that the following is true and correct:

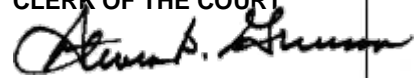
That on September 13, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

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, ST. PAUL FIRE & MARINE INSURANCE COMPANY
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	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 **DECL**

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22 Attorneys for Defendants NATIONAL UNION FIRE INSURANCE

23 COMPANY OF PITTSBURGH, PA & ROOF DECK

24 ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB

25 **DISTRICT COURT**

26 **CLARK COUNTY, NEVADA**

27 ST. PAUL FIRE & MARINE INSURANCE
28 COMPANY,

Plaintiffs,

vs.

29 ASPEN SPECIALTY INSURANCE
30 COMPANY; NATIONAL UNION FIRE
31 INSURANCE COMPANY OF
32 PITTSBURGH PA.; ROOF DECK
33 ENTERTAINMENT, LLC d/b/a MARQUEE
34 NIGHTCLUB; and DOES 1 through 25,
35 inclusive,

Defendants.

CASE NO.: A-17-758902-C

DEPT.: XXVI

**DECLARATION OF NICHOLAS B.
SALERNO IN SUPPORT OF
DEFENDANT ROOF DECK
ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S MOTION
FOR SUMMARY JUDGMENT**

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I, Nicholas B. Salerno, declare as follows:

1. I am an attorney with the law firm of Herold & Sager, counsel for Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"). I have personal knowledge of the facts stated herein and, if called as a witness, I could competently testify thereto.

2. Attached hereto as Exhibit 2 Marquee's Appendix of Exhibits in support of Motion for Summary Judgment is a true and correct copy of St. Paul Policy No. QK 06503290, produced in this action by St. Paul as part of its initial disclosures.

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

Dated this 12th day of September, 2019.



Nicholas B. Salerno

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

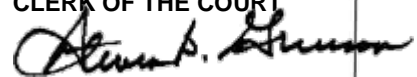
That on September 13, 2019, service of DECLARATION OF NICHOLAS B. SALERNO IN SUPPORT OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

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, ST. PAUL FIRE & MARINE INSURANCE COMPANY
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	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 **DECL**

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4 NICHOLAS B. SALERNO, ESQ.

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

25 **DISTRICT COURT**

26 **CLARK COUNTY, NEVADA**

27 ST. PAUL FIRE & MARINE INSURANCE
28 COMPANY,

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

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.

**DECLARATION OF BILL BONBREST IN
SUPPORT OF DEFENDANT ROOF
DECK ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S MOTION
FOR SUMMARY JUDGMENT**

1 I, Bill Bonbrest, declare as follows:

2 1. I am the Chief Operating Officer ("COO") for TAO Group, a related entity to Roof
3 Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"). I am involved in the management
4 of Marquee and am authorized to make this declaration on behalf of Marquee.

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

8 3. Marquee entered into a Nightclub Management Agreement with Nevada Restaurant
9 Venture 1, LLC on April 21, 2010 with regard to the Marquee Nightclub located within The
10 Cosmopolitan Hotel & Casino.

11 4. As part of my job responsibilities as COO, I am required to maintain, monitor,
12 review and be acquainted with the management agreements for the various nightclubs and other
13 venues of the TAO Group, including the Nightclub Management Agreement for the Marquee
14 Nightclub.

15 5. I reviewed the Nightclub Management Agreement for the Marquee Nightclub and
16 am familiar with its contents.

17 6. A true and correct copy of the Nightclub Management Agreement is filed under
18 temporary seal as Exhibit 1 to Marquee's Appendix of Exhibits in support of its Motion for
19 Summary Judgment.

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

22 Dated this 13th day of September, 2019.



23
24 Bill Bonbrest

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

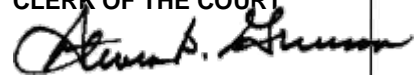
That on September 13, 2019, service of DECLARATION OF BILL BONBREST IN SUPPORT OF DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

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, ST. PAUL FIRE & MARINE INSURANCE COMPANY
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	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


Julie A. Bloedel



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2 Nevada Bar No. 7378
NICHOLAS B. SALERNO, ESQ.
3 Nevada Bar No. 6118
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14 Attorneys for Defendants NATIONAL UNION FIRE
15 INSURANCE COMPANY OF PITTSBURGH PA. and
ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

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

27 Defendants.
28

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

**DEFENDANT ROOF DECK
ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S APPENDIX
OF EXHIBITS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

1 Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub, by and through its
2 counsel, hereby submits the following Appendix of Exhibits in support of Motion for Summary
3 Judgment.

4 **Exhibit 1:** Nightclub Management Agreement Between Nevada Restaurant Venture 1,
5 LLC and Roof Deck Entertainment, LLC (**Filed under temporary seal**
6 **pursuant to S.C.R. Part VII, Rule 3.2.)**

7 **Exhibit 2:** St. Paul Policy No. QK 06503290

8 **Exhibit 3:** Excerpt of the March 24, 2017 transcript of trial proceedings in the
9 underlying bodily injury action captioned *David Moradi v. Nevada Property*
10 *1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada,
11 Case No. A-14-698824-C

12
13 DATED: September 12, 2019

HEROLD & SAGER

14
15
16 By: 

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
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20 KELLER/ANDERLE LLP
21 Jennifer Lynn Keller, Esq. (Pro Hac Vice)
22 Jeremy Stamelman, Esq. (Pro Hac Vice)
23 18300 Von Karman Ave., Suite 930
24 Irvine, CA 92612

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

EXHIBIT 1

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

EXHIBIT 1

EXHIBIT 2

EXHIBIT 2

CERTIFIED POLICY

This certification is affixed to a policy which is a true and accurate copy of the document in the company's business records as of the date shown below.

No additional insurance is afforded by this copy.

St. Paul Fire and Marine Insurance Company

Name of Insuring Company(ies)

QK 06503290

Policy Number(s)

03/01/11 to 03/01/13

Policy Period(s)

04/24/18

Date



Kenneth Kupec, Second Vice President
BI Document Management



DECLARATIONS

St. Paul Fire and Marine Insurance Company

2 JERICHO PLAZA
JERICHO NY 11753

Item 1. Named Insured: PREMIER HOTEL INSURANCE GROUP (P2)
"A RISK PURCHASING GROUP"
Address: 10900 NE 4TH STREET
SUITE 1100
BELLEVUE WA 98004

Item 2. Policy Period: From: 03/01/2011 To: 03/01/2013
At 12:01 A.M. Standard Time at the address of the Named Insured shown above

Item 3. Limits Of Insurance

The Limits Of Insurance, subject to all the terms of this policy, are:

- A. \$25,000,000 Each occurrence
- B. \$100,000,000 General aggregate (in accordance with Section III, Limits Of Insurance)
- C. \$25,000,000 Products-Completed Operations aggregate (in accordance with Section III, Limits Of Insurance)

Item 4. Self Insured Retention \$0

Item 5. Premium: \$TBD
Surcharge/Surtax:

Rate, if applicable:

Minimum premium,
if applicable: \$

Item 6. Agent: NATIONAL SPECIALTY UNDERWRITERS
10900 NE 4TH STREET
SUITE 1100
BELLEVUE WA 98004

Agency Number: 4601026

Item 7. Endorsements attached: See attached schedule.

Item 8. Policy Number: QK06503290
This Replaces Policy Number: QK06502174

Brian MacLean
President

Wendy C. Shy
Secretary

POLICY FORM LIST

Here's a list of all forms included in your policy, on the date shown below. These forms are listed in the same order as they appear in your policy.

Title	Form Number	Edition Date
Disclosure Notice Terrorism Risk Insurance Act Of 2002	D0100	03-09
Declarations (St. Paul Fire and Marine Insurance Company)	SU089	03-03
Policy Form List	40705	05-84
What To Do If You Have A Loss - Specialty Commercial Umbrella Liability Policy	SU106	05-03
Specialty Commercial Umbrella Liability Policy	SU001	10-02
Amendment of Cancellation Notice	SU007	10-02
Claims-Made Coverage And Extended Reporting Period Endorsement	SU015	06-08
Anti-Stacking Endorsement	SUP028	02-10
Pollution Exclusion Exception For Certain Equipment Including Pollutants From Swimming Pools And Garages	SUP029	02-10
Employee Benefit Liability Endorsement	SU035	06-08
Lead Exclusion	SU050	10-02
Mold or Other Fungi or Bacteria Exclusion	SU061	10-02
Pesticide, Herbicide or Fertilizer Applications Endorsement	SU070	10-02
Waiver of Rights of Recovery Endorsement	SU085	10-02
Scheduled Retained Limits	SU091	03-03
Scheduled Underlying Insurance	SU109	08-08
Scheduled Underlying Insurance - Continued	SU110	03-03
Silica Exclusion	SU157	08-04
Washington Amendatory Endorsement	SU162	09-04
Unsolicited Communication Exclusion Endorsement	SU163	10-04
Application Of Limits Of Insurance	SU221	04-11
Auto Liability Limits of Ins. End't. - Exception for Damages Not Subj to Underlying Aggregate Limit Applies Only to Auto	SU244	10-06
Auto Liability Limitation	SU257	03-07
Garagekeepers Legal Liability	SU260	04-07
Pollution Exclusion Except Building Heating Or Air Conditioning Equipment Or Water Heating Equipment	SU267	03-07
Knowledge Of Occurrence Or Claim	SU280	12-07
Crisis Management Service Expense Endorsement	SU300	12-09
Failure To Notify Insurer Of Occurrence	SUM189	04-08

Name of Insured	Policy Number QK06503290	Effective Date 03/01/11
PREMIER HOTEL INSURANCE GROUP (P2)	Processing Date 05/03/11 13:52	001

40705 Ed. 5-84

Form List

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AA001483

DISCLOSURE NOTICE TERRORISM RISK INSURANCE ACT OF 2002

On December 26, 2007, the President of the United States signed into law amendments to the Terrorism Risk Insurance Act of 2002 (the "Act"), which, among other things, extend the Act and expand its scope. The Act establishes a program under which the Federal Government may partially reimburse "Insured Losses" (as defined in the Act) caused by "acts of terrorism". An "act of terrorism" is defined in Section 102(l) of the Act to mean any act that is certified by the Secretary of the Treasury - in concurrence with the Secretary of State and the Attorney General of the United States - to be an act of terrorism; to be a violent act or an act that is dangerous to human life, property, or infrastructure; to have resulted in damage within the United States, or outside the United States in the case of certain air carriers or vessels or the premises of a United States Mission; and to have been committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

The federal government's share of compensation for Insured Losses is 85% of the amount of Insured Losses in excess of each Insurer's statutorily established deductible, subject to the "Program Trigger", (as defined in the Act). In no event, however, will the federal government or any Insurer be required to pay any portion of the amount of aggregate Insured Losses occurring in any one year that exceeds \$100,000,000,000, provided that such Insurer has met its deductible. If aggregate Insured Losses exceed \$100,000,000,000 in any one year, your coverage may therefore be reduced.

The premium charge shown below is for coverage under this policy for insured losses covered by the Act. This terrorism premium does not include any charges for the portion of insured losses covered by the federal government under the Act.

If \$0 is shown below for the certified acts of terrorism premium charge, this policy provides such terrorism coverage for no premium charge.

The certified acts of terrorism premium charge shown below applies to all coverage under this policy for Insured Losses covered by the Act that you purchased for a premium charge. For any insuring agreement or coverage part for which you did not purchase such terrorism coverage, this policy may include one or more terrorism exclusions that apply to certified acts of terrorism. Under the federal Terrorism Risk Insurance Program Reauthorization Act of 2007, the applicable definition of certified acts of terrorism no longer requires that the act of terrorism be committed on behalf of a foreign person or foreign interest. Therefore, each such exclusion is not limited to an act of terrorism committed on behalf of a foreign person or interest.

Name of Insured: PREMIER HOTEL INSURANCE GROUP (P2)

Policy Number: QK06503290

Effective Date: 03/01/11

Certified Acts Of Terrorism Premium Charge: INCLUDED

Processing Date: 05/03/11 13:52 001

What To Do If You Have A Loss - Specialty Commercial Umbrella Liability Policy

When an Occurrence happens or is committed that will likely result in damages that are covered by this policy, you or any Insured covered under this policy are required to report the claim to:

The Travelers Companies, Inc.
Attn: Travelers Excess Casualty Claim Division
Mail Code 9275-NB08E
385 Washington Street
St. Paul, MN 55102-1396

All other terms of your policy remain the same.

Specialty Commercial Umbrella Liability Policy

This is a Commercial Umbrella Liability Policy Form. It specifies the coverage provided, restrictions or exclusions to that coverage, and the rights and duties under this contract.

Throughout this policy the words "you" and "your" refer to the **Named Insured**. The word "Named Insured" and all other words or phrases that appear in bold, other than bold used for titles, have or include special meaning as described in this form. The words "we", "us" and "our" refer to the Company indicated in the Declarations as providing this insurance.

In consideration of the payment of the premium and in reliance upon the statements in the Declarations we agree with you as follows:

Insuring Agreements

I. Coverage

A. We will pay on behalf of:

1. the **Insured** all sums in excess of the **Retained Limit** that the **Insured** becomes legally obligated to pay as damages by reason of liability imposed by law; or
2. the **Named Insured** all sums in excess of the **Retained Limit** that the **Named Insured** becomes legally obligated to pay as damages assumed by the **Named Insured** under an **Insured Contract**;

because of:

1. **Bodily Injury** or **Property Damage** that occurs during the **Policy Period** and is caused by an **Occurrence**; or
2. **Personal Injury** or **Advertising Injury** that is caused by an **Occurrence** committed during the **Policy Period**;

if such **Occurrence** takes place anywhere in the world, except for any country or jurisdiction which is subject to any trade sanction, embargo or similar regulation imposed by the United States of America that prohibits the transaction of business with or within such country or jurisdiction.

If we are prevented by law or statute from paying such sums on behalf of any **Insured**, then we will, where permitted by law or statute, indemnify that **Insured** for such sums in excess of the **Retained Limit**. In any event, the amount we will pay for damages is limited as described in Section III. **Limits of Insurance**.

There is no coverage under this policy for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** unless a **Retained Limit** applies.

B. **Retained Limit** means the greater of the following:

1. the total of the applicable limits of all **Scheduled Underlying Insurance**, and the applicable limits of any **Other Insurance**, for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** covered by such **Scheduled Underlying Insurance** or **Other Insurance**;
2. the total of the applicable limits of all **Scheduled Retained Limits** for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** covered by such **Scheduled Retained Limits**; or
3. if applicable, the amount stated in the Declarations as a **Self Insured Retention** because of any **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** not covered by either any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**, and caused by any one **Occurrence**.

- C. If coverage for the **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** does not exist under any:

1. **Scheduled Underlying Insurance**; or
2. **Scheduled Retained Limit**;

because of a specific exclusion or other specific coverage limitation, then paragraph I. Coverage B.3 above does not apply, unless such coverage is specifically provided by endorsement to this policy.

- D. This insurance applies to **Bodily Injury and Property Damage** only if no **Named Insured** knew, prior to the **Policy Period**, that the **Bodily Injury or Property Damage** had occurred, in whole or in part. If a **Named Insured** knew, prior to the **Policy Period**, that the **Bodily Injury or Property Damage** had occurred, then any continuation, change or resumption of such **Bodily Injury or Property Damage** during or after the **Policy Period** will be considered to have been known by a **Named Insured** prior to the **Policy Period** if such continuation, change or resumption would otherwise be covered by this policy because of a continuous, multiple or other coverage trigger required under the law that applies.

Bodily Injury or Property Damage which occurs during the **Policy Period** and was not, prior to the **Policy Period**, known to have occurred by any **Named Insured** includes any continuation, change or resumption of that **Bodily Injury or Property Damage** after the end of the **Policy Period** if that would be the result because of a continuous, multiple or other coverage trigger required under the law that applies.

Bodily Injury or Property Damage will be considered to have been known to have occurred at the earliest time when any **Named Insured**:

1. reports all, or any part, of the **Bodily Injury or Property Damage** to us or any other insurer;
2. receives a written or verbal demand or **Claim** for damages because of the **Bodily Injury or Property Damage**; or
3. becomes aware by any means that the **Bodily Injury or Property Damage** has occurred or has begun to occur.

- E. Solely for the purpose of liability assumed by the **Named Insured** under an **Insured Contract**, reasonable attorney's fees and necessary litigation expenses incurred by or for a party other than an **Insured** are deemed to be damages because of **Bodily Injury, Property Damage, Personal Injury or Advertising Injury**, provided:

1. liability to such party for such attorney's fees and necessary litigation expense has also been assumed by the **Named Insured** in the same **Insured Contract**; and
2. such attorney's fees and litigation expenses are for defense of such party against a **Suit** seeking damages covered by this policy.

- F. If any **Scheduled Underlying Insurance** has a limit of insurance greater than the amount shown in the **Schedule of Underlying Insurance**, this policy will apply in excess of that greater amount. If any **Scheduled Underlying Insurance** has a limit of insurance, prior to any reduction or exhaustion by payment of one or more **Claims or Suits** seeking damages that would be covered under this policy, that is less than the amount shown in the **Schedule of Underlying Insurance**, this policy will apply in excess of the amount shown in that schedule.

If any **Scheduled Retained Limit** has a limit of insurance greater than the amount shown in the **Schedule of Retained Limits**, this policy will apply in excess of that greater amount. If any **Scheduled Retained Limit** has a limit of insurance, prior to any reduction or exhaustion by payment of one or more **Claims or Suits** seeking damages that would be covered under this policy, that is less than the amount shown in the **Schedule of Retained Limits**, this policy will apply in excess of the amount shown in that schedule.

