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 02:29 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPENDIX TO APPELLANT'S OPENING BRIEF
VOLUME XII of XVI

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CERTIFICATE OF SERVICE

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

____
An employee of Hutchison & Steffen, PLLC

Scheduled Underlying Insurance - Continued

Type Of Coverage:	Limits Of Liability
FOREIGN LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT. Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT. Policy Period SEE ACCOUNT CERTIFCATE Coverage is: ☐ claims-made ☒ not claims-made	$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)

Type Of Coverage:	Limits Of Liability
LIQUOR LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT. Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT. Policy Period SEE ACCOUNT CERTIFCATE Coverage is: ☐ claims-made ☒ not claims-made	$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)

Type Of Coverage:	Limits Of Liability
GARAGEKEEPERS LEGAL LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT. Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT. Policy Period SEE ACCOUNT CERTIFCATE Coverage is: ☐ claims-made ☒ not claims-made	$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)

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

Scheduled Underlying Insurance - Continued

Type Of Coverage:
MARINE OPERATORS LEGAL LIABILITY

Carrier
PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.

Policy Number
PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.

Policy Period SEE ACCOUNT CERTIFCATE

Coverage is: ☐ claims-made
☒ not claims-made

Limits Of Liability

$5,000,000 OCCURRENCE
$5,000,000 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)

Type Of Coverage:
PROTECTION & INDEMNITY LIABILITY

Carrier
PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.

Policy Number
PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.

Policy Period SEE ACCOUNT CERTIFCATE

Coverage is: ☐ claims-made
☒ not claims-made

Limits Of Liability

$5,000,000
$5,000,000

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

Type Of Coverage:

Carrier

Policy Number

Policy Period

Coverage is: ☐ claims-made
☐ not claims-made

Limits Of Liability

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;

      at or on any premises owned, rented, or occupied by or loaned to, any **Insured**; and
   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

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.

<u>Schedule of Covered Premises</u>

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.

<u>Schedule of Designated Operations</u>

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 Techicians (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.

ORIGINAL

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Steven D. Grierson
CLERK OF THE COURT

ORDR

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT.: XXVI **CONDITIONAL ORDER TO STAY DISCOVERY**

WHEREAS, the Parties conducted a Rule 16 Conference in this matter on August 21, 2019 and September 11, 2019;

WHEREAS, Defendants National Union Fire Insurance Company of Pittsburgh, Pa ("National Union") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") propose the implementation of phased discovery with the first phase of discovery limited to any discovery necessary to address the authenticity of the operative contracts that National Union and Marquee contend are necessary for the Court to decide their currently pending motions for summary judgment against Plaintiff, with all remaining discovery stayed until summary judgment motions are determined by the Court;

WHEREAS, Plaintiff contends that phased discovery is not appropriate; and

WHEREAS, the Parties cannot agree whether phased discovery is appropriate in this matter;

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FOR GOOD CAUSE SHOWN, IT IS HEREBY ORDERED AS FOLLOWS:

All discovery between Plaintiff on one hand and National Union and Marquee on the other in this matter shall be conditionally stayed until the Discovery Commissioner can address whether phased discovery is appropriate and, if so, in what manner. This stay of discovery, however, is subject to the submission of a motion to address the appropriateness of phased discovery to the Discovery Commissioner on or before September 20, 2019. The stay of discovery contemplated by this Order will not come into effect if such a motion is not submitted to the Discovery Commissioner on or before September 20, 2019.

IT IS SO ORDERED this 24th day of September, 2019

DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY MARQUEE AND COUNTERMOTION RE: DUTY TO INDEMNIFY

Additional Documents: Consolidated Appendix (A-V); Declaration of William Reeves, Response to Facts

Date: October 15, 2019
Time: 9:30 a.m.

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

Plaintiff St. Paul Fire & Marine Ins. Co. ("St. Paul") hereby both opposes the Motion for Summary Judgment filed by Roof Deck Entertainment, LLC dba Marquee ("Marquee") and moves for Partial Summary Judgment regarding Marquee's obligation to indemnify St. Paul for sums it incurred and paid on behalf of Nevada Property 1 LLC dba Cosmo Hotel ("Cosmo") to satisfy the adverse judgment entered against it.

As discussed herein, Marquee's motion constitutes an improper attempt to seek reconsideration of two prior rulings previously made by this Court rejecting the identical arguments now made for a third time in its motion. As previously addressed, it is undisputed that Cosmo is <u>not</u> a party to the Nightclub Management Agreement ("Management Agreement"). Given this, Cosmo's claims at issue in this case are neither curtailed nor limited by the provisions of the Management Agreement that Marquee relies upon in its motion such that Marquee's arguments fail.