- G. If the total of the applicable limits of any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit** are reduced or exhausted by payment of one or more **Claims** or **Suits** seeking damages that would be covered by this policy, we will:
1. in the event of reduction of the limits of the **Scheduled Underlying Insurance** or the **Scheduled Retained Limit**, pay in excess of such reduced limits; or
 2. in the event of exhaustion of the limits of the **Scheduled Underlying Insurance** or the **Scheduled Retained Limit**, continue in force as underlying insurance upon such exhaustion;
- and subject to any specific exclusions or other specific coverage limitations of that **Scheduled Underlying Insurance** or **Scheduled Retained Limit**.
- H. The applicable limits of any **Scheduled Underlying Insurance** or **Scheduled Retained Limit** shall not, for the purpose of determining when this policy applies, be reduced or exhausted by any payment with respect to **Claims** or **Suits** seeking damages which are not covered by this policy.
- II. **Defense**
- A. We shall have the right and duty to assume control of the defense of any **Claim** or **Suit** seeking damages covered by this policy, and we shall have the right to investigate and settle such **Claim** or **Suit**, when the **Retained Limit** has been exhausted by payment of judgments or settlements that would be covered by this policy. These rights and duties apply even if the **Claim** or **Suit** is groundless, false or fraudulent.
- B. Prior to the exhaustion of the **Retained Limit** we shall have the right, but not the duty, to participate in the investigation, settlement or defense of any **Claim** or **Suit** seeking damages that would be covered by this policy. This right includes the opportunity to participate in the defense of any **Claim** or **Suit** that may result in damages covered by this policy. If we exercise this right, we will do so at our own expense.
- C. We have no duty to defend, investigate or settle any **Claim** or **Suit** seeking damages not covered by this policy.
- D. We will not defend any **Claim** or **Suit** after the applicable limits of insurance under this policy have been exhausted by payment of judgments or settlements.
- E. All expenses we incur in the defense of any **Claim** or **Suit** are in addition to the limits of insurance under this policy.
- F. When we assume the defense of any **Claim** or **Suit** we will pay the following, to the extent that they are not included in the **Scheduled Underlying Insurance**, **Scheduled Retained Limits** or in any **Other Insurance**:
1. premiums on bonds to release attachments for amounts not exceeding our limits of insurance, but we are not obligated to apply for or furnish any such bond;
 2. premiums on appeal bonds required by law to appeal any **Claim** or **Suit** we defend, but we are not obligated to apply for or furnish any such bond;
 3. all costs taxed against the **Insured** for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury**, covered by this policy, in any **Suit** we defend;
 4. pre-judgment interest awarded against the **Insured** on that part of the judgment we pay. But if we make an offer to pay the applicable limit of insurance, we will not pay any pre-judgment interest based on that period of time after the offer;
 5. all interest that accrues after entry of judgment and before we have paid, offered to pay or deposited in court the part of the judgment that is within the applicable limit of insurance under this policy; and

6. the **Insured's** reasonable expenses incurred at our request.

- G. When we have the duty to defend, but are prevented by law or otherwise from performing that duty, the **Insured** shall make or arrange for any necessary investigation or defense. We will reimburse the **Insured** for the reasonable and necessary expenses incurred to provide that investigation or defense, subject to the terms and conditions of this policy.

III. Limits Of Insurance

- A. The limits of insurance stated in Item 3 of the Declarations and the rules below establish the most we will pay regardless of the number of:
1. **Insureds**;
 2. **Claims** made or **Suits** brought;
 3. person or organizations making **Claims** or bringing **Suits**; or
 4. coverages provided under this policy.
- B. The General Aggregate Limit is the most we will pay for all damages covered under Insuring Agreement I. Coverage except for:
1. damages included in the **Products - Completed Operations Hazard**; and
 2. coverages included in the **Scheduled Underlying Insurance** or **Scheduled Retained Limits** to which no underlying aggregate applies.

If any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit** contains aggregate limits, other than an aggregate applying to the **Products-Completed Operations Hazard**, the General Aggregate stated in the Declarations will apply in the same manner as the aggregate limits of each **Scheduled Underlying Insurance** or each **Scheduled Retained Limit**.

- C. The **Products - Completed Operations Aggregate Limit** is the most we will pay for all damages included in the **Products - Completed Operations Hazard**.
- D. Subject to B. and C. above, the **Each Occurrence Limit** is the most we will pay for all damages covered under Insuring Agreement I. Coverage because of all **Bodily Injury, Property Damage, Personal Injury** and **Advertising Injury** caused by any one **Occurrence**.
- E. The limits of insurance of this policy apply separately to each consecutive annual period and to any remaining period of less than twelve months, starting with the beginning of the **Policy Period** shown in the Declarations. If, however, the **Policy Period** is extended after issuance for an additional period of less than 12 months, the additional period will be considered part of the last preceding period for purposes of determining the limits of insurance that apply.

IV. Definitions

- A. **Advertisement** means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For purposes of this definition:
1. notices that are published include material placed on the Internet or similar electronic means of communication;
 2. only that part of your website that is about your goods, products or services for the purpose of attracting customers or supporters is considered an **Advertisement**; and

3. the placing of advertising, borders or frames for you or others, or links for or to others, on or in your website is not considered an **Advertisement**.
- B. **Advertising Idea** means a manner or style of **Advertisement** that others use and intend to attract attention in their **Advertisement**. However, information used to identify or record customers or supporters, such as a list of customers or supporters, shall not be considered to be an **Advertising Idea**.
- C. **Advertising Injury** means injury, other than **Bodily Injury** or **Personal Injury**, arising out of your business and caused by one or more of the following offenses:
1. oral, written or electronic publication of material in your **Advertisement** that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 2. oral, written or electronic publication of material in your **Advertisement** that violates a person's right of privacy;
 3. unauthorized use in your **Advertisement** of another's **Advertising Idea**; or
 4. infringement in your **Advertisement** of another's copyright, trade dress, or **Slogan**.
- D. **Auto** means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any attached machinery or equipment. But **Auto** does not include **Mobile Equipment**.
- E. **Bodily Injury** means any physical harm, sickness or disease to the physical health of other persons, including death or any of the following resulting at any time from such physical harm, sickness or disease:
1. mental injury;
 2. mental anguish;
 3. emotional distress;
 4. shock; or
 5. humiliation.
- F. **Claim** means a demand that seeks damages.
- G. **Employee** includes any person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. However, **Employee** does not include any person who is furnished to you to substitute for a permanent **Employee** on leave or to meet seasonal or short-term workload conditions.
- H. **Hostile Fire** means a fire which becomes uncontrollable or breaks out from where it was intended to be.
- I. **Impaired Property** means **Tangible Property**, other than **Your Product** or **Your Work**, that cannot be used or is less useful because:
1. it incorporates **Your Product** or **Your Work** that is known or thought to be defective, deficient, inadequate or dangerous; or
 2. you have, or anyone acting on your behalf has, failed to fulfill the terms of a contract or agreement;
- if such property can be restored to use by:
1. the repair, replacement, adjustment or removal of **Your Product** or **Your Work**; or
 2. you, or anyone acting on your behalf, fulfilling the terms of the contract or agreement.
- As used in this definition, **Tangible Property** does not include data.

J. **Insured** means each of the following, to the extent set forth:

1. the **Named Insured**;
2. any person or organization, other than the **Named Insured**, included as an additional insured in any **Scheduled Underlying Insurance** but then for no broader coverage than is provided to such person or organization under such **Scheduled Underlying Insurance**;
3. any of your **Employees**, other than:
 - a. your managers if you are a limited liability company; or
 - b. your executive officers if you are an organization other than a partnership, joint venture or limited liability company;

but only for acts within the scope of their employment by you while performing duties related to the conduct of your business.

However, no person or organization is an **Insured** under this paragraph IV.J.3. for the ownership, maintenance, operation, use, **Loading or Unloading**, or entrustment to others, of any **Autos**, aircraft or watercraft unless such coverage is included under the **Scheduled Underlying Insurance** and then for no broader coverage than is provided under such **Scheduled Underlying Insurance**.

4. any person, other than any of your **Employees**, or organization while acting as your real estate manager;
5. any person, organization, trustee or estate to whom you are obligated by a written contract or agreement to provide insurance such as is afforded by this policy but only with respect to liability arising out of:
 - a. **Your Work**; or
 - b. facilities owned or used by you.
6. any person (other than any of your partners or co-venturers if you are a partnership or joint venture, any of your members or managers if you are a limited liability company, or any of your executive officers, directors or stockholders if you are an organization other than a partnership, joint venture or limited liability company, or any of your **Employees**) or organization with respect to any **Auto**:
 - a. owned by you, loaned to you or hired by you or on your behalf; and
 - b. used by that person or organization with your permission.

However, none of the following is an **Insured** under this paragraph IV.J.6.:

- a. the owner or anyone else from whom you hire or borrow an **Auto**. But this exception does not apply if the **Auto** is a trailer or semi-trailer connected to an **Auto** you own; or
- b. any person using an **Auto** while working in a business that sells, services, repairs or parks **Autos** unless you are in that business.

K. **Insured Contract** means that part of any contract or agreement pertaining to your business under which the **Named Insured** assumes the **Tort Liability** of another party to pay for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** to a third person or organization, but only if:

1. the **Bodily Injury** or **Property Damage** occurs; or
2. the **Personal Injury** or **Advertising Injury** is caused by an **Occurrence** committed;

subsequent to the execution of the **Insured Contract**.

L. Loading or Unloading means the handling of property:

1. while it is being moved from the place where it is accepted for transportation;
2. while it is being loaded, transported or unloaded; and
3. until it is moved to the place where it is finally delivered.

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

1. bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
2. vehicles maintained for use solely on or next to premises you own or rent;
3. vehicles that travel on crawler treads;
4. vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - a. power cranes, shovels, loaders, diggers or drills; or
 - b. road construction or resurfacing equipment such as graders, scrapers or rollers;
5. vehicles not described in paragraphs IV.M.1., 2., 3. or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - a. air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - b. cherry pickers and similar devices used to raise or lower workers; and
6. vehicles not described in IV.M.1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo.

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

- a. equipment designed primarily for:
 - 1) snow removal;
 - 2) road maintenance, but not construction or resurfacing; or
 - 3) street cleaning;
- b. cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- c. air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

N. Named Insured means:

1. any person or organization listed in Item 1 of the Declarations, any company that is your subsidiary as of the effective date of this policy and any company in which you own a majority or controlling interest as of the effective date of this policy; and
2. any organization, other than a partnership, joint venture or limited liability company, which is newly acquired, controlled or formed by you during the Policy Period but only:
 - a. as respects Occurrences taking place after you acquire, take control of or form such organization;

- b. to the extent such organization is included under the coverage provided by any **Scheduled Underlying Insurance**;
- c. if you give us prompt notice after you acquire, take control of or form such organization; and
- d. if you own a majority or controlling interest in such organization;

We may make an additional premium charge for any such organizations you acquire, take control of or form during the **Policy Period**;

- 3. if you are an individual, you and your spouse, but only with respect to the conduct of a business of which you are the sole owner;
- 4. if you are a partnership or joint venture, your partners or co-venturers and their spouses, but only with respect to the conduct of your business;
- 5. if you are a limited liability company, your members, but only with respect to the conduct of your business, and your managers, but only with respect to their duties as your managers; and
- 6. if you are an organization other than a partnership, joint venture or limited liability company, any of your executive officers, directors or stockholders but only while acting within their duties or capacities as such;

However, no person or organization is a **Named Insured** with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a **Named Insured** in the **Declarations**.

Also, no person or organization is a **Named Insured** under paragraphs IV.N.3., 4., 5. or 6. for the ownership, maintenance, operation, use, **Loading or Unloading**, or entrustment to others, of any Autos, aircraft or watercraft unless such coverage is included under the **Scheduled Underlying Insurance** and then for no broader coverage than is provided under such **Scheduled Underlying Insurance**.

O. Occurrence means:

- 1. as respects **Bodily Injury or Property Damage**, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in **Bodily Injury or Property Damage**. All **Bodily Injury or Property Damage** caused by such exposure to substantially the same general harmful conditions shall be considered to be caused by one **Occurrence**;
- 2. as respects **Personal Injury**, an offense arising out of your business that results in **Personal Injury**. All **Personal Injury** caused by the same or related injurious material, act or offense shall be considered to be caused by one **Occurrence**, regardless of the frequency or repetition thereof, the number and kind of media used or the number of persons or organizations making **Claims** or bringing **Suits**; and
- 3. as respects **Advertising Injury**, an offense committed in the course of advertising your goods, products and services that results in **Advertising Injury**. All **Advertising Injury** caused by the same or related injurious material, act or offense shall be considered to be caused by one **Occurrence**, regardless of the frequency or repetition thereof, the number and kind of media used or the number of persons or organizations making **Claims** or bringing **Suits**.

P. Other Insurance means any insurance providing coverage for damages covered in whole or in part by this policy. **Other Insurance** includes alternative risk transfer, risk management or financing methods or programs, such as risk retention groups or self-insurance methods or programs. But **Other Insurance** does not include:

- 1. any **Scheduled Underlying Insurance**;

2. the **Self-Insured Retention**; or
3. any policy of insurance specifically purchased to be excess of this policy and affording coverage that this policy also affords.

Q. Personal Injury means injury, other than **Bodily Injury** or **Advertising Injury**, arising out of your business and caused by one or more of the following offenses:

1. false arrest, detention or imprisonment;
2. malicious prosecution;
3. the wrongful eviction from, wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or on behalf of its owner, landlord or lessor;
4. oral, written or electronic publication of material that slanders or libels a person or organization, or disparages a person's or organization's goods, products or services; or
5. oral, written or electronic publication of material that violates a person's right of privacy.

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

S. Pollutant means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and **Waste**.

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

1. products that are still in your physical possession; or
2. work that has not yet been completed or abandoned. However, we will consider **Your Work** to be completed at the earliest of the following times:
 - a. when all of the work called for in your contract has been completed;
 - b. when all of the work to be done at the job site has been completed if your contract calls for work at more than one job site; or
 - c. when any person or organization, other than another contractor or subcontractor working on the same project, has put that part of the work done at a job site to its intended use.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, shall be considered to be completed.

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

1. the transportation of property, unless the **Bodily Injury** or **Property Damage** arises out of a condition in or on a vehicle created by the **Loading** or **Unloading** of that vehicle by an **Insured**; or
2. the existence of tools, uninstalled equipment or abandoned or unused materials.

U. Property Damage means:

1. physical injury to **Tangible Property** of others including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
2. loss of use of **Tangible Property** of others that is not physically injured. All such loss of use shall be deemed to occur at the time of the **Occurrence** that caused it.

As used in this definition, **Tangible Property** does not include data.

- V. Scheduled Retained Limits** means the amount and type of insurance, not covered by any **Scheduled Underlying Insurance**, listed in the Schedule of Retained Limits forming a part of this policy.
- W. Scheduled Underlying Insurance** means:
1. the policy or policies of insurance listed in the Schedule of Underlying Insurance forming a part of this policy; and
 2. automatically any renewal or replacement of any policy described in paragraph IV.W.1. above, provided that such renewal or replacement provides equivalent coverage to and affords limits of insurance equal to or greater than the policy being renewed or replaced.
- X. Self-Insured Retention** means the amount indicated in Item 4 of the Declarations which is the maximum amount that:
1. the **Insured** becomes legally obligated to pay by reason of liability imposed by law; or
 2. the **Named Insured** becomes legally obligated to pay as damages assumed by the **Named Insured** under an **Insured Contract**;
- not covered by either any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit** and caused by any one Occurrence.
- Y. Slogan** means a phrase that others use and intend to attract attention in their **Advertisement**. However, a **Slogan** does not include a phrase used as, or in, the name of:
1. any person or organization, other than you; or
 2. any business or any of the premises, goods, products or services of any person or organization, other than you.
- Z. Suit** means a civil proceeding that seeks damages. **Suit** includes:
1. an arbitration proceeding that seeks damages and to which you must submit or do submit with our consent; or
 2. any other alternative dispute resolution proceeding that seeks damages and to which you submit with our consent.
- AA. Tort Liability** means a liability that would be imposed by law in the absence of any contract or agreement.
- BB. Waste** includes materials which are intended to be or have been recycled, reconditioned or reclaimed.
- CC. Your Product** means:
1. any goods or products, other than real property, that are or were manufactured, sold, handled, distributed or disposed of by:
 - a. you;
 - b. others trading under your name; or
 - c. a person or organization whose business or assets you have acquired; and
 2. containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

Your Product includes:

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

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

DD. Your Work means:

1. work or operations performed or being performed by you or on your behalf; and
2. materials, parts or equipment furnished in connection with such work or operations.

Your Work includes:

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

V. Exclusions

This insurance does not apply to:

A. Workers' Compensation, Disability Benefits or Unemployment Compensation Laws

Any obligation of the **Insured** under any workers compensation law, disability benefits law, unemployment compensation law or any similar law.

B. ERISA or COBRA

Any obligation of the **Insured** under:

1. the Employees Retirement Income Security Act Of 1974 (ERISA);
2. the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA); or
3. any similar common or statutory law of any jurisdiction;

including any amendments to such laws.

C. Uninsured Motorists, Underinsured Motorists or Automobile No-Fault Laws

Any liability or obligation of the **Insured** under any automobile:

1. uninsured motorists;
2. underinsured motorists; or
3. no-fault or other first party benefits law.

D. Asbestos

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of asbestos in any form by any person; or
 - b. existence of asbestos in any form.

2. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of any other solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and **Waste**, in any form by any person; or
 - b. existence of any such other irritant or contaminant in any form;and that is part of any **Claim** or **Suit** that also alleges any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** described in paragraph V.D.1. of this exclusion, above.
3. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that any **Insured** or others:
 - a. test for, monitor, clean up, remove, contain, treat, detoxify or neutralize asbestos in any form; or
 - b. respond to, or assess, in any way the effects of asbestos in any form.

Because asbestos, and any other such irritants or contaminants, are **Pollutants**, this exclusion applies in addition to any of the following exclusions that apply:

- a. the pollution exclusion in this policy; or
- b. any other pollution-related exclusion made part of this policy.

E. Employment-Related Practices

Bodily Injury or Personal Injury to:

1. a person arising out of any:
 - a. refusal to employ that person;
 - b. termination of that person's employment; or
 - c. employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, failure to promote or advance, harassment, humiliation or discrimination applied to or directed at that person; or
2. the spouse, child, parent, brother or sister of that person as a consequence of such **Bodily Injury or Personal Injury** to that person described in paragraph V.E.1., of this exclusion, above.

This exclusion applies to any obligation to share damages with or repay someone else who must pay damages because of the **Bodily Injury or Personal Injury**.

F. Property Damage to Certain Property

Property Damage to:

1. property you own, rent or occupy;
2. premises you sell, give away or abandon if the **Property Damage** arises out of any part of those premises;
3. property loaned to you;
4. personal property in the care, custody or control of any **Insured**;

5. that particular part of real property on which you or any contractors or sub-contractors working directly or indirectly on your behalf are performing operations if the **Property Damage** arises out of those operations;
6. that particular part of any property that must be restored, repaired or replaced because **Your Work** was incorrectly performed on it;
7. **Your Product** arising out of **Your Product** or any part of it; or
8. **Your Work** arising out of **Your Work** or any part of it and included in the **Products-Completed Operations Hazard**, unless the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

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

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

G. Property Damage to Impaired Property or Property Not Physically Injured

Property Damage to Impaired Property, or property that has not been physically injured, arising out of:

1. a defect, deficiency, inadequacy or dangerous condition in **Your Product** or **Your Work**; or
2. a delay or failure by you, or anyone acting on your behalf, to fulfill the terms of a contract or agreement.

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

H. Product Recall

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

1. **Your Product**;
2. **Your Work**; or
3. **Impaired Property**;

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

I. Expected or Intended Bodily Injury or Property Damage

Bodily Injury or **Property Damage** expected or intended from the standpoint of the **Insured**.

This exclusion does not apply to **Bodily Injury** or **Property Damage** resulting from the use of reasonable force to protect persons or property.

J. Known Violation of Rights

Personal Injury or **Advertising Injury** caused by or committed at the direction of the **Insured**, or by an offense committed at the direction of the **Insured**, with knowledge that the rights of another would be violated and that **Personal Injury** or **Advertising Injury** would result.

K. Material Published with Knowledge of Falsity

Personal Injury or Advertising Injury arising out of oral, written, or electronic publication of material, if done by or at the direction of the **Insured** with knowledge of its falsity.

L. Material Published Prior to Policy Period

Personal Injury or Advertising Injury arising out of any:

1. oral, written, or electronic publication of material whose first publication;
2. unauthorized use in your **Advertisement** of another's **Advertising Idea** if that unauthorized use first; or
3. infringement in your **Advertisement** of another's copyright, trade dress or **Slogan** if that infringement first;

took place before the beginning of the **Policy Period**.

M. Criminal Acts

Personal Injury or Advertising Injury arising out the willful violation of a penal statute or ordinance committed by, at the direction of, any **Insured**.

N. Advertising, Broadcasting, Publishing, Telecasting, Media and Internet Businesses

Personal Injury or Advertising Injury committed by an **Insured** whose business is:

1. Advertising, broadcasting, publishing or telecasting;
2. Designing or determining content of websites for others; or
3. An Internet search, access, content or service provider.

However, this exclusions does not apply to **Personal Injury** caused by any of the following offenses:

1. false arrest, detention or imprisonment;
2. malicious prosecution;
3. the wrongful eviction from, wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or on behalf of its owner, landlord or lessor.

For the purpose of this exclusion, the placing of advertising, borders or frames for an **Insured** or others, or links for or to others, on or in an **Insured's** website is not by itself considered the business of advertising, broadcasting, publishing or telecasting.

O. Breach of Contract

Personal Injury or Advertising Injury arising out of breach of contract, other than misappropriation of **Advertising Ideas** under an implied contract.

P. Quality or Performance of Goods - Failure to Conforms to Statements

Advertising Injury arising out of the failure of goods, products or services to conform with advertised quality or performance.

Q. Wrong Description of Prices

Advertising Injury arising out of the wrong description of the price of goods, products or services.

R. Intellectual Property

Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of the actual or alleged infringement or violation of any of the following rights or laws:

1. copyright;
2. patent;
3. trade name;
4. trade secret;
5. trademark; or
6. other intellectual property rights or laws.

This exclusion does not apply to Bodily Injury or Property Damage that:

1. results from Your Products or Your Work; or
2. is included in the Products-Completed Operations Hazard.

This exclusion also does not apply to Advertising Injury that results from:

1. the unauthorized use in your Advertisement of another's Advertising Idea; or
2. infringement in your Advertisement of another's copyright, trade dress or trademarked Slogan.

S. Pollution

1. Bodily Injury, Property Damage or Personal Injury or Advertising Injury arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of Pollutants anywhere in the world;
2. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that we, the Insured or any other person or organization test for, monitor, clean-up, remove, contain, treat, detoxify, respond to, neutralize or assess the effects of Pollutants; or
3. Any loss, cost or expense arising out of any Claim or Suit by or for any governmental authority or any other person or organization for damages arising out of the testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or responding to or assessing in any way, Pollutants.

This exclusion does not apply to Bodily Injury or Property Damage:

- a. arising out of heat, smoke or fumes from a Hostile Fire;
- b. arising out of the upset, overturn or collision of an Auto; or
- c. included in the Products-Completed Operations Hazard;

if insurance for such Bodily Injury or Property Damage is provided by any Scheduled Underlying Insurance or any Scheduled Retained Limit. However, the insurance provided by this policy for such Bodily Injury or Property Damage will not be broader than the insurance provided by such Scheduled Underlying Insurance or Scheduled Retained Limit.

T. Nuclear Material

Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of:

1. the actual, alleged or threatened exposure of any person or property to; or
2. the **Hazardous Properties** of;

any **Nuclear Material**.

As used in this exclusion:

1. **hazardous properties** includes radioactive, toxic or explosive properties;
2. **nuclear material** means source material, special nuclear material or by-product material;
3. **source material, special nuclear material and by-product material** have the meanings given them in the Atomic Energy Act of 1954 or any law amendatory thereof.

Because **Nuclear Material** is a **Pollutant**, this exclusion applies in addition to any of the following exclusions that apply:

1. the pollution exclusion in this policy; or
2. any other pollution-related exclusion made part of this policy.

VI. Additional Exclusions

This insurance does not apply to the following, unless insurance for such liability is provided by any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit** and then it will be no broader than the insurance provided by such **Scheduled Underlying Insurance** or **Scheduled Retained Limit**:

A. Fellow Employee

Liability of any Employee with respect to **Bodily Injury or Personal Injury** to:

1. another **Employee** of the same employer; or
2. the spouse or any child, parent, brother or sister of that other **Employee** as a consequence of such **Bodily Injury or Personal Injury** to that other **Employee** described in paragraph VI.A.1. of this exclusion.

B. Watercraft

Bodily Injury or Property Damage arising out of the ownership, maintenance, use, operation, **Loading or Unloading**, or entrustment to others of any watercraft owned, operated or rented by, or loaned to, any **Insured**. This exclusion does not apply to watercraft while ashore on premises owned or rented by any **Insured**.

C. Aircraft

Bodily Injury or Property Damage arising out of the ownership, maintenance, use, operation, **Loading or Unloading** or entrustment to others of any aircraft owned, rented or chartered by, or loaned to, any **Insured** or on an **Insured's** behalf, with or without crew.

VII. Conditions

A. Appeals

We have the right but not the duty to appeal an award or judgment, including damages covered by this policy, in excess of the applicable **Retained Limit**. If we elect to appeal we will pay, in addition to any applicable limits of insurance of this policy, all costs, interest and expenses incidental to such appeal. However, the result of an appeal will not change the limits of coverage that apply under this policy.

B. Audit

We may audit the **Insured's** books and records at any time during the term of the **Policy Period** or within three years after expiration or termination of this policy.

C. Bankruptcy or Insolvency

1. The **Insured's** bankruptcy, insolvency or inability to pay, or the bankruptcy, insolvency or inability to pay of any issuer of **Scheduled Underlying Insurance** will not relieve us of our obligations under this policy.
2. In the event of any such bankruptcy, insolvency or inability to pay:
 - a. this insurance will neither replace or reduce the insurance provided by **Scheduled Underlying Insurance** nor replace or reduce any **Scheduled Retained Limit**; and
 - b. this insurance will apply only to amounts in excess of the applicable limits of such **Scheduled Underlying Insurance** and **Scheduled Retained Limits**.

D. Cancellation

1. You may cancel this policy. You must mail or deliver to us advance written notice to us stating when the cancellation is to take effect.
2. We may cancel this policy. If we cancel because of non-payment of premium, we must mail or deliver to you not less than 10 days advance written notice stating when the cancellation is to take effect. If we cancel for any other reason, we must mail or deliver to you not less than 60 days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the **Declarations** shall be sufficient to prove such notice.
3. The **Policy Period** will end on the day and time stated in the cancellation notice.
4. If we cancel, final premium shall be calculated pro rata based on the time this policy was in force.
5. If you cancel, final premium will be more than pro rata. It will be based on the time this policy was in force and increased by our short rate cancellation table and procedure.
6. Premium adjustment may be made at the time of cancellation or as soon as practicable thereafter, but the cancellation will be effective even if we have not made or offered any premium refund due you. Our check, or our representative's check, mailed or delivered to you at your mailing address shown in Item 1 of the **Declarations**, shall be sufficient tender of any such refund due you.
7. The first **Named Insured** in Item 1 of the **Declarations** shall act on behalf of all other **Insureds** with respect to the giving or receiving of notice of cancellation and the receipt of any premium refund that may become payable under this policy.

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

E. Changes

Notice to any agent or knowledge possessed by any agent or any other person will not effect a waiver of, or a change in, any part of this policy. This policy can only be changed by a written endorsement that becomes a part of this policy and that is signed by one of our authorized representatives.

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

1. You must see to it that we are notified as soon as practicable of an **Occurrence** which may result in a **Claim** or **Suit** seeking damages covered by this policy. To the extent possible, notice should include:
 - a. how, when and where the **Occurrence** took place;
 - b. the names and addresses of any injured persons and witnesses; and
 - c. the nature and location of any **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** arising out of the **Occurrence**.
2. If a **Claim** is made or **Suit** is brought against any **Insured** that is reasonably likely to involve the coverage provided by this policy, you must notify us in writing as soon as practicable. You and any other involved **Insured** also must:
 - a. immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **Claim** or **Suit**;
 - b. authorize us to obtain necessary records and other information;
 - c. cooperate with us in the investigation, settlement or defense of any **Claim** or **Suit** we investigate, settle or defend; and
 - d. assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the **Insured** because of injury or damage to which this insurance may apply.
3. No **Insured** will, except at that **Insured's** own expense, voluntarily make a payment, assume any obligation, make any admission, or incur any expense, other than for first aid for **Bodily Injury** covered by this policy, without our consent.

G. First Named Insured

The person or organization first named in Item 1 of the Declarations is primarily responsible for the payment of all premiums, the giving and receiving of notice of cancellation and the receiving of any return premiums that become payable under this policy.

H. Inspection

We have the right, but are not obligated, to inspect your premises and operations at any time. Our inspections are not safety inspections. They relate only to the insurability of your premises and operations and the premiums to be charged. We may give your reports on the conditions that we find. We may also recommend changes. However, we will not undertake to perform the duty of any person or organization to provide for the health or safety of your **Employees** or the public. We do not warrant the health and safety conditions of your premises or operations or represent that your premises or operations comply with any law, regulation, code or standard.

I. Knowledge of Occurrence or Claim

Knowledge of an Occurrence, Claim or Suit by your agent, servant or Employee shall not in itself constitute knowledge by you, unless a Named Insured:

1. shall have received notice of such Occurrence, Claim or Suit from said agent, servant or Employee; or
2. otherwise has knowledge of such Occurrence, Claim or Suit.

J. Legal Action Against Us

No person or organization has a right under this policy to sue us, join us as a party, or otherwise bring us into a Suit seeking damages from, or to determine the liability of, any Insured unless:

1. you have, and any other involved Insured has, complied with all the terms of this policy; and
2. the amount you owe has been determined with our consent or by actual trial and final judgment.

K. Maintenance of Scheduled Underlying Insurance

1. During the Policy Period, you agree:
 - a. to keep Scheduled Underlying Insurance in full force and effect;
 - b. that the terms, including definitions, conditions and exclusions, of Scheduled Underlying Insurance shall not materially change;
 - c. that the total applicable limits of Scheduled Underlying Insurance shall not decrease, except for any reduction or exhaustion of aggregate limits by payment of Claims or Suits for Bodily Injury, Property Damage, Personal Injury or Advertising Injury covered by this policy; and
 - d. that any renewals or replacements of Scheduled Underlying Insurance shall provide equivalent coverage to and afford limits of insurance equal to or greater than the policy being renewed or replaced.
2. If you fail to comply with these requirements, we will be liable only to the same extent that we would have, had you fully complied with these requirements.
3. If you are unable to recover from an issuer of any Scheduled Underlying Insurance because that issuer is unable to pay or you fail to comply with any term or condition of any Scheduled Underlying Insurance, we will only pay those sums covered by this insurance which are in excess of the applicable limit of Scheduled Underlying Insurance shown in the Schedule of Underlying Insurance.

L. Other Insurance

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

M. Premium

The premium for this policy is the amount stated in Item 5 of the Declarations. It is a flat premium unless specified as subject to an audit adjustment.

N. Separation of Insureds

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

1. as if each Named Insured were the only Named Insured; and
2. separately to each Insured against whom the Claim is made or the Suit is brought.

O. Titles

The titles of the various sections or paragraphs in this policy and endorsements, if any, attached to this policy are intended solely for convenience or reference and are not to be deemed in any way to affect the provisions to which they relate.

P. Transfer of Rights of Recovery to Us

1. If any Insured has rights to recover from any other person or organization all or part of any payment we have made under this policy, those rights are transferred to us. The Insured must do nothing after loss to impair those rights and must help us enforce them.
2. Any such recovery shall be applied as follows:
 - a. first, any person or organization, including the Insured, that has paid an amount in excess of the applicable limits of insurance of this policy will be reimbursed for the actual excess amount paid under this policy;
 - b. then, we will be reimbursed up to the amount we have paid; and
 - c. last, any Insured or issuer of Scheduled Underlying Insurance is entitled to claim the remainder, up to the amount that Insured or issuer of Scheduled Underlying Insurance has paid.
3. Expenses incurred in the exercise of such rights of recovery shall be apportioned among such persons or organizations, including the Insured, in the same ratio as their respective recoveries are finally shared.

Q. Transfer of Your Rights and Duties

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

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

R. Unintentional Failure to Disclose Hazards

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

S. When Damages Are Payable

We will not make any payment under this policy unless and until the Insured or any other insurer is obligated to pay the Retained Limit.

When the amount of loss has been determined, we will promptly pay on behalf of the Insured the amount of loss covered by this policy.

You shall promptly reimburse us for any amount within the Self-Insured Retention paid by us on behalf of an Insured.

In Witness Whereof we have caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by one of our duly authorized representatives where required by law.

Amendment of Cancellation Notice

Paragraph 2 of Section VII. Conditions, D. Cancellation is replaced by the following:

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

All other terms of your policy remain the same.

Claims-Made Coverage And Extended Reporting Period Endorsement

- A. With respect to the coverage provided by this policy that applies in excess of the **Scheduled Underlying Insurance** listed directly below, which provides coverage on a claims-made basis, this policy also provides coverage on a claims-made basis:

Scheduled Underlying Insurance Description: **EMPLOYEE BENEFITS LIABILITY**
Scheduled Underlying Insurance Carrier: **PER SCHEDULE ON INDIVIDUAL ACCOUNT CERTIFICATE**
Scheduled Underlying Insurance Policy #: **PER SCHEDULE ON INDIVIDUAL ACCOUNT CERTIFICATE**
Scheduled Underlying Insurance Limits: **\$1,000,000/\$1,000,000**
Scheduled Underlying Insurance Retroactive Date:

Scheduled Underlying Insurance Description:
Scheduled Underlying Insurance Carrier:
Scheduled Underlying Insurance Policy #:
Scheduled Underlying Insurance Limits:
Scheduled Underlying Insurance Retroactive Date:

Scheduled Underlying Insurance Description:
Scheduled Underlying Insurance Carrier:
Scheduled Underlying Insurance Policy #:
Scheduled Underlying Insurance Limits:
Scheduled Underlying Insurance Retroactive Date:

- B. Each of the following applies to such coverage provided by this policy on a claims-made basis:

1. The **Bodily Injury** or **Property Damage** must have occurred, the **Personal Injury** or **Advertising Injury** must have been caused by an **Occurrence** committed, or the negligent act, error, or omission must have been committed, on or after the **Retroactive Date** of this policy;
2. The **Bodily Injury** or **Property Damage** must have occurred, the **Personal Injury** or **Advertising Injury** must have been caused by an **Occurrence** committed, or the negligent act, error or omission must have been committed, on or before the earlier of the expiration date shown in Item 2 of the **Declarations** or the termination date of this policy;
3. The **Claim** or **Suit** for any **Bodily Injury**, **Property Damage**, **Personal Injury**, **Advertising Injury**, or negligent act, error, or omission must have been first made or brought during the **Policy Period** or within 60 days thereafter, or within any **Extended Reporting Period** provided under this policy. A **Claim** or **Suit** is deemed first made or brought when notice of such **Claim** or **Suit** is first received by any **Insured** or by us, whichever is earlier.
4. No insurance is provided by this policy for any **Claim** or **Suit**, or any notification being treated as a **Claim** or **Suit**, which is made or brought before the inception date shown in Item 2 of the **Declarations** and for which any **Insured** has given notice to any person or organization providing **Other Insurance**.

- C. The following is added to section VII. **Conditions F. Duties in the Event of an Occurrence, Claim or Suit** but only with respect to this endorsement:

4. Notice of an **Occurrence** as described in F.1. above is not notice of a **Claim** or **Suit**. However, if:
- a. we are notified during the **Policy Period**, as specified above, of an **Occurrence**; and
 - b. a **Claim** or **Suit** is made or brought within 36 months from the date we are notified of that **Occurrence**;

then this policy will apply as if notice of that **Claim** or **Suit** has been made during the **Policy Period**.

D. The following is added to section VII. Conditions:

Extended Reporting Period

1. If the **Insured** cancels or does not renew this policy, or if we either cancel or non-renew this policy for any reason other than non-payment of premium, the **Insured** may elect to purchase the **Extended Reporting Period**.
2. The **Extended Reporting Period** will apply only if:
 - a. The **Insured** requests it in writing within 60 days after the end of the **Policy Period**;
 - b. The **Insured** has paid all premiums due for this policy at the time the **Insured** makes such request; and
 - c. The **Insured** pays the additional premium for such **Extended Reporting Period** as charged by us. The additional premium will not exceed 200%.
3. Once the **Extended Reporting Period** is effective, neither we nor you may cancel the **Extended Reporting Period**, and we shall not refund any part of the premium paid for the **Extended Reporting Period** for any reason.
4. Any **Claim** or **Suit** first made or brought during the **Extended Reporting Period** will be deemed to have been made or brought on the last day of the **Policy Period**. The **Extended Reporting Period** will not extend the **Policy Period** or reinstate or increase the **Limits of Liability** of this policy.
5. Any insurance provided by this policy for **Claims** or **Suits** made or brought during the **Extended Reporting Period** is excess over any **Other Insurance** providing coverage for such **Claims** or **Suits** made or brought after the **Extended Reporting Period** begins.

E. With respect to this endorsement only, the following are added to section IV. Definitions:

Extended Reporting Period means a period of 5 years or the length of the add'l **Extended Reporting Period** in your **Scheduled Underlying Insurance**, whichever is less, starting with the expiration date of this policy, during which **Claims** or **Suits** may be first made or brought.

Retroactive Date means . If no retroactive date is shown, then the retroactive date of this policy is the same as the retroactive date shown on the applicable **Scheduled Underlying Insurance** listed in part A. of this endorsement.

All other terms of your policy remain the same.

Anti-Stacking Endorsement

For the purpose of this endorsement only, the following is added to section **III. Limits of Insurance**:

Regardless of the Limits specified in the Declarations of this policy, if any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** covered by this policy is also covered by any other Named Insured Certificate issued on the Premier Hotel Insurance Group policy QK06503290 and QK06503289, then the maximum that we will pay for all such **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** will be the highest applicable Each Occurrence Limit under any one of those certificates.

This endorsement does not apply to certificate holders that have no contractual relationship or common ownership between them.

All other terms of your policy remain the same.