Meanwhile, St. Paul's countermotion presents a purely legal issue given that it is undisputed that Cosmo's liability in the underlying matter was derivative of Marquee's active negligence in solely and exclusively operating and managing the subject nightclub. Given that all facts regarding the respective roles of both Cosmo and Marquee are undisputed, it is appropriate and warranted for this Court to adjudicate the purely legal issue of whether St. Paul, as subrogee of all rights of Cosmo, is entitled to be indemnified by Marquee for the sums St. Paul paid to satisfy the judgment entered against Cosmo via settlement.

Accordingly, for the reasons set forth herein, it is respectfully submitted that Marquee's motion be denied and that St. Paul's counter-motion be granted.[1]

<u>Overview</u>

This matter arises from an underlying bodily injury claim involving a guest at at the

[1] A separate issue has arisen regarding the purported timeliness of this brief. In connection with efforts to explore a briefing schedule, Marquee simultaneously agreed to an extended schedule while opining that this Opposition is untimely as it should have been filed ten (10) calendared days after the motion was filed. Appendix, Ex. V. Per the controlling Local Rules that remain posted on this Court's website, however, parties are afforded ten (10) court days (not calendared days) to file Oppositions such that Marquee's position fails. See Declaration of William Reeves. Regardless, by agreeing to a briefing schedule in response to an inquiry made within one week of the filing of its motion, Marquee is estopped from now claiming this brief is untimely, especially given the lack of any conceivable prejudice.

Marquee Nightclub in which the guest obtained a $150,000,000+ judgment against Marquee and Cosmo that was subsequently resolved via settlement. It is undisputed that the judgment arose from the conduct of Marquee as it solely and exclusively operated the nightclub pursuant to the terms of the Management Agreement that it had entered into with Nevada Restaurant Venture I, LLC ("Master Tenant"), a separate legal entity from Cosmo. <u>Of significance, Cosmo is not a party to the Management Agreement as the agreement is between Marquee and the Master Tenant only, and not Cosmo.</u>[2]

In an effort to avoid bearing the exposure for its own conduct for which Cosmo was held vicariously liable, Marquee again intentionally conflates Cosmo and the Master Tenant in an effort to argue that Cosmo's claims are barred pursuant to various provisions of the Management Agreement. Marquee's efforts to mislead this Court regarding the parties to the Management Agreement are undertaken for a patent and obvious reason - Marquee is solely exclusively liable and responsible for the judgment entered in the underlying matter as it solely and exclusively operated and managed the nightclub.

Given that Cosmo was <u>not</u> a party to the Management Agreement, Cosmo's claims against Marquee are <u>not</u> barred or impacted by any terms or conditions of the Management Agreement since it is <u>not</u> bound by it (except as to limited provisions not relevant to this suit. Given this, St. Paul's subrogation claims (in which it stands in the shoes of Cosmo) are viable and, as discussed herein, meritorious.[3]

St. Paul's claims against Marquee are based on the fact while Marquee actively managed and operated the nightclub, Cosmo did not, such that Cosmo's exposure was limited to vicarious liability. As Cosmo had no active role as to any aspect of the nightclub's operation such that its exposure was based on vicarious, derivative liability for the acts or omissions of Marquee, Cosmo is entitled to reimbursement from Marquee. See *Rodriguez v. Primadonna Co.*, LLC, 125 Nev. 578

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[2] Master Tenant was <u>not</u> named as a Defendant in the underlying suit. Meanwhile Cosmo is a limited signatory to only certain provisions of the Management Agreement, none of which are relevant to this matter.

[3] Unlike in the motion AIG filed, Marquee does not argue that Nevada does not recognize the concept of subrogation. While AIG's position on this issue is misplaced, it has not been raised by Marquee, and is therefore not an issue in dispute in connection with its motion,

(2009); *The Doctors Co. v. Vincent*, 120 Nev. 644 (2004). As St. Paul indemnified Cosmo, St. Paul, by standing in the shoes of its insured, is entitled to recover directly from Marquee. See *Arguello v. Sunset Station, Inc.*, 127 Nev. 365 (2011), explaining that subrogation permits for an insurer that has paid a loss under an insurance policy to pursue all the rights and remedies belonging to the insured with respect to any loss covered by the policy.

Background Facts

Per above, this matter arises from an underlying suit in which a guest contends he was injured at the Marquee Nightclub. See Appendix, Ex. B. Operation of the Marquee Nightclub is governed by the Management Agreement. Appendix, Ex. A. Per the Agreement:

- Marquee is defined as the "Operator"
- Master Tenant is defined as "Owner"
- Cosmo is defined as the "Property Owner"

Appendix, Ex. A, pp 2, 15-17.

The Management Agreement expressly provides that it is entered by and between Marquee (Operator) and the Master Tenant (Owner). Appendix, Ex. A, p 2. Cosmo, while a beneficiary of certain terms of the Management Agreement, is not a party to the agreement. Appendix, Ex. A, p 2.[4]

Per the Management Agreement, Marquee developed, operated and managed the Marquee Nightclub. Ex. A, p 24. Consistent with the terms and provisions of the Management Agreement, a Marquee