Pollution Exclusion Exception For Certain Equipment Including Pollutants From Swimming Pools And Garages

The following is added to the second paragraph of section V. Exclusions S. Pollution 3.

- d. arising out of the discharge, dispersal, seepage, migration, release or escape of pollutants from:
 - 1. chlorine equipment, refrigeration equipment, ventilation equipment, air conditioning equipment; or
 - 2. release of a substance from a swimming pool or a garage.

All other terms of your policy remain the same.

Employee Benefits Liability Endorsement

1. The following is added to section I. Coverage A:

We will also pay on behalf of the Insured all sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of any negligent act, error or omission committed in the Administration of your Employee Benefits Program. However, the insurance provided by this endorsement will not be broader than the insurance provided by the applicable Scheduled Underlying Insurance or the applicable Scheduled Retained Limit for such damages.

2. The following are added to section IV. Definitions:

Administration means any of the following administrative functions:

1. Providing information to Employees, including dependents and beneficiaries, with respect to eligibility for or scope of an Employee Benefit Program;
2. Handling records in connection with an Employee Benefit Program; or
3. Effecting or terminating any Employee's participation in a plan included in the Employee Benefit Program.

Employee Benefit Program means any of the following plans:

1. Group life insurance; group accident or health insurance; dental, vision and hearing plans; and flexible spending accounts; provided that no one other than an Employee may subscribe to such insurance or plans and such plans are generally available to those Employees who satisfy the plan's eligibility requirements;
2. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an Employee may subscribe to such plans and such plans are generally available to all Employees who are eligible under the plan;
3. Unemployment insurance, social security benefits, workers compensation and disability benefits;
4. Vacation plans; or
5. Any other plan designated in the Schedule of Designated Plans below or added by endorsement to this policy.

Schedule of Designated Plans

All other terms of your policy remain the same.

Lead Exclusion

This Insurance does not apply to:

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of lead in any form by any person; or
 - b. existence of lead in any form.
2. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of any other solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and Waste, in any form by any person; or
 - b. existence of any such other irritant or contaminant in any form;and that are part of any **Claim or Suit** that also alleges any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** described in paragraph 1. of this exclusion, above.
3. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that any **Insured** or others:
 - a. test for, monitor, clean up, remove, contain, treat, detoxify or neutralize lead in any form;
 - b. respond to, or assess, in any way the effects of lead in any form.

Because lead, and any other such irritant or contaminant, are **Pollutants**, this exclusion applies in addition to any of the following exclusions that apply:

- a. the pollution exclusion in this policy; or
- b. any other pollution-related exclusion made part of this policy.

All other terms of your policy remain the same.

Mold or Other Fungi or Bacteria Exclusion

This insurance does not apply to:

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:

- a. absorption, ingestion or inhalation of **Mold or other fungi or Bacteria** in any form by any person; or
- b. existence of **Mold or other fungi or Bacteria** in any form;

Paragraph 1 of this exclusion does not apply to:

- a. **Bodily Injury or Property Damage** arising out of **Mold or other fungi or Bacteria** which are in, on or part of any good or product that is intended to be consumed as food, beverage or medicine;
- b. **Bodily Injury** arising out of **bacteria** which are directly transmitted solely by or from another person to the person sustaining the **Bodily Injury**, or
- c. **Bodily Injury** arising out of a bacterial infection which develops in connection with physical harm to the person sustaining the **Bodily Injury**, if such physical harm is not excluded by this paragraph of this exclusion, or by any other part of this exclusion, and a **Claim or Suit** is made or brought against the **Insured** because of such physical harm;

2. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:

1. absorption, ingestion or inhalation of any other solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and **Waste**, in any form by any person; or
2. existence of any such other irritant or contaminant in any form;

and that is part of any **Claim or Suit** that also alleges any **Bodily Injury, Property Damage, Personal Injury, or Advertising Injury** described in paragraph 1. of this exclusion, above; or

3. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that any **Insured** or others:

- a. test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Mold or other fungi or Bacteria** in any form; or
- b. respond to, or assess in any way, the effects of **Mold or other fungi or Bacteria** in any form.

Because **Mold or other fungi or Bacteria** can be **Pollutants**, and such other irritants or contaminants are **Pollutants**, this exclusion applies in addition to any of the following exclusions that apply:

- a. the pollution exclusion in this policy; or
- b. any other pollution-related exclusion made part of this policy.

For purposes of this endorsement only, the following words or phrases have or include special meaning:

1. **Molds or other fungi** means:
 - a. any type or form of mold or mildew;
 - b. any other type or form of fungus; or
 - c. any mycotoxin, spore, scent or byproduct that is produced or released by such mold, mildew or other fungus.

2. Bacteria means:

- a. any type or form of bacterium; or
- b. any mycotoxin, spore, scent or byproduct that is produced or released by such bacterium.

All other terms of your policy remain the same.

Pesticide, Herbicide or Fertilizer Applications Endorsement

The following is added to Section V. Exclusions, F. Property Damage to Certain Property:

Paragraph V.F.5. of this exclusion, above, does not apply to Property Damage to real estate property arising out of Your Work in the application of any pesticide, herbicide or fertilizer.

All other terms of your policy remain the same.

Waiver of Rights of Recovery Endorsement

The following is added to section VII. Conditions, P. Transfer of Rights of Recovery to Us:

If, prior to an Occurrence, covered by this policy, you have agreed in a written contract, to waive your rights to recovery of payment for damages for **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** caused by that Occurrence, then we agree to waive our right of recovery for such payment.

All other terms of your policy remain the same.

SCHEDULED RETAINED LIMITS

Type of Coverage	Limits Of Liability
Certified Acts of Terrorism	\$1,000,000

Name of Insured	Policy Number QK06503290	Effective Date 03/01/11
PREMIER HOTEL INSURANCE GROUP (P2)		Processing Date 05/03/11 13:52 001

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Scheduled Underlying Insurance

Comprehensive General Liability	Limits Of Liability
Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	General Aggregate. \$2,000,000
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Products/Completed Operations Aggregate. \$1,000,000
Policy Period SEE ACCOUNT CERTIFICATE	Personal and Advertising Injury. \$1,000,000
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	Each Occurrence. \$1,000,000

Automobile Liability	Limits Of Liability
Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Bodily Injury And Property Damage Combined, Each Accident \$1,000,000 CSL
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Bodily Injury, Each Person \$ Each Accident \$
Policy Period SEE ACCOUNT CERTIFICATE	Property Damage, Each Accident \$

Employers Liability	Limits Of Liability
Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Bodily Injury By Accident Each Accident \$500,000*
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Bodily Injury Disease Policy Limit Each Employee \$500,000*
Policy Period SEE ACCOUNT CERTIFICATE	

*UNLIMITED IN THE STATE OF NEW YORK

ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)

Name of Insured	Policy Number QK06503290	Effective Date 03/01/11
PREMIER HOTEL INSURANCE GROUP (P2)	Processing Date 05/03/11 13:52	001

Scheduled Underlying Insurance

Comprehensive General Liability		Limits Of Liability	
Carrier		General Aggregate.	\$
Policy Number		Products/Completed Operations Aggregate.	\$
Policy Period		Personal and Advertising Injury.	\$
		Each Occurrence.	\$
Coverage is:	<input type="checkbox"/> claims-made <input type="checkbox"/> not claims-made		

Automobile Liability	Limits Of Liability	
Carrier	Bodily Injury And Property Damage Combined. Each Accident	
	\$	
Policy Number	Bodily Injury. Each Person	Each Accident
	\$	\$
Policy Period	Property Damage. Each Accident	
	\$	

Employers Liability		Limits Of Liability	
Carrier		Bodily Injury By Accident Each Accident	
Policy Number		\$	
		Bodily Injury By Disease	
		Policy Limit	Each Employee
Policy Period		\$	\$

Scheduled Underlying Insurance - Continued

Type Of Coverage: FOREIGN LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$1,000,000 EACH OCCURRENCE \$1,000,000 AGGREGATE ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Type Of Coverage: LIQUOR LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$1,000,000 EACH COMMON CAUSE \$1,000,000 AGGREGATE ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Type Of Coverage: GARAGEKEEPERS LEGAL LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$1,000,000 EACH OCCURRENCE ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Name of Insured	Policy Number QK06503290	Effective Date 03/01/11
PREMIER HOTEL INSURANCE GROUP (P2)		Processing Date 05/03/11 13:52 001

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Scheduled Underlying Insurance - Continued

Type Of Coverage: MARINE OPERATORS LEGAL LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$5,000,000 OCCURRENCE \$5,000,000 AGGREGATE
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Type Of Coverage: PROTECTION & INDEMNITY LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$5,000,000 \$5,000,000
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Type Of Coverage: Carrier Policy Number Policy Period	Limits Of Liability
Coverage is: <input type="checkbox"/> claims-made <input type="checkbox"/> not claims-made	

Silica Exclusion

This insurance does not apply to:

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of any actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of silica in any form by any person; or
 - b. existence of silica in any form.
2. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of any actual, alleged or threatened:
 - a. absorption, ingestion, or inhalation of any other solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and Waste, in any form by any person; or
 - b. existence of any such other irritant or contaminant in any form;and that are part of any Claim or Suit that also alleges any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** described in paragraph 1 of this exclusion above.
3. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that any Insured or others:
 - a. test for, monitor, clean up, remove, contain, treat, detoxify or neutralize silica in any form; or
 - b. respond to, or assess, in any way the effects of silica in any form.

Because silica, and any other such irritants or contaminants, are Pollutants, this exclusion applies in addition to any of the following exclusions that apply:

- a. the pollution exclusion in this policy; or
- b. any other pollution-related exclusion made part of this policy.

All other terms of your policy remain the same.

Washington Amendatory Endorsement

This endorsement changes your policy to comply with, or otherwise respond to, Washington law. Therefore, each change made by this endorsement applies only to the extent:

1. required by Washington statutory or regulatory law; or
2. specifically described in the part of this endorsement which makes that change.

As a result, if the address shown for you in Item 1 of the Declarations of your policy is outside Washington, each change that is made to comply with Washington statutory or regulatory law applies only if, and to the extent:

1. your policy provides coverage for damages that result from your operations in, or which affect, Washington; and
2. that law applies to that coverage.

1. Section VII. Conditions D. Cancellation 2. is replaced by the following:

2. We may cancel this policy. If we cancel because of non-payment of premium, we must mail or deliver to you and your agent or broker not less than 10 days advance written notice stating when the cancellation is to take effect. If we cancel for any other reason, we must mail or deliver to you and your agent or broker not less than 60 days advance written notice stating when the cancellation is to take effect. The cancellation notice will state the specific reason for cancellation.

2. The following condition is added to Section VII. Conditions D. Cancellation:

We may decide not to renew or continue this policy. If so, we will mail or deliver a notice of nonrenewal to you and your agent or broker at least 60 days before policy expiration unless you have obtained replacement insurance or you fail to pay any premium when due after we have offered to renew this policy at least 20 days before the expiration date. The notice will state the reason for cancellation. Mailing that notice to you at your mailing address shown in Item 1 of the Declarations shall be sufficient to prove such notice.

All other terms of your policy remain the same.

Unsolicited Communication Exclusion Endorsement

1. The following is added to section V. Exclusions:

Unsolicited Communication

This insurance does not apply to **Bodily Injury, Property Damage, Personal Injury or Advertising Injury:**

1. arising out of the actual or alleged violation of any law or regulation that restricts or prohibits the transmitting of **Unsolicited Communication**; or
2. alleged in a **Claim or Suit** that also alleges a violation of any law or regulation that restricts or prohibits the transmitting of **Unsolicited Communication**.

2. The following is added to section IV. Definitions:

Unsolicited Communication means any communication, in any form, that:

1. is received by any person or organization; and
2. such person or organization did not ask to receive.

All other terms of your policy remain the same.

Application of Limits of Insurance

1. The following replaces Section III. Limits Of Insurance B. of this policy:

B. The General Aggregate Limit, applicable separately to each individual Certificate issued to member of The Premier Hotel Insurance Group , is the most we will pay for all damages covered under Insuring Agreement I. Coverage except for:

1. damages included in the Products-Completed Operations Hazard, applicable separately for each individual Certificate issued to member of The Premier Hotel Insurance Group ; and
2. damages that would have been covered under any Automobile Liability type of coverage included in the Scheduled Underlying Insurance or Scheduled Retained Limits to which no aggregate limit applies.

For damages because of Bodily Injury or Property Damage, if any one Scheduled Underlying Insurance or any one Scheduled Retained Limit contains aggregate limits in the same policy that apply separately to each Location or Project, other than an aggregate limit applying to the Products-Completed Operations Hazard, then the General Aggregate Limit stated in the Declarations will apply in the same manner as such aggregate limits of that Scheduled Underlying Insurance or Scheduled Retained Limit.

However, with respect to The Premier Hotel Insurance Group and to each separate Certificate issued to members of The Premier Hotel Insurance Group , we will not pay more than \$100,000,000 for the combined total of all damages covered under Insuring Agreement I. Coverage because of Bodily Injury and Property Damage that arises out of any Location or Project. For the purposes of determining the applicable General Aggregate Limit, each Location or Project that includes premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, or waterway, or by a right-of-way of a railroad, will be considered a single Location or Project.

2. The following is added to section III. Limits of Insurance:

With respect to each separately numbered Certificate issued to members of The Premier Hotel Insurance Group , endorsed to this policy, and evidenced by monthly bordereaux to us, the General Aggregate Limit will apply jointly to all Named Insureds shown on such Certificate.

3. The following is added to Section IV. Definitions of this policy:

Location means any premises, site or location that you rent or lease from others, or own.

Project means any area away from any premises, site, or location that you rent or lease from others, or own, and at which you are performing operations pursuant to a contract or agreement.

4. The following is added to section IV. Definitions R. Policy Period:

For purposes of the beginning and ending date of coverage under this insurance for each Named Insured, Policy Period shall mean the period of time from the inception date shown on the applicable Certificate to the earlier of the expiration date shown on such Certificate or the termination date of this policy.

All other terms of your policy remain the same.

**Auto Liability Limits of Insurance Endorsement -
Exception for Damages Not Subject to Underlying Aggregate Limit
Applies Only to Auto Liability**

The following replaces the first paragraph of Section III. **Limits Of Insurance B.** of this policy:

- B. The General Aggregate Limit is the most we will pay for all damages covered under Insuring Agreement I. Coverage except for:
1. damages included in the **Products-Completed Operations Hazard**; and
 2. damages that would have been covered under any **Automobile Liability** type of coverage included in the **Scheduled Underlying Insurance** or **Scheduled Retained Limits** to which no aggregate limit applies.

All other terms of your policy remain the same.

Auto Liability Limitation

The following is added to section V, Exclusions:

Auto

This insurance does not apply to **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the ownership, maintenance, operation, use, **Loading or Unloading** or entrustment to others of any Auto.

However, if insurance for such **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** is provided by any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**, then:

1. this exclusion shall not apply; and
2. the insurance provided by this policy will not be broader than the insurance provided by that **Scheduled Underlying Insurance** or that **Scheduled Retained Limit**.

All other terms of your policy remain the same.

Garagekeepers Legal Liability

This insurance does not apply to **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of:

Garagekeepers Legal Liability.

However, if insurance for such **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** is provided by any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**, then:

1. this exclusion does not apply;
2. section V. F. **Property Damage To Certain Property** does not apply; and
3. the insurance provided by this policy will not provide broader coverage than the insurance provided by that **Scheduled Underlying Insurance** or that **Scheduled Retained Limit**.

All other terms of your policy remain the same.

Pollution Exclusion Except Building Heating Or Air Conditioning Equipment Or Water Heating Equipment

1. The following is added to Section V. Exclusions S. Pollution of this policy:

This exclusion also does not apply to **Bodily Injury** arising out of **Building Heating or Air Conditioning Equipment or Water Heating Equipment Fumes, Smoke, Soot, or Vapors** if insurance for such **Bodily Injury** is provided by any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**. However, the insurance provided by this policy for such **Bodily Injury** will not be broader than the insurance provided by such **Scheduled Underlying Insurance** or **Scheduled Retained Limit**.

2. The following is added to Section IV. Definitions of this policy:

Building Heating or Air Conditioning Equipment or Water Heating Equipment Fumes, Smoke, Soot, or Vapors means only the fumes, smoke, soot, or vapors that:

1. result from equipment used to:
 - a. heat, cool or dehumidify, a building; or
 - b. heat water for personal use by persons within a building;
2. are within that building.

All other terms of your policy remain the same.

Knowledge Of Occurrence Or Claim

- 1 The following replaces section VII. Conditions I. Knowledge of Occurrence or Claim

Knowledge of Occurrence or Claim

Knowledge of an Occurrence, Claim or Suit by your agent, servant or Employee shall not in itself constitute knowledge by you, unless an Executive Officer or anyone working in the capacity as Partner

1. shall have received notice of such Occurrence, Claim or Suit from said agent, servant or Employee; or
2. otherwise has knowledge of such Occurrence, Claim or Suit.

All other terms of your policy remain the same.

Crisis Management Service Expenses Endorsement

1. The following is added to section I. Coverage:

Crisis Management Service Expenses

We will reimburse you, or pay on your behalf, **Crisis Management Service Expenses** arising out of a **Crisis Management Event** that first commences during the **Policy Period**. The most we will pay for all **Crisis Management Service Expenses** for all **Crisis Management Events** that first commence during the **Policy Period** is the **Crisis Management Service Expenses Limit**. The **Crisis Management Service Expenses Limit** is 1% of the General aggregate limit stated in Item 3.B. of the Declarations. A **Crisis Management Event** will be deemed to first commence at the time when any **Executive Officer** first becomes aware of an **Occurrence** that leads to a **Crisis Management Event** and will end when we determine that the crisis no longer exists, or when the **Crisis Management Service Expenses Limit** has been exhausted, whichever occurs first.

A **Retained Limit** does not apply to **Crisis Management Service Expenses**.

Any payment of **Crisis Management Service Expenses** that we make under this endorsement shall not be determinative of our obligations under this policy with respect to, nor create any duty to defend against or indemnify any **Insured** for, any **Claim** or **Suit**.

2. The following is added to section III. **Limits of Insurance**:

The most we will pay for **Crisis Management Service Expenses** arising out of all **Crisis Management Events** is the **Crisis Management Service Expenses limit** as stated in paragraph 1. above. Payment of any such **Crisis Management Service Expenses** is in addition to, and shall not reduce, any aggregate limits under this policy.

3. The following is added to section IV. **Definitions**:

Crisis Management Event means an **Occurrence** that an **Executive Officer** of the **Named Insured** reasonably determines has resulted, or may result, in:

1. damages covered by this policy that are in excess of the total applicable limits of the **Scheduled Underlying Insurance** or **Scheduled Retained Limit**; and
2. significant adverse regional or national media coverage.

Crisis Management Service Expenses means the reasonable and necessary expenses you incur in:

1. retaining a public relations consultant or firm, or a crisis management consultant or firm; or
 2. planning or executing your public relations campaign;
- to mitigate the negative publicity generated from a **Crisis Management Event**.

Executive Officer means the:

1. Chief Executive Officer;
 2. Chief Operating Officer;
 3. Chief Financial Officer;
 4. President;
 5. General Counsel;
 6. general partner (if the **Named Insured** is a partnership); or
 7. sole proprietor (if the **Named Insured** is a sole proprietorship);
- of the **Named Insured**, or any person acting in the same capacity as any individual listed above.

4. The following is added to section V. Exclusions:

Newly Acquired, Controlled or Formed Entities

Crisis Management Service Expenses arising out of a **Crisis Management Event** that occurred prior to the date you acquired, controlled or formed any other entity, even though an **Executive Officer** only first becomes aware of an **Occurrence** that leads to such **Crisis Management Event** after such date.

5. The following is added to section VII. Conditions F. Duties in the Event of an Occurrence, Claim or Suit:

You must also see to it that we are notified by telephone within 24 hours of a **Crisis Management Event** that may result in **Crisis Management Service Expenses**.

You must also provide written notice as soon as practicable. To the extent possible, notice should include:

- a. how, when and where the **Crisis Management Event** took place;
- b. the names and addresses of any injured persons and witnesses;
- c. the nature and location of any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the **Crisis Management Event**; and
- d. the reason it is likely to involve damages covered by this policy in excess of the **Retained Limit** and involve regional or national media coverage.

You must submit all incurred expenses within 180 days after we have notified you of our determination that the **Crisis Management Event** no longer exists. Expenses submitted after 180 days of such notice are not reimbursable.

All other terms of your policy remain the same.

Failure To Notify Insurer Of Occurrence

The following is added to section VII. Conditions F. 2:

Your failure to notify us of an Occurrence that may result in a Claim or Suit seeking damages covered by this Policy because you inadvertently notified another insurer of such Occurrence will not invalidate this Policy, but only if you notify us immediately after you become aware of such inadvertent error.

All other terms of your policy remain the same.

POLICY CHANGE ENDORSEMENT

This endorsement summarizes the changes to your policy. All other terms of your policy not affected by these changes remain the same.

How Your Policy Is Changed

EFFECTIVE 11/01/2011 THE FOLLOWING FORMS ARE ADDED TO YOUR POLICY BUT ONLY WITH RESPECT TO THE NAMED INSURED AND CERTIFICATE LISTED:

SUP001 DESIGNATED PREMISES LIMITATION AS RESPECTS:
NEVADA PROPERTY 1 LLC DBA THE COSMOPOLITAN OF LAS VEGAS
CERTIFICATE #2149-A

SUP009 DESIGNATED OPERATIONS EXCLUSION AS RESPECTS:
NEVADA PROPERTY 1 LLC DBA THE COSMOPOLITAN OF LAS VEGAS
CERTIFICATE #2149-B

SUP007 PROFESSIONAL SERVICES EXCLUSION AS RESPECTS:
NEVADA PROPERTY 1 LLC DBA THE COSMOPOLITAN OF LAS VEGAS
CERTIFICATE #2149-C

SU301 LIMITED ABUSE OR MOLESTATION COVERAGE ENDORSEMENT AS RESPECTS:
NEVADA PROPERTY 1 LLC DBA THE COSMOPOLITAN OF LAS VEGAS
CERTIFICATE #2149-D

Premium Change Which Is Due Now

Additional premium N/A

Returned premium N/A

If issued after the date your policy begins, these spaces must be completed and our representative must sign below.

Policy issued to:
PREMIER HOTEL INSURANCE GROUP (P2)

Authorized Representative

Endorsement takes effect: 11/01/11
Policy number: QK06503290
Processing date: 11/22/11 14:10 090

40704 Ed. 5-84

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Endorsement

Page 1

Designated Premises Limitation

This endorsement changes your Specialty Commercial Umbrella Liability Policy, but only as respects to:

Nevada Property I LLC dba The Cosmopolitan of Las Vegas
Certificate #2149-A
Effective Date of Cert Holder 11/01/2011
Effective Date of Endorsement 11/01/2011
Pol #QK06503290

This insurance only applies to Bodily Injury, Property Damage, Personal Injury or Advertising Liability arising out of:

1. the ownership, maintenance, occupancy or use of the premises designated in the Schedule of Covered Premises, below, including any property located on such premises; or
2. any goods or products manufactured, distributed or serviced at or from such premises.

Schedule of Covered Premises

Description and Location of Premises:

	Added	Deleted
Cosmopolitan Hotel 3708 Las Vegas Blvd, Las Vegas NV 89109	11/01/2011	
Leased Office Space 4285 Polaris Ave, Las Vegas NV 89103	11/01/2011	
Leased Space - Recruitment Center 7180 Pollack Drive, Suites 100 and 140, Las Vegas NV 89119	11/01/2011	
Leased Office Space 3485 West Harmon Blvd, Las Vegas NV 89103	11/01/2011	
Leased Office - Training Space 650 White Drive, Suite 280, Las Vegas NV 89103	11/01/2011	
Leased Office Space - Corporate Office 5170 Badura Avenue, Las Vegas NV 89118	11/01/2011	
Leased Warehouse Space Units 100,110,120,130 6025 Procyon Street, Las Vegas NV 89118	11/01/2011	
Parking Lot - Used for Employee Parking 3200 West Tomkins Avenue, Las Vegas NV 89103	11/01/2011	

Description and Location of Premises (continued):

All other terms of your policy remain the same.

Designated Operations Exclusion

This endorsement changes your Specialty Commercial Umbrella Liability Policy, but only as respects to:

Nevada Property I LLC dba The Cosmopolitan of Las Vegas
Certificate #2149-B
Effective Date of Cert Holder 11/01/2011
Effective Date of Endorsement 11/01/2011
Pol #QK06503290

The following is added to section V. Exclusions:

Described Operations

This insurance does not apply to Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of the operations designated in the Schedule of Designated Operations below.

Schedule of Designated Operations

All Operations covered under OCIP/Wrap Up for the construction of the Cosmopolitan Hotel of Las Vegas and all property damage to "your work" arising out of it or any part of it including the Products/Completed Operations Hazard related to the original construction.

Professional Services Exclusion

This endorsement changes your Specialty Commercial Umbrella Liability Policy, but only as respects to:

Nevada Property I LLC dba The Cosmopolitan of Las Vegas

Certificate #2149-C

Effective Date of Cert Holder 11/01/2011

Effective Date of Endorsement 11/01/2011

Pol #QK06503290 with respect to Emergency Medical Technicians (EMT's)

This insurance does not apply to Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of the rendering of, or failure to render, any professional service by or on behalf of the Insured.

All other terms of your policy remain the same.

Limited Abuse Or Molestation Coverage Endorsement

Nevada Property I LLC dba The Cosmopolitan of Las Vegas

Certificate #2149-D

Effective Date of Cert Holder 11/01/2011, Effective Date of Endorsement 11/01/2011

Pol #QK06503290

1. The following is added to section V. Exclusions:

This insurance does not apply to Bodily Injury, Property Damage, Personal Injury, or Advertising Injury arising out of any Abuse or Molestation.

However if insurance for such Bodily Injury or Personal Injury is provided by any Scheduled Underlying Insurance or any Scheduled Retained Limit, then:

1. this exclusion does not apply; and
2. the insurance provided by this policy will not provide broader coverage than the insurance provided by that Scheduled Underlying Insurance or that Scheduled Retained Limit.

2. The following is added to section IV. Definitions J. Insured:

However, none of the following is an Insured under paragraph IV. J. for Bodily Injury or Personal Injury arising out of any Abuse or Molestation:

1. any Perpetrator;
2. any person or organization that has been added to your policy as an additional insured, or any employee, leased worker, agent, representative or volunteer worker of such person or organization; or
3. any of your independent contractors, or any employee, leased worker, agent, representative or volunteer worker of such independent contractor.

Subject to section II. Defense of this agreement, paragraph 2.1 above does not apply to any Perpetrator once a final, non-appealable adjudication in the Suit establishes that such Perpetrator did not commit the Abuse or Molestation.

Also, paragraph 2.2. above does not apply to any person or organization:

1. to whom you have agreed in a written contract requiring insurance to include such person or organization as an additional insured; or
2. that has been added to your policy as an additional insured because such person or organization owns property that you manage, but only to the extent such Abuse or Molestation is committed on such property.

Such person or organization is an Insured, but only to the extent that the Bodily Injury or Personal Injury is caused by Abuse or Molestation arising out of your business. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization. The insurance provided to such additional insureds shall be limited to the limits of liability required by that written contract requiring insurance. This endorsement shall not increase the limits of insurance described in section III. Limits of Insurance.

3. The following is added to section IV. Definitions O. Occurrence:

As respects Bodily Injury or Personal Injury arising out of any Abuse or Molestation, all single, multiple, continuous, sporadic or related acts of Abuse or Molestation, committed by one Perpetrator or two or more Perpetrators acting together, will be deemed to be one Occurrence, regardless of the number of:

1. Insureds;
2. Claims made or Suits brought; or

3. persons or organizations making **Claims** or bringing **Suits**.

Such **Occurrence** will be deemed to have been committed on the date the first such **Abuse** or **Molestation** is committed, regardless of when such acts or contacts are actually committed.

4. The following are added to section **IV. Definitions**:

Abuse or Molestation means any illegal or offensive physical act or contact committed by any **Perpetrator** against any person who is:

1. under 18 years of age;
2. legally incompetent; or
3. in the care, custody or control of any **Insured** and is physically or mentally incapable of consenting to such physical act or contact.

Perpetrator means any of the following persons who actually or allegedly commit any illegal or offensive physical act or contact:

1. you or your spouse, if you are an individual;
2. your partners or members, or their spouses, if you are a partnership or joint venture;
3. your managers or members, if you are a limited liability company;
4. your executive officers or directors, if you are an organization other than a partnership, joint venture or limited liability company;
5. your **Employees** or volunteer workers; or
6. any other person acting together with any of the persons described in paragraphs 1. through 5. above.

5. The following is added to section **II. Defense A.**:

We have no duty to defend, investigate or settle any **Claim** or **Suit** on behalf of any **Perpetrator**. However, we will reimburse you or such **Perpetrator** for the amount of such person's reasonable and necessary defense costs:

1. once a final, non-appealable adjudication in the **Suit** establishes that such **Perpetrator** did not commit the **Abuse** or **Molestation**;
2. when the **Retained Limit** has been exhausted by payment of judgment or settlements that would be covered by this policy; and
3. only to the extent that such defense costs are also covered by the applicable **Scheduled Underlying Insurance** or **Scheduled Retained Limit**.

All other terms of your policy remain the same.

EXHIBIT 3

EXHIBIT 3

A-14-698824-C • 03/24/2017

TRAN

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DISTRICT COURT

CLARK COUNTY, NEVADA



CLERK OF THE COURT

DAVID MORADI, Individually,)

Plaintiff,)

vs.)

CASE NO.: A-14-698824-C

DEPT. NO.: XX

NEVADA PROPERTY 1, LLC, d/b/a)

"The Cosmopolitan of Las)

Vegas"; ROOF DECK)

ENTERTAINMENT, LLC, d/b/a)

"Marquee Nightclub"; and DOES)

I through X, inclusive; ROE)

CORPORATION I through X,)

inclusive,)

Defendants.)

REPORTER'S TRANSCRIPT OF JURY TRIAL, PM SESSION

BEFORE THE HONORABLE JUDGE ERIC JOHNSON

DEPARTMENT XX

FRIDAY, MARCH 24, 2017

2:18 P.M.

Reported by: Amber M. McClane, NV CCR No. 914

Amber M. McClane, CCR No. 914
(702) 927-1206 • ambermcclaneccr@gmail.com

Pursuant to NRS 239.053, illegal to copy without payment.

AA001543

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A-14-698824-C • 03/24/2017

1 **LAS VEGAS, NEVADA; FRIDAY, MARCH 24, 2017**

2 **2:18 P.M.**

3 *** * * * ***

4 **P R O C E E D I N G S**

5 *** * * * ***

6 **THE COURT:** I think we finished up this
7 morning with plaintiff's brief relating to evidence to
8 vote improper bias or animus. Am I correct? Is there
9 anything we -- I think we covered everything on that
10 one.

11 Then is there something still outstanding as
12 it relates to Dr. Duke?

13 **MR. AICKLEN:** There is, Your Honor. I
14 apologize. I thought we were done when I left this
15 afternoon. I thought we were going to do it now. So I
16 wasn't here when the issue came up.

17 **THE COURT:** Okay.

18 **MR. AICKLEN:** Josh Aicklen, for the
19 defendants, Your Honor.

20 My understanding of what was discussed, the
21 plaintiff didn't argue their personal attacks or to
22 discredit him based on him being my -- my wife's
23 physician. To tell you the truth, I brought that out
24 before the depo. If I had never brought it up, they
25 would have never known because of HIPAA.

 But my wife in 2016 had a herniated disc,

1 cervical spine. I asked Dr. John Herr who's the best
2 neurosurgeon in town, just like Ms. Cohen asked who's
3 the best neurosurgeon in town for the plaintiff, they
4 told me Derek Duke. I took my wife there. When I had
5 problems with it, a doctor told me I needed a
6 laminectomy, I went to him.

7 As far as allegations by plaintiff's counsel
8 that I spoke to Dr. Duke about Mr. Moradi, that's
9 absolutely false. And if needs be, if you want to
10 swear me in on that issue --

11 **THE COURT:** Hold on. All right. Are you
12 plan -- is anybody planning on bringing up his --

13 **MR. AICKLEN:** It was in the briefing.

14 **THE COURT:** -- his wife or him being --

15 **MR. RAVIPUDI:** With the understanding --

16 **THE COURT:** -- patients of Dr. Duke?

17 **MR. RAVIPUDI:** What the understanding is that
18 the scope of his testimony, as discussed before we took
19 the lunch break, that will not be the topic of
20 anything.

21 **THE COURT:** Okay. All right. I mean,
22 that's --

23 **MR. DIAL:** Your Honor, the scope that I
24 discussed this morning was what I was going to cover in
25 opening. I specifically said there might be other

1 areas that Mr. Aicklen would want to discuss because
2 he's --

3 **THE COURT:** I am.

4 **MR. DIAL:** -- he's putting him on, not me.

5 **THE COURT:** Let me just say, I'm good with
6 what we discussed this morning, which was that he went
7 to see Dr. Duke, Dr. Duke looked at the scan --

8 **MR. AICKLEN:** CT scan.

9 **THE COURT:** -- said it was a normal-looking
10 scan, said that he might have a minor concussion, and
11 he should avoid stimulation for the next couple weeks.

12 **MR. RAVIPUDI:** Yeah. Whatever's contained in
13 his letter of diagnoses.

14 **THE COURT:** Letter of diagnosis. Are we
15 going --

16 **MR. AICKLEN:** Can I address that?

17 **THE COURT:** -- somewhere beyond that --

18 **MR. AICKLEN:** I would like to if I could,
19 Your Honor.

20 **THE COURT:** Okay. I mean, I'll let you do
21 that. I'm just saying --

22 **MR. AICKLEN:** I appreciate it.

23 **THE COURT:** -- I'm hoping that was going to
24 be where we were going to stop.

25 **MR. AICKLEN:** So that's where we're at now,

1 but I'd like to go beyond that, if we could.

2 Your Honor, if I can approach, I want to show
3 you plaintiff's February 25th, 2015, designation, their
4 first initial 16.1.

5 **THE COURT:** Okay.

6 **MR. AICKLEN:** Just to show it to you real
7 quick.

8 **THE COURT:** I mean, this is yours, but, I
9 mean, do you know what he's showing me or --

10 **MR. PADDA:** If we can see what he's showing.

11 **MR. RAVIPUDI:** I haven't seen -- I don't
12 know.

13 **MR. AICKLEN:** It's your initial dated
14 February 25th.

15 **THE COURT:** Well, I know it's there. But, I
16 mean, rather than us have them hunt for it, show what
17 you're going to show me real quick so they know what
18 we're talking about.

19 **MR. AICKLEN:** Can we get the ELMO?

20 **THE COURT:** Yeah, you can use the ELMO. I
21 think we can.

22 **MR. AICKLEN:** I know it picked up on my blank
23 legal pad.

24 **THE COURT:** All right.

25 **MR. AICKLEN:** There we go. This is

1 plaintiff's initial 16.1, Your Honor. This -- their
2 argument is that this witness should have been
3 designated by us, a report, testimony, history, and
4 everything. That is not correct. This witness is --
5 was a treating physician who plaintiff chose.

6 Now, under the federal rules, I could reach
7 out and talk to this doctor. But under the state
8 rules, I cannot. I couldn't have gone to Dr. Duke as a
9 treating physician and said, "Hey, I need you to do a
10 report. I need you to get me a rate sheet," and all
11 those things. I could not have designated him.

12 But I want you to know what the plaintiffs
13 designated him as. Dr. Derek A. Duke -- this is in
14 their initial disclosure -- is also listed, Your Honor,
15 within their 16(a) -- (3) (1) (a).

16 It says, "This witness and/or these witnesses
17 shall testify as to the authenticity and genuineness of
18 all records and billings; plaintiff's injuries and
19 causation therefor; the reasonableness and necessity of
20 all past, present, and future medical treatment
21 rendered to plaintiff, and causation therefor; the
22 reasonableness, necessity, customary nature of said
23 treatment, and relating billings and causation
24 therefor."

25 This is their description of how they're

1 going to use Dr. Duke.

2 Under 16.1 I have the right to rely upon that
3 in my -- whether I call him direct if they drop him as
4 a witness or in my cross-examination of him. I could
5 not ethically, under the state law, have reached out to
6 Dr. Duke to demand a report -- or to request a report
7 and a rate sheet and a case list that you normally do
8 with a 16.1 expert.

9 So -- but under 16.1, I want to show you
10 their pretrial designation as well.

11 Here is plaintiff's pretrial disclosure
12 pursuant to NRC 16.1(a) (3) dated 1/6/2017. And it
13 just lists the witness. Right? You just have to
14 list -- this isn't an expert disclosure or 16.1. This
15 is these are who the witnesses are. We've already
16 described what they're going to testify to. Dr. Derek
17 A. Duke is in there.

18 So I have the right -- and also if you look
19 at our disclosure, Dr. Duke is in there. And it also,
20 in our disclosure, says that defendant reserves the
21 right to question any expert witness called by the
22 plaintiff.

23 So I would argue to you, Your Honor, that
24 Dr. Duke, even though he is a one-time treating
25 physician, if you think about an IME, even though he's

1 not an IME doctor, so that order issue isn't there.
2 But if you think about an IME, the IME doctor only
3 sees -- generally only sees the plaintiff one time as
4 well. And every day we have very qualified Hallmark
5 experts coming in after one examination of the
6 plaintiff.

7 So I say that under our rules and 16.1, I
8 have a right to rely upon their designation of Duke as
9 an expert and to call him as such.

10 **THE COURT:** Okay. So what are you going to
11 want to call him to testify to?

12 **MR. AICKLEN:** The -- what you earlier
13 mentioned, okay, the factual.

14 Ms. Padda referred plaintiff to you. Did you
15 get a CT scan?

16 Yes.

17 Did you review it?

18 Yes.

19 Did you review a cervical CT?

20 Yes.

21 Did you talk to him?

22 Yes.

23 What did you tell him?

24 I told him he probably had a concussion; he
25 should take it easy for a couple weeks.

1 Now, when I took his deposition -- so this
2 isn't going to come as a surprise to them -- I paid him
3 as an expert. He'd been designated as a causation
4 expert by the plaintiffs. And I asked him all the
5 expert questions.

6 "Did you find that he had a traumatic brain
7 injury?

8 "No, I did not. I found that he had
9 postconcussive syndrome.

10 "What's the difference between a TBI and
11 postconcussive?

12 "Well, postconcussive" --

13 **THE COURT:** I mean, did he find that during
14 his examination?

15 **MR. AICKLEN:** Yes, he did. He found it was
16 postconcussive syndrome.

17 **THE COURT:** Okay. All right. Go ahead.
18 What else? So we have everything -- okay. What
19 else -- where else are you going to go with him?

20 **MR. AICKLEN:** I would say that that's it.

21 **THE COURT:** Okay.

22 **MR. AICKLEN:** Did you examine him? Did you
23 tell him he had a postconcussive syndrome? Did you
24 find any traumatic brain injury?

25 No, sir, I did not.

1 Why?

2 Here's why.

3 And the points that enforce it.

4 **THE COURT:** All right. What's the
5 plaintiff's position in reference to that?

6 **MR. RAVIPUDI:** So, again, if that is
7 literally the scope of the testimony, then that's the
8 scope of the testimony. I think that's -- just to put
9 it in front, this is Exhibit A to Dr. Duke's
10 deposition, which is part of the record. And I think
11 there's a stipulated admissibility as to this document.
12 And just to show it -- and then on Exhibit -- oops. I
13 hope I didn't do anything. There we go. Okay. Let me
14 try to zoom in now that I see how this works.

15 But here's the diagnoses. And, you know,
16 postconcussive syndrome with symptoms of decreased
17 concentration, photophobia, severe headache, and lack
18 of concentration. And he goes on to describe what his
19 findings are, in this document.

20 He specifically testifies in his deposition
21 he has no recollection of examining Mr. Moradi, has no
22 recollection of actually what was told to him, but this
23 is his -- I guess, his past recollection recorded.

24 And so he should be limited to that.

25 Questions were asked of Dr. Duke: Well, what do you

1 think of neuroradiologist Dr. Keith Lewis?

2 Oh, I have lots of opinions about Dr. Lewis.

3 You know, that's --

4 **THE COURT:** You're not going there, are you?

5 **MR. AICKLEN:** No. I don't care about
6 Dr. Lewis.

7 **MR. RAVIPUDI:** Okay. Dr. Duke had not
8 reviewed any MRIs that were performed after the --
9 after his treatment of him on April 11. He doesn't
10 know what other doctors Mr. Moradi saw.

11 He specifically says in here that if he's got
12 any issues, he should continue to treat with the
13 neurologist. And that neurologist that he treated with
14 was not Dr. Duke.

15 So it really -- his scope of his exam is
16 limited to that. And if that's what's going to happen,
17 then --

18 **THE COURT:** Okay.

19 **MR. RAVIPUDI:** -- I've got no qualms.

20 **THE COURT:** I just feel like we're arguing
21 about nothing. I'm going to be frank. So, you know --
22 you know, Dr. Duke met him. He didn't find whatever
23 you said he didn't -- you asked him, did you find -- I
24 forget what.

25 **MR. AICKLEN:** Traumatic brain injury.

1 **THE COURT:** -- traumatic brain injury. He
2 said, no. He'll say, "No, I didn't find it." You
3 don't have a problem if he says -- says that?

4 **MR. RAVIPUDI:** If he says that and that's
5 what his records are, that's fine.

6 **THE COURT:** I mean, that's --

7 **MR. RAVIPUDI:** Then if he says -- if the
8 question is asked, "Does he have a traumatic brain
9 injury?" he shouldn't be able to answer that question.
10 He should just say, "I didn't diagnose him" --

11 **THE COURT:** Well, you can ask him, "Did you
12 diagnose it?" And then he'd say --

13 **MR. RAVIPUDI:** -- whatever he says, yeah.

14 **THE COURT:** And that's fair. Whether he has
15 one -- he -- at least when he left there, he didn't
16 diagnose one.

17 **MR. RAVIPUDI:** That's it.

18 **THE COURT:** That's fair.

19 **MR. AICKLEN:** And I'm certainly -- just to
20 assuage the Court, I'm certainly not going to ask him
21 about developments with Mr. Moradi beyond his
22 treatment. He didn't look at any records or anything
23 like that.

24 **MR. RAVIPUDI:** That was the scope of our
25 motion.

1 **THE COURT:** All right. I think we're --

2 **MR. RAVIPUDI:** Okay.

3 **THE COURT:** -- on the same page. You can ask
4 Dr. Duke about his one-day experience with Mr. Moradi
5 and his CT scan and what his conclusions were at the
6 end of the examination. You know, if there's something
7 far beyond what's in that letter -- I'm assuming that
8 you're -- you know, then raise it with me before you do
9 it. But that's -- that's -- that's fine, and everybody
10 seems to be on the same page. That's fine.

11 **MR. AICKLEN:** Thank you, Your Honor.

12 **MR. RAVIPUDI:** Thank you, Your Honor.

13 **THE COURT:** Okay. All right.

14 All right. Let me clarify. I've dealt with
15 the motion for reconsideration for summary judgment and
16 the joint and several liability materials. I go back,
17 and I see where defense is coming from with my original
18 minute order relating to Rockwell v. Sun Harbor Budget
19 Suites and minute order relating to whether the Marquee
20 security people were employees of The Cosmopolitan.

21 And I've gone back, looked at Rockwell v. Sun
22 Harbor, and I've gone back and read through the
23 available legislative history on 651.015.

24 While I don't find that the Marquee security
25 people were employees of The Cosmopolitan, I do find

1 that The Cosmopolitan has a nondelegable duty and can
2 be vicariously held responsible for the conduct of the
3 Marquee security officers based upon Rockwell in which
4 Rockwell ultimately says that if someone such -- has a
5 responsibility for security, hires an independent
6 contractor to do it, that they still are responsible in
7 Nevada.

8 And I appreciate I've got other cases that
9 were given to me, but my reading of Rockwell is Nevada
10 adopts the rule which provides that, if you have an
11 obligation for security and you contract that away to
12 somebody else who then hires the security, you still
13 have a nondelegable duty, which effectively makes them
14 in the nature of employees, whether or not they really
15 are employees.

16 I've looked at 651.051, and, you know, it's
17 very clear the crux of that statute was looking at the
18 essentially criminal acts of third parties coming onto
19 the premises of casinos. I note that in testimony to
20 the Senate committee considering it, Harvey Whittemore
21 expressed that judicial interpretation could find that
22 the references to control and supervision would
23 encompass independent contractors.

24 It's going to be my ruling here that,
25 effectively, the concepts of control and supervision

1 extend in this instance because I think that The
2 Cosmopolitan has a responsibility for security and it
3 can't escape that responsibility by essentially
4 subcontracting it and subleasing it off as it did in
5 this case.

6 I haven't had time to look at plaintiff's
7 joint venture theory, so I'm not making any
8 determination upon that. But I'm going to tell you
9 that at this point in time, I find that The
10 Cosmopolitan has a nondelegable duty in reference to
11 the security that -- in that, effectively, you know,
12 Marquee employees, if they did engage in intention or
13 negligent conduct, that can be vicariously held to The
14 Cosmopolitan.

15 Consequently, I'm going to deny the motion
16 for reconsideration of summary judgment, and I'm going
17 to find that for -- at this point in time, I'm going to
18 deny -- well, I don't know. Brief for determination of
19 several liability, I'm going to find that the Marquee
20 and Cosmopolitan -- I guess it should be Rooftop
21 Entertainment -- or Roof Deck Entertainment can be
22 jointly and severally liable.

23 So that's my rulings on that. Everybody is
24 going to disagree one way or another. Unless you
25 really feel you need something --

1 **MR. ROBERTS:** Very --

2 **THE COURT:** -- on the record --

3 **MR. ROBERTS:** Very briefly --

4 **THE COURT:** -- I've made my decision, so...

5 **MR. ROBERTS:** I understand. This is just to
6 preserve the record. I don't know if we thoroughly
7 addressed it in the brief and find some of the
8 supplemental authority that we submitted.

9 And I just wanted to state, one, we don't
10 believe the record shows that Nevada Property was the
11 person in control of the premises who had the
12 nondelegable duty to hire security. In fact, Nevada
13 Restaurant is the one that hired Roof Deck, not just to
14 provide security but to operate the entire club; and,
15 therefore, it's not a parallel situation.

16 In addition, I would note that even in the
17 Rockwell case, in discussing the last cause of action,
18 the court analyzed the security guard as a third party
19 as to the landlord and said that there had to be
20 foreseeability in order to hold the landlord liable
21 under that final cause of action.

22 If the Court had truly meant that this was a
23 vicarious liability which could be imposed without any
24 foreseeability or fault on behalf of the landlord, it
25 would have been completely unnecessary to reach the

1 issue of analysis of liability for a third party, as
2 the Rockwell court did in that case.

3 And if you look at that, they cite
4 Restatement 344. Restatement 344 is the concept which
5 the Rockwell court drew upon for their finding on the
6 third cause of action, which is also clear from the
7 comments that foreseeability of this event is a
8 condition to holding the landlord responsible for the
9 actions of the third-party security guard.

10 Thank you, Your Honor.

11 **THE COURT:** Okay.

12 **MR. AICKLEN:** Your Honor, on the issue of
13 joint and several liability?

14 **THE COURT:** Okay.

15 **MR. AICKLEN:** There are only negligence
16 actions against Cosmopolitan, and there are negligence
17 and also intentional acts allegations against Marquee.

18 So in the negligence actions, I think the
19 record is pretty clear and I think -- you know, I don't
20 want a preruling, but we are going to have a
21 comparative fault instruction under 41.141.

22 **THE COURT:** And, you know, I'm not -- I'm
23 not -- I'm just saying at this point in time, in terms
24 of what you asked me, I'm not prepared to say there is
25 a joint and several liability. You may very well --

1 **MR. AICKLEN:** Wait. There is or is not?

2 **THE COURT:** You can be held jointly and
3 severally liable.

4 **MR. AICKLEN:** At this moment.

5 **THE COURT:** At this time, yes.

6 Now, as the case develops and I get the jury
7 instructions, I'll take a look at the comparative
8 negligence issue.

9 **MR. AICKLEN:** Okay.

10 **THE COURT:** But you're wanting something
11 today because you said you needed it for opening
12 statements on Monday. So I'm giving you my initial --
13 my initial position in all this right now.

14 **MR. AICKLEN:** All right. Your Honor, then I
15 would ask, though, that the issue of joint and several
16 liability not be addressed -- that's a legal issue --
17 it not be addressed in opening statement.

18 **THE COURT:** I don't -- I assume you're not
19 going to get into that in opening statements, but I was
20 told you needed a preliminary decision from me for your
21 opening statements; otherwise, I would have put off
22 dealing with this in more detail to begin with.

23 **MR. AICKLEN:** So the understanding is with
24 prejudice and they can't open it -- or discuss it in
25 opening because it's a legal issue, an instruction of

1 law, then --

2 **THE COURT:** Were you planning on discussing
3 it in opening?

4 **MR. RAVIPUDI:** "Joint and several liability"
5 were not words that I thought I would be using in
6 opening statement.

7 **THE COURT:** All right. Then there's -- we'll
8 deal with the issue in more detail later.

9 **MR. AICKLEN:** All right. Thank you, Your
10 Honor. So denied without prejudice.

11 **THE COURT:** Yeah, denied without prejudice.

12 **MR. AICKLEN:** Okay. Thank you.

13 **THE COURT:** Okay. So okay. Let's look at
14 the Wynn records. I gave you my preliminary ruling
15 this morning. I am generally good with letting in
16 defendant's gaming activity, both prior to the incident
17 and after the incident, both in terms of the games
18 played and the amount of time spent playing the games.

19 I'm open as to the issue of win or loss,
20 whether or not that's really necessary to include
21 and -- but I'll let you give me some more thought in
22 that regard. I'm not inclined to get into any records,
23 you know, he open -- you know, somebody stuck a card
24 key in the door or he ate something out of the mini bar
25 or he went to a restaurant and ate anything. I'm

1 **MR. RAVIFUDI:** Great. Thank you, Your Honor.

2 **THE COURT:** Thank you.

3 *(Whereupon, the proceedings concluded at 3:58*
4 *p.m.)*

5 -o0o-

6 **ATTEST:** FULL, TRUE, AND ACCURATE TRANSCRIPT OF
7 **PROCEEDINGS.**

8
9 *Amber M. McClane*
10 /S/ Amber M. McClane, NV CCR No. 914
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CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

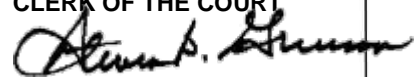
That on September 13, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S APPENDIX OF EXHIBITS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

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Executed on the 13th day of September, 2019.


Julie A. Bloedel



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17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

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

Defendants.

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

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF DEFENDANT ROOF
DECK ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S MOTION
FOR SUMMARY JUDGMENT**

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

4 1. During proceedings on March 24, 2017, the court in the underlying bodily injury
5 action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District
6 Court Clark County, Nevada, Case No. A-14-698824-C held as a matter of law that Nevada
7 Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan"), "had a nondelegable
8 duty and can be vicariously held responsible for the conduct of the Marquee security officers..."
9 and that Marquee and Cosmopolitan could be held jointly and severally liable. A true and correct
10 copy of an excerpt of the March 24, 2017 trial transcript is attached to Marquee's Appendix of
11 Exhibits in Support of Motion for Summary Judgment as **Exhibit 3**.

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

6
7 DATED: September 12, 2019

HEROLD & SAGER

8
9 By:


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CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

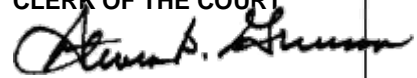
That on September 13, 2019, service of REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

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Executed on the 13th day of September, 2019.


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17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

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

Defendants.

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

HEARING REQUESTED

**DEFENDANT NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH PA'S MOTION FOR
SUMMARY JUDGMENT**

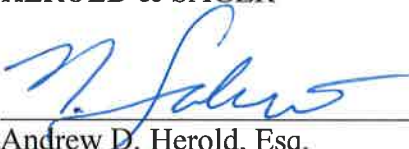
1 Comes now, Defendant National Union Fire Insurance Company of Pittsburgh, PA, by and
2 through its attorneys of record, and hereby moves for summary judgment on Plaintiff St. Paul Fire
3 & Marine Insurance Company's Second, Fourth, Seventh and Eighth Causes of Action in the First
4 Amended Complaint.

5 This Motion is made and based upon the Memorandum of Points and Authorities,
6 Declarations of Nicholas B. Salerno and Richard Perkins in support thereof, the Appendix and all
7 attached Exhibits, all papers and pleadings on file with the Court in this action, and any argument
8 that may be heard at the hearing of this Motion.

9
10 DATED: September 12, 2019

HEROLD & SAGER

11
12 By:



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24 MARQUEE NIGHTCLUB
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I.

INTRODUCTION

The claims raised by Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") in the First Amended Complaint ("FAC") against Defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union") fail as a matter of law. Subrogation and equitable contribution claims between insurers are not established rights in Nevada. For this Court to find in St. Paul's favor on these claims would create new Nevada law. Even if such claims between insurers were established in Nevada (which they are not), St. Paul has no legal basis to pursue either type of claim against National Union because subrogation and equitable contribution claims between equal level excess insurers have never been allowed in any known jurisdiction and this Court should not be the first to create such new law.

On these legal issues, National Union submitted a motion to dismiss St. Paul's claims against National Union in this matter. On February 28, 2019, the Court issued a minute order denying the motion to dismiss on the premise such motion asked the court to go beyond the pleadings to analyze insurance policies without testing through discovery whether the National Union excess policy was complete and due to the absence of the St. Paul policy from the record.¹ As such, the motion to dismiss was denied without prejudice to raise the presented issues in a motion for summary judgment. In so doing, the Court's Minute Order stated "[b]ased 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."

Discovery has now established the true and correct copies of the insurance policies that are relevant to a determination of the legal issues necessary to decide summary judgment of the claims against National Union as a matter of law. Namely, that the St. Paul policy is not excess to the National Union policy as a matter of law because St. Paul and National Union are both excess carriers at the same level of coverage for the common insured, Cosmopolitan. As such, even if Nevada were to recognize a right of subrogation by an excess carrier against a lower-level carrier

¹ Despite repeated requests, St. Paul refused to attach its insurance policy to the First Amended Complaint.

1 (which the Nevada Supreme Court has never done), St. Paul's subrogation claims against National
2 Union fail as a matter of law.

3 In the Second and Fourth Causes of Action, St. Paul asserts claims against National Union
4 premised on an alleged right to subrogation for which it has no legal basis or standing to pursue
5 given that St. Paul and National Union are both excess insurers at the same level of coverage. Both
6 of these causes of action, if recognized at all, are inapplicable between carriers who offer coverage
7 to a common insured at the same level of coverage.

8 The Second Cause of Action also fails because St. Paul cannot show a superior equity
9 position to National Union as a matter of law because it had its own independent obligations to
10 Cosmopolitan and could have settled the underlying action prior to verdict if desired. The Fourth
11 Cause of Action also fails because St. Paul has no legal basis or standing to step into the shoes of
12 Cosmopolitan to pursue subrogation for breach of contract against National Union when, as in the
13 underlying action, Cosmopolitan was fully defended and indemnified by the insurers and, thus,
14 suffered no damages covered under the insurance contract.

15 The Eighth Cause of Action for equitable contribution fails as a matter of law given
16 contribution between insurers is not a recognized remedy in Nevada and, if it were, contribution
17 does not apply to an attempt to recover damages outside of policy limits as St. Paul attempts to do
18 here. The Seventh Cause of Action for equitable estoppel fails as a matter of law given it is
19 dependent on the legal viability of the other causes of action against National Union that fail as a
20 matter of law and seeks no monetary damages. Accordingly, National Union is entitled to summary
21 judgment as a matter of law.

22 II.

23 FACTUAL BACKGROUND

24 A. Underlying Action

25 This action arises out of an underlying bodily injury action captioned *David Moradi v.*
26 *Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case
27 No. A-14-698824-C ("Underlying Action"). (FAC ¶ 6.) Plaintiff David Moradi ("Moradi") alleged
28 that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan

1 Hotel and Casino to socialize with friends, when he was beaten by Marquee employees, whose
2 conduct was allegedly ratified, encouraged and countenanced by Cosmopolitan, resulting in bodily
3 injuries. (FAC ¶¶ 6-7.) Moradi filed a complaint against Nevada Property 1, LLC d/b/a The
4 Cosmopolitan of Las Vegas (“Cosmopolitan”) and Roof Deck Entertainment, LLC d/b/a Marquee
5 Nightclub (“Marquee”) on April 4, 2014, asserting causes of action for Assault and Battery,
6 Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (FAC ¶¶ 8-10,
7 Exhibit A.) Moradi alleged that, as a result of his injuries, he suffered past and future lost
8 wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit
9 A.)

10 During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the
11 owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced
12 exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)
13 Specifically, the Court held as a matter of law that Cosmopolitan, as owner of the property, “had a
14 nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security
15 officers...” and that Marquee and Cosmopolitan can be jointly and severally liable. (RJN, Ex. 5.)

16 After a five-week trial, the jury in the Underlying Action issued a special verdict on April
17 26, 2017 finding that Moradi established his claims for assault, battery, false imprisonment and
18 negligence against Marquee and Cosmopolitan jointly and that the actions of the employees of the
19 Marquee nightclub were a legal cause of injury or damage to Moradi and awarded compensatory
20 damages in the amount of \$160,500,000. (FAC, Ex. C.) After the verdict and during the punitive
21 damages phase of the trial, Moradi made a global settlement demand to Marquee and
22 Cosmopolitan. (FAC ¶ 66.) National Union, St. Paul and the other insurers accepted the settlement
23 demand and resolved the Underlying Action with the confidential contributions set forth in the FAC
24 filed by St. Paul under seal. (FAC ¶¶ 67-70.) The settlement was funded entirely by the various
25 insurance carriers for the entities at issue, no defendant in the underlying case contributed any
26 money toward the settlement.

27 ///

28 ///

1 **B. Insurance Policies**

2 **1. The Cosmopolitan Insurance Tower**

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

5 Zurich American Insurance Company ("Zurich") issued commercial general liability policy
6 number PRA 9829242-01, effective November 1, 2011 to November 1, 2012 to Nevada Property 1
7 LLC ("Zurich Primary Policy"). (FAC ¶ 69; Declaration of Nicholas B. Salerno ("Salerno Decl."),
8 Ex. 3, at T000040.) Cosmopolitan is an insured under the Zurich Primary Policy. (Salerno Decl.,
9 Ex. 2, at W005478.) The Zurich Primary Policy contains limits of \$1,000,000 each occurrence and
10 \$2,000,000 general aggregate. (Salerno Decl., Ex. 2, at W005508.) The Zurich Primary Policy
11 provides that Zurich will pay "those sums that the insured becomes legally obligated to pay as
12 damages because of 'bodily injury' or 'property damage' to which this insurance applies." (Salerno
13 Decl., Ex. 2, at W005497 – W005498.) The Zurich primary Policy provides that it applies to
14 "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the
15 policy period. (Id.)

16 **b. Cosmopolitan's Excess Policy with St. Paul**

17 St. Paul issued commercial umbrella liability policy number QK06503290, effective March
18 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group ("St. Paul Excess Policy") (FAC
19 ¶ 40; Salerno Decl., Ex. 3, at T000002.) Cosmopolitan is an insured under the St. Paul Excess
20 Policy. (FAC ¶ 40; Salerno Decl., Ex. 3, at T000056.) The St. Paul Excess Policy contains limits of
21 \$25,000,000 with each occurrence and \$25,000,000 general aggregate. (Salerno Decl., Ex. 3, at
22 T000002.) The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums
23 in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by
24 reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained
25 Limit" that the named insured becomes legally obligated to pay as damages assumed by the named
26 insured under an "Insured Contract." (Salerno Decl., Ex. 3, at T000007.)

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

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

5 (Salerno Decl., Ex. 3, at T000025.)

6 **2. The Marquee Insurance Tower**

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

8 Aspen Specialty Insurance Company ("Aspen") issued primary commercial general liability
9 policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 to The Restaurant
10 Group et. al. ("Aspen Primary Policy"). (FAC ¶ 15; Declaration of Richard C. Perkins in Support of
11 National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment
12 ("Perkins Decl."), Ex. 1, at 32.) Marquee is an insured under the Aspen Policy. (Salerno Decl., Ex.
13 4, at ASPEN000063.) The Aspen Policy contains limits of \$1,000,000 each occurrence and
14 \$2,000,000 general aggregate. (Salerno Decl., Ex. 4, at ASPEN000036.) The Aspen Policy provides
15 that Aspen will pay "those sums that the insured becomes legally obligated to pay as damages
16 because of 'bodily injury' or 'property damage' to which this insurance applies." (Salerno Decl.,
17 Ex. 4, at ASPEN000042.) The Aspen Policy provides that it applies to "bodily injury" and
18 "property damage" only if caused by an "occurrence" that occurs during the policy period. (Id.)

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

20 National Union issued commercial umbrella liability policy number BE 25414413, effective
21 October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. ("National Union Excess
22 Policy") (Perkins Decl., Ex. 1, at 6.) Marquee is an insured under the National Union Excess Policy.
23 (FAC ¶ 30; Perkins Decl., Ex. 1, at 57.) The National Union Excess Policy contains limits of
24 \$25,000,000 each occurrence and \$25,000,000 general aggregate. (Perkins Decl., Ex. 1, at 6.) The
25 National Union Excess Policy provides that National Union will pay on behalf of the insured "those
26 sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages
27 by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and
28 Advertising Injury to which this insurance applies or because of Bodily Injury or Property Damage

1 to which this insurance applies assumed by the Insured under an Insured Contract.” (Perkins Decl.,
2 Ex. 1, at 8.) The National Union Excess Policy defines Retained Limit, in pertinent part, as the total
3 applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance providing
4 coverage to the Insured. ((Perkins Decl., Ex. 1, at 30.) The policy defines Scheduled Underlying
5 Insurance as the policy or policies of insurance and limits of insurance shown in the Schedule of
6 Underlying Insurance forming a part of the National Union Excess Policy. (Id.) Other Insurance is
7 defined in the National Union Excess Policy as a valid and collectible policy of insurance providing
8 coverage for damages covered in whole or in part by this policy. (Perkins Decl., Ex. 1, at 29.)

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

10 If other valid and collectible insurance applies to damages that are also
11 covered by this policy, this policy will apply excess of the Other Insurance.
12 However, this provision will not apply if the Other Insurance is specifically
written to be excess of this policy. (Perkins Decl., Ex. 1, at 23.)

13 Cosmopolitan was an additional insured to the National Union Excess Policy with respect to
14 the Underlying Action. (FAC ¶ 33.) National Union received notice of the Underlying Action
15 against Marquee and Cosmopolitan and provided a defense to Cosmopolitan and Marquee in the
16 Underlying Action under a reservation of rights. (FAC ¶ 35.)

17 C. St. Paul’s Claims Against National Union

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

26 In its Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract, St.
27 Paul makes very similar allegations to those raised in its cause of action for breach of the duty to
28 settle. St. Paul asserts that National Union breached its obligations to Cosmopolitan by failing to

1 provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan's interests,
2 failing to pay all available limits under the National Union Excess Policy to resolve Cosmopolitan's
3 liability, and failing to pay any amount on Cosmopolitan's behalf towards the settlement of the
4 Underlying Action. (FAC ¶ 105.) St. Paul claims it was damaged because it was required to
5 contribute to the settlement of the Underlying Action as a result of this alleged breach. (*Id.* ¶¶ 108,
6 111.) St. Paul alleges that pursuant to the express terms of the St. Paul Primary Policy and
7 principles of subrogation, it is entitled to step into Cosmopolitan's shoes and pursue its rights of
8 recovery against National Union. (*Id.* ¶ 110.)

9 St. Paul's Seventh Cause of Action for Equitable Estoppel is asserted against both National
10 Union and Aspen. St. Paul alleges that, throughout the Underlying Action, the insurers represented
11 "through both words and actions" that the coverage provided by Aspen and National Union to
12 Cosmopolitan was primary to Cosmopolitan's direct coverage under Cosmopolitan's own policies,
13 including the St. Paul Excess Policy. (FAC ¶ 132.) St. Paul alleges that it and Cosmopolitan's other
14 direct carriers did not participate in the defense or settlement negotiations on behalf of
15 Cosmopolitan based on these representations. (*Id.* ¶ 134.) St. Paul alleges that equity requires that
16 National Union now be precluded from claiming that St. Paul and National Union were co-excess
17 carriers and that St. Paul had the same obligation to resolve the Underlying Action.

18 Finally, in its Eighth Cause of Action, St. Paul seeks Equitable Contribution from National
19 Union. St. Paul alleges that in contributing to the settlement of the Underlying Action, it incurred
20 amounts in excess of its equitable share and that National Union failed to contribute its fair and
21 equitable share towards the settlement of the Underlying Action on behalf of Cosmopolitan. (FAC
22 ¶¶ 138-139.) St. Paul accordingly alleges that National Union is obligated under principles of equity
23 to reimburse St. Paul for the settlement amounts St. Paul contributed towards settlement of the
24 Underlying Action. (*Id.* ¶ 141.)

25 All of these causes of action against National Union fail as a matter of law. The FAC asserts
26 that principles of equity entitle it to subrogation against National Union. The Nevada Supreme
27 Court, however, has not recognized an insurer's right to pursue equitable subrogation or equitable
28 contribution against another insurer. Additionally, Nevada courts have rejected an insurer's claim

1 for contractual subrogation against another insurer, which precludes St. Paul's claims that are not
2 based on equity. Further, even if claims for contractual and/or equitable subrogation were
3 recognized in Nevada, St. Paul's claims against National Union fail as a matter of law given St.
4 Paul and National Union were both excess insurers at the same level of coverage. In other words,
5 St. Paul has no superior equity to National Union as St. Paul owed a separate concurrent duty to
6 Cosmopolitan to settle the Underlying Action.

7 St. Paul's alternative claim for equitable contribution against National Union fails as the
8 National Union Excess Policy exhausted when the Underlying Action was settled, precluding any
9 further contribution obligation from National Union. Finally, St. Paul's claim for equitable estoppel
10 fails as it is derivative of St. Paul's other causes of action and seeks no monetary damages.
11 Accordingly, all of the claims alleged in St. Paul's FAC fail as a matter of law.

12 III.

13 LEGAL STANDARDS

14 Nevada Rules of Civil Procedure ("NRCP") 56(a) and (b) authorize the court to enter
15 summary judgment "upon all or any part" of the claims made by or against the moving party.
16 Summary judgment is appropriate when the pleadings and all other evidence before the court
17 demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to
18 judgment as a matter of law. *Frederic and Barbara Rosenberg Living Trust v. MacDonald*
19 *Highlands Realty, LLC*, 427 P.3d 104, 109 (Nev. 2018); *Wood v. Safeway*, 121 Nev. 724 (2005).

20 While evidence is interpreted in favor of the non-moving party, the non-moving party must
21 "do more than simply show that there is some 'metaphysical doubt' as to the operative facts in
22 order to avoid summary judgment being entered in the moving party's favor." *Wood*, 121 Nev. at
23 732 (quoting *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986)).
24 Accordingly, the non-moving party "must, by affidavit or otherwise, set forth specific facts
25 demonstrating the existence of a genuine issue for trial or have summary judgment entered against
26 him." *Id.* (quoting *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110 (Nev. 1992)). This Motion
27 establishes that there is no genuine issue of material fact and that National Union is entitled to
28 judgment as a matter of law on all of the claims asserted by St. Paul.

IV.

STATEMENT OF UNDISPUTED MATERIAL FACTS

No.	Undisputed Fact	Supporting Evidence
1.	This action arises out of an underlying bodily injury action captioned <i>David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.</i> , District Court Clark County, Nevada, Case No. A-14-698824-C (“Underlying Action”).	FAC ¶ 6.
2.	In the Underlying Action, David Moradi (“Moradi”) alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was attacked by Marquee employees resulting in personal injuries.	FAC ¶¶ 6-7.
3.	Moradi filed his complaint in the Underlying Action against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas (“Cosmopolitan”) and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub (“Marquee”) on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment.	FAC ¶¶ 8-10, Ex. A.
4.	Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages.	FAC ¶ 9, Ex. A.
5.	During the course of the Underlying Action, Moradi asserted that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi.	FAC ¶ 13.
6.	The Court in the Underlying Action held as a matter of law that Cosmopolitan, as owner of the property, “had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers...” and that Marquee and Cosmopolitan could be held jointly and severally liable.	RJN, Ex. 5.
7.	The Underlying Action went to trial and, on April 28, 2017, the jury returned a verdict in Moradi’s favor and awarded compensatory damages in the amount of \$160,500,000.	FAC, Ex. C.
8.	During the punitive damages phase of the trial in the Underlying Action, Moradi made a global settlement demand to Marquee and Cosmopolitan	FAC ¶ 66.

No.	Undisputed Fact	Supporting Evidence
9.	National Union, St. Paul and the other insurers accepted Moradi's settlement demand and resolved the Underlying Action, the specific contributions of which are confidential.	FAC ¶ 67-70.
10.	National Union and St. Paul contributed the same amount towards the settlement of the Underlying Action.	FAC ¶ 67-70.
11.	National Union issued commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("National Union Excess Policy")	Perkins Decl., Ex. 1
12.	Marquee is an insured under the National Union Excess Policy	FAC ¶ 30; Perkins Decl., Ex. 1.
13.	The National Union Excess Policy contains limits of \$25,000,000 each occurrence and \$25,000,000 general aggregate.	Perkins Decl., Ex. 1.
14.	The National Union Excess Policy provides that National Union will pay on behalf of the insured "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and Advertising Injury to which this insurance applies or because of Bodily Injury or Property Damage to which this insurance applies assumed by the Insured under an Insured Contract."	Perkins Decl., Ex. 1.
15.	The National Union Excess Policy contains an Other Insurance provision, which provides: "If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the Other Insurance. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy."	Perkins Decl., Ex. 1.
16.	The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy	Perkins Decl., Ex. 1.
17.	National Union's contribution towards the settlement of the Underlying Action exhausted the National Union Excess Policy.	Perkins Decl., Ex. 1; FAC ¶ 68.

1	No.	Undisputed Fact	Supporting Evidence
2	18.	Cosmopolitan was an additional insured to the National Union umbrella policy with respect to the Underlying Action.	FAC ¶ 33
3	19.	National Union received notice of the Underlying Action against Marquee and Cosmopolitan and provided a defense to Cosmopolitan and Marquee in the Underlying Action under a reservation of rights.	FAC ¶ 35
4	20.	St. Paul issued commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group ("St. Paul Excess Policy")	FAC ¶ 40; Salerno Decl., Ex. 3
5	21.	Cosmopolitan is an insured under the St. Paul Excess Policy.	FAC ¶ 40; Salerno Decl., Ex. 3
6	22.	The St. Paul Excess Policy contains limits of \$25,000,000 with each occurrence and \$25,000,000 general aggregate.	Salerno Decl., Ex. 3
7	23.	The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained Limit" that the named insured becomes legally obligated to pay as damages assumed by the named insured under an "Insured Contract."	Salerno Decl., Ex. 3, at T000007
8	24.	The St. Paul Excess Policy contains an other insurance provision, which provides: If Other Insurance applies to damages that are also covered by this policy, this policy will apply excess of and shall not contribute with, that Other Insurance, whether it is primary, excess, contingent or any other basis. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.	Salerno Decl., Ex. 3, at T000025
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V.

NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE SECOND AND FOURTH CAUSES OF ACTION BECAUSE ST. PAUL HAS NO LEGAL BASIS TO ASSERT A CLAIM FOR EQUITABLE SUBROGATION

A. Finding An Equitable Subrogation Claim Between Insurers Creates New Nevada Law The Nevada Supreme Court Has Never Recognized

The Nevada Supreme Court has never recognized a subrogation claim between insurers. St. Paul's claim for equitable subrogation for failure to settle fails as a matter of law because Nevada has not established an insurer's right to pursue a claim for equitable subrogation against another insurer, let alone allowing an insurer to pursue another insurer for failure to settle. Given equitable subrogation against other insurers is not a right for insurers in Nevada, St. Paul has no legal basis to assert equitable subrogation claims against National Union based upon National Union's alleged failure to settle.

B. Finding An Equitable Subrogation Claim Between Excess Carriers in Separate Towers of Coverage Providing the Same Level of Coverage Creates New Law No Known Court Anywhere Has Recognized

Even if equitable subrogation claims between insurers were established in Nevada (which they are not), St. Paul cannot not pursue such a claim against National Union because no known court has allowed a subrogation claims between the equal level excess insurers. National Union respectfully submits that this Court should not be the first to make that new law.

In opposing this motion, National Union expects St. Paul will cite cases from a Nevada federal District Court and other jurisdictions, such as California, which have allowed an *excess insurer* to pursue equitable subrogation *against a lower level insurer in the same tower of coverage* for failure to settle. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 (D. Nev. June 9, 2016); *Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co.*, 938 F.Supp.2d 908, 916-917 (C.D. Cal. 2013); *Ace American Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal.App.5th 159 (2016). However, the circumstances of this matter are markedly different from the *Colony* case and the California cases where excess insurers have been allowed to pursue lower level insurers in the same tower of coverage for failure to settle an underlying case.

1 In the FAC, St. Paul asserts that its policy is excess to the National Union Excess Policy.
2 (*see, e.g.*, FAC ¶ 44.) However, general insurance principles and the St. Paul and National Union
3 policies demonstrate that it is indisputable the St. Paul Excess Policy is not excess to National
4 Union's Excess Policy as a matter of law. It is well-established that "[p]rimary coverage is
5 insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the
6 happening of the occurrence that gives rise to liability" and that "[e]xcess or secondary coverage is
7 coverage whereby, under the terms of the policy, liability attaches only after a predetermined
8 amount of primary coverage has been exhausted." *Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co.*,
9 93 Cal.App.4th 1142, 1149 (2001) citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126
10 Cal.App.3d 593, 597-598 (1981); *Carmel Dev. Co. v. RLI Ins. Co.*, 126 Cal.App.4th 502, 513-514
11 (2005) (finding "umbrella coverage is generally regarded 'as true excess over and above any type of
12 primary coverage, excess provisions arising in any manner, or escape clauses'." (Citation omitted.)

13 As admitted by St. Paul in the FAC and shown by the National Union and St. Paul policies,
14 St. Paul and National Union both issued umbrella policies and, as such, are co-excess insurers
15 which provided coverage to Cosmopolitan under two separate and distinct coverage towers, *i.e.*, as
16 a named insured under the St. Paul Excess Policy and as an additional insured under the National
17 Union Excess Policy. (FAC ¶¶ 30, 40; Perkins Decl., Ex. 1.) St. Paul's self-serving graphic in the
18 FAC depicting the St. Paul and National Union policies in a single tower, which reflects St. Paul as
19 a second layer excess policy above National Union is misleading and contrary to the indisputable
20 facts as a matter of law.

21 Marquee and Cosmopolitan had separate insurance towers. Marquee was a named insured
22 on the Aspen Primary Policy and National Union Excess Policy, while Cosmopolitan was a named
23 insured under the Zurich Primary Policy and the St. Paul Excess Policy. Cosmopolitan qualified as
24 an additional insured under the policies issued by Aspen and National Union, but that status did not
25 alleviate St. Paul's obligations to Cosmopolitan under its separate tower of coverage and does not
26 position St. Paul as a second layer excess carrier above National Union as St. Paul contends. An
27 accurate graphic of the insurance towers for Marquee and Cosmopolitan is as follows:

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MARQUEE TOWER
National Union Fire Insurance Company of Pittsburgh, PA (Umbrella)
Aspen Specialty Insurance Company (Primary)

COSMOPOLITAN TOWER
St. Paul Fire & Marine Insurance Company (Umbrella)
Zurich American Insurance Company (Primary)

Further, the National Union Excess Policy is a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured, including St. Paul. (Perkins Decl., Ex. 1.) The St. Paul Excess Policy similarly provides that it is excess over scheduled underlying insurance and applicable other insurance providing coverage to the insured. (Salerno Decl., Ex. 3.) The National Union and St. Paul policies contain nearly identical excess other insurance provisions. When two policies contain such language, applicable law requires that neither policy shall be excess to the other. *See Everest Nat. Ins. Co. v. Evanston Ins. Co.*, 2011 WL 534007 at *3 (Feb. 8, 2011) (ruling judgment and defense costs were to be shared equally between insurers that contained the same amounts of limits and both contained Other Insurance clauses providing they were excess to other available insurance); *See, CSE Ins. Group v. Northbrook Property & Cas. Co.*, 23 Cal.App.4th 1839, 1842-1843 (1994); *Century Surety Co. v. United Pacific Ins. Co.*, 109 Cal.App.4th 1246, 1257 (2003).

The St. Paul Excess Policy is not excess to the National Union Excess Policy as a matter of law. Both St. Paul and National Union had independent obligations to Cosmopolitan as a matter of law, both discharged those obligations, both had the same limits of insurance, and neither is in an equitably superior position as to the other. Accordingly, even if the Court were to recognize equitable subrogation rights under Nevada law, St. Paul has no legal basis to assert a claim for subrogation against National Union for failure to settle the Underlying Action.

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1 C. Nevada Has Rejected Claims for Conventional Subrogation Between Insurers

2 In its FAC, as compared to its original complaint, St. Paul deleted the word “equitable”
3 from its subrogation causes of action and seeks to step into Cosmopolitan’s shoes to pursue
4 subrogation “under its policy, by law, and principles of equity”, presumably asserting liability
5 theories under both conventional and equitable subrogation. (FAC ¶ 93.) However, St. Paul’s
6 attempt to expand its claim to include a claim for conventional (or contractual) subrogation does
7 not save its causes of action, as any right to subrogation an insurer may have arises by operation of
8 law and is not dependent on or enlarged by policy provisions. *Sapiano v. Williamsburg Nat’l Ins.*
9 *Co.*, 28 Cal.App.4th 533, 538 (1994) (noting that although insurers may place subrogation clauses
10 in their policies, those provisions typically are general and add nothing to the rights of subrogation
11 arising by law); *Progressive West Ins. Co. v. Yolo County Sup. Ct.*, 135 Cal.App.4th 263, 272
12 (2005).

13 Further, the Nevada District Court has expressly rejected contractual subrogation claims
14 between co-insurers finding that “in the insurance context, contractual subrogation is generally
15 applied not by an excess insurer against a primary insurer, but between an insurer and a third-party
16 tortfeasor.” *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 at *6 (D. Nev. June 9,
17 2016). Notably, the *Colony* court cited to the *Progressive West Ins. Co.* decision in support of its
18 holding. The *Colony* court soundly noted that “the Nevada Supreme Court has held that
19 contractual subrogation in the context of insurers and insureds may contravene public policy” and
20 that contractual subrogation may provide for windfalls in the insurance context. (*Id.*) Accordingly,
21 St. Paul’s claim for contractual subrogation against National Union fails as a matter of law.

22 VI.

23 **NATIONAL UNION IS ALSO ENTITLED TO SUMMARY JUDGMENT ON THE**
24 **SECOND CAUSE OF ACTION BECAUSE A SUPERIOR EQUITY CANNOT**
25 **EXIST BETWEEN EXCESS INSURERS WITH THE SAME**
OBLIGATIONS TO THE INSURED

26 While subrogation allows an insurer to step into the shoes of its insured, the insurer’s
27 substitute position is subject to important equitable principles, one of which is the doctrine of
28 superior equities, which prevents an insurer from recovering against a party whose equities are

1 equal or superior to those of the insurer. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*,
2 143 Cal.App.4th 1098, 1107 (2006); *Sompo Japan Ins. Co. of America v. Action Exp., LLC*, 19
3 F.Supp.3d 954, 958 (C.D. Cal. 2014).

4 St. Paul asserts that its insurance coverage to Cosmopolitan is excess to that provided by
5 National Union, however, for the reasons stated above, that simply is not the case as a matter of
6 law. Cosmopolitan was a named insured under the St. Paul Excess Policy. As such, St. Paul owed
7 an independent concurrent obligation to Cosmopolitan under its policy, separate and apart from any
8 obligation owed by National Union and could have settled the case against Cosmopolitan prior to
9 the verdict, if it believed that an adverse verdict was going to occur. If St. Paul truly believed there
10 was a substantial likelihood of an adverse verdict, then it should have settled the case on behalf of
11 Cosmopolitan prior to the verdict. St. Paul chose not to do so and, therefore, has no superior equity
12 to National Union as a matter of law for the alleged failure to settle. St. Paul instead sat idly by and
13 now complains about the outcome.

14 While St. Paul may assert that Cosmopolitan was akin to an innocent bystander in this
15 matter, neither the underlying allegations, nor the history of the litigation would support such a
16 position. Cosmopolitan was facing its own liability for breach of the “non-delegable duty” to keep
17 patrons safe for which Cosmopolitan was ultimately found to be jointly and severally liable with
18 Marquee. Cosmopolitan’s liability for its own independent negligence is covered by its insurance
19 provided by Zurich and St. Paul, who were placed on notice of the Underlying Action.

20 St. Paul cannot establish superior equity to National Union as National Union did not cause
21 St. Paul’s loss. St. Paul asserts that National Union breached its duty to settle the Underlying Action
22 prior to verdict. (FAC ¶¶ 88-89.) St. Paul also claims that National Union’s failure to do so resulted
23 in an excess verdict against Cosmopolitan which ultimately required St. Paul’s settlement
24 contribution. (*Id.* ¶ 92.) However, St. Paul owed an independent duty to Cosmopolitan to settle the
25 Underlying Action under its own policy. St. Paul had the opportunity to settle the case prior to the
26 verdict but chose not to do so. Accordingly, St. Paul cannot now assert superior equity to National
27 Union and, as result, its claim for equitable subrogation for failure to settle fails as a matter of law.

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VII.

**NATIONAL UNION IS ALSO ENTITLED TO SUMMARY JUDGMENT ON THE
FOURTH CAUSE OF ACTION BECAUSE COSMOPOLITAN
HAS SUFFERED NO DAMAGES**

In the FAC, St. Paul's Fourth Cause of Action asserts that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy by failing to provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan's interests, failing to pay all available limits under the National Union Excess Policy to resolve Cosmopolitan's liability when it had the opportunity, and failing to pay any amount of settlement on behalf of Cosmopolitan. (FAC ¶ 105.) As a result of National Union's alleged breaches, St. Paul seeks the amount it contributed towards settlement of the Underlying Action. (FAC ¶¶ 108, 111.) However, St. Paul is not a party to the National Union Excess Policy under which Marquee is a named insured and Cosmopolitan is an additional insured. St. Paul is pursuing its breach of contract claim as an alleged subrogee of Cosmopolitan. As noted above, subrogation allows an insurer to step into the shoes of its insured, but the insurer has no greater rights than the insured and is subject to all of the same defenses that can be asserted against the insured. *State Farm*, 143 Cal.App.4th at 1107.

A breach of contract claim requires (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *See Contreras v. American Family Mut. Ins. Co.*, 135 F.Supp.3d 1208, 1224 (D. Nevada 2015) *citing Richardson v. Jones*, 1 Nev. 405, 409 (1865). A claim for breach of contract is not actionable without damage. *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815, at *4 (Cal.Ct.App. May 18, 2018) (unpublished); *Bramalea California, Inc. v. Reliable Interiors, Inc.*, 119 Cal.App.4th 468, 473 (2004). Here, St. Paul alleges that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy, however, the claimed damage sought by St. Paul is based on the amount St. Paul paid in settlement of the Underlying Action rather than any damages suffered by Cosmopolitan. Notably absent is any allegation that Cosmopolitan directly contributed towards settlement of the Underlying Action. It is undisputed that Cosmopolitan was fully indemnified by National Union, St. Paul, and the other insurers who paid the settlement in the Underlying Action. Further, Cosmopolitan's defense in the Underlying Action was fully paid by Aspen and National Union.

1 Accordingly, Cosmopolitan suffered no damage as a matter of law as a result of any alleged breach
2 by National Union with regard to its defense of Cosmopolitan in the Underlying Action.

3 The facts of this case are similar to *California Capital* in which an insurer sued another
4 insurer to recover amounts it paid in settlement (and defense) of its named insureds in an underlying
5 bodily injury action. Like St. Paul, plaintiff insurer, California Capital, asserted causes of action for
6 breach of contract and breach of the covenant of good faith and fair dealing, among others, alleging
7 its named insureds were additional insureds under the defendant insurer's policy and that its named
8 insureds had expressly assigned all of their rights under the defendant insurer's policy to California
9 Capital. *Id.* at *2-4. In its complaint, California Capital alleged the defendant insurer breached its
10 policy by refusing to provide the additional insureds the benefits due under the policy and also
11 alleged defendant insurer breached its obligations of good faith by failing to defend and indemnify
12 the insureds when it knew they were entitled to overage under the policy, withholding payments
13 under the policy when defendant insurer knew plaintiff's claim was valid, failing to properly
14 investigate the insureds' request for policy benefits, and failing to provide a reasonable explanation
15 of the factual basis for denial of the insureds' claim for benefits under the policy. *Id.* at *4. The trial
16 court held that California Capital had no cause of action for breach of contract or breach of the
17 covenant of good faith and fair dealing because the insureds had sustained no damage as a result of
18 defendant insurer's alleged failure to defend and indemnify them or its failure to settle the claim
19 within its policy limit. *Id.* Given the insureds' defense and post-judgment settlement had been fully
20 paid by California Capital, the trial court found the essential element of damages was absent from
21 the breach of contract and breach of the covenant of good faith and fair dealing causes of action and
22 the insureds had no viable claims to assign to California Capital. *Id.* The trial court further found
23 that California Capital had no direct cause of action against defendant insurer because it was not a
24 party to defendant insurer's policy. *Id.* at *6.

25 Like the plaintiff insurer in *California Capital*, St. Paul is not a party to the National Union
26 Excess Policy and has no direct cause of action against National Union for breach of contract or
27 breach of the covenant of good faith and fair dealing. Given Cosmopolitan's post-verdict settlement

28 ///

1 was paid by the insurers, Cosmopolitan has no damages and therefore no viable claim for breach of
2 contract or breach of the covenant of good faith and fair dealing.

3
4 **VIII.**

5 **NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE EIGHTH**
6 **CAUSE OF ACTION BECAUSE EQUITABLE CONTRIBUTION IS NOT**
7 **AN AVAILABLE REMEDY AS A MATTER OF LAW**

8 **A. Contribution Claims Between Insurers is Not An Established Right Under Nevada**
9 **Law**

10 Similar to equitable subrogation, Nevada has not established an insurer's right to pursue a
11 claim for equitable contribution against another insurer. Given equitable contribution against other
12 insurers is not an established right for insurers in Nevada, St. Paul has no legal basis to assert an
equitable contribution claim against National Union.

13 **B. Contribution is Not An Available Remedy to Seek Damages Beyond Policy Limits**

14 St. Paul's claim for equitable contribution against National Union also fails because
15 National Union exhausted its policy limit when it contributed to the settlement in the Underlying
16 Action. Notably, the National Union Excess Policy provides that the "Limits of Insurance" as set
17 forth in the declarations is the most that National Union will pay regardless of the number of
18 insureds, claims or suits brought, persons or organizations making claims or bringing suits, or
19 coverages provided under the policy. (Perkins Decl., Ex. 1.) The National Union Excess Policy
20 further provides the most National Union will pay for damages on behalf of any person or
21 organization to whom the named insured is obligated to provide insurance is the lesser of the limits
22 shown in the declarations or the minimum limits of insurance the named insured agrees to procure
23 in a written insured contract. (*Id.*) Here, National Union contributed towards the settlement of the
24 Underlying Action and the policy is exhausted. Given the policy is exhausted, National Union has
25 no further obligation under the policy. *See Everest Indem. Ins. Co. v. Aventine-Tramonti*
26 *Homeowners Ass'n*, 2012 WL 870289 at *3 (D. Nev. Mar. 14, 2012) ("... once the [limits are]
27 reached, the insurer's duties under the policy are extinguished."); *Deere & Co. v. Allstate Ins. Co.*,
28 32 Cal.App.5th 499, 515 (Cal.Ct.App. 2019) (holding "[a] 'policy limit' or 'limit of liability' 'is the

1 maximum amount the insurer is obligated to pay in contract benefits on a covered loss.”). Just as
2 Cosmopolitan could not sue National Union under a cause of action for contribution to seek policy
3 benefits beyond the National Union Excess Policy limits, neither can St. Paul. Accordingly, St.
4 Paul’s claim for equitable contribution against National Union fails as a matter of law.

5
6 **IX.**

7 **NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE SEVENTH**
8 **CAUSE OF ACTION WHERE AS HERE ST. PAUL HAS NO LEGAL**
9 **BASIS TO ASSERT CLAIMS FOR SUBROGATION**
10 **AND EQUITABLE CONTRIBUTION**

11 In the FAC, St. Paul asserts the Seventh Cause of Action seeking to preclude National
12 Union from asserting that: (1) National Union’s policies were not primarily responsible for the
13 defense and resolution of the Underlying Action; and (2) St. Paul, a non-defending carrier, had the
14 same obligation to resolve the Underlying Action as Aspen and National Union. (FAC ¶ 135.)² St.
15 Paul is asserting equitable estoppel as a prophylactic defense to an anticipated defense of National
16 Union. *See Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597 (1984). However, St. Paul’s
17 equitable estoppel claim is dependent on the legal viability of its other causes of action for
18 subrogation and equitable contribution. Given St. Paul’s causes of action for subrogation and
19 equitable contribution fail as a matter of law, St. Paul’s cause of action for equitable estoppel
20 similarly fails as a matter of law.

21 ///

22 ///

23 ///

24 ² Typically, equitable estoppel is raised as an affirmative defense. However, under Nevada Law, equitable
25 estoppel can be treated as an affirmative claim. To establish equitable estoppel, the plaintiff must prove the
26 following: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct
27 shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended;
28 (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must have relied to
his detriment on the conduct of the party to be estopped. *See Cheger, Inc. v. Painters & Decorators*, 98 Nev.
609, 614 (1982); *In re Harrison Living Trust*, 112 P.3d 1058, 1061-1062 (Nev. 2005). While equitable
estoppel may be asserted as an affirmative claim, the claim does not seek monetary damages but rather
serves to “prevent the assertion of legal rights that in equity and good conscience should not be available due
to a party’s conduct.” *Viets v. Wachovia Mortg., FSB*, 2012 WL 6720617 at *2 (D. Nevada Dec. 26, 2012)
(citing *In re Harrison Living Trust*, 112 P.3d 1058, 1061-62 (Nev. 2005)).

1 X.


2 CONCLUSION

3 For the foregoing reasons, St. Paul has no legal basis to pursue its claims against National
4 Union and National Union is entitled to judgment as a matter of law. Therefore, National Union
5 requests that the Court grant this Motion for Summary Judgment.

6
7 DATED: September 12, 2019

HEROLD & SAGER

8
9 By:


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19 OF PITTSBURGH PA. and ROOF DECK
20 ENTERTAINMENT, LLC dba
21 MARQUEE NIGHTCLUB
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE


I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

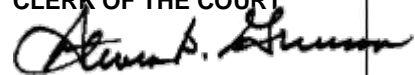
That on September 13, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

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, ST. PAUL FIRE & MARINE INSURANCE COMPANY
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	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 **DECL**

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22 Attorneys for Defendant NATIONAL UNION FIRE INSURANCE
23 COMPANY OF PITTSBURGH, PA. & ROOF DECK ENTERTAINMENT, LLC
24 d/b/a MARQUEE NIGHTCLUB

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

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

Defendants.

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

**DECLARATION OF NICHOLAS B.
SALERNO IN SUPPORT OF NATIONAL
UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA'S MOTION FOR
SUMMARY JUDGMENT**

1 I, Nicholas B. Salerno, declare as follows:

2 1. I am an attorney with the law firm of Herold & Sager, counsel for Defendant
3 National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). I have personal
4 knowledge of the facts stated herein and, if called as a witness, I could competently testify thereto.


5 2. Attached as Exhibit 2 to National Union's Appendix of Exhibits in support of
6 Motion for Summary Judgment is a true and correct copy of Zurich Policy No. PRA 9829242-01,
7 produced in this action by Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul") as part
8 of its initial disclosures.

9 3. Attached hereto as Exhibit 3 to National Union's Appendix of Exhibits in support of
10 Motion for Summary Judgment is a true and correct copy of St. Paul Policy No. QK 06503290,
11 produced in this action by St. Paul as part of its initial disclosures.

12 4. Attached hereto as Exhibit 4 to National Union's Appendix of Exhibits in support of
13 Motion for Summary Judgment is a true and correct copy of Aspen Policy No. CRA8XYD11,
14 produced in this action by Defendant Aspen Specialty Insurance Company as part of its initial
15 disclosures.

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

18 Dated this 12th day of September, 2019.

19
20 
21 _____
22 Nicholas B. Salerno
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

That on September 13, 2019, service of DECLARATION OF NICHOLAS B. SALERNO IN SUPPORT OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

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, ST. PAUL FIRE & MARINE INSURANCE COMPANY
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	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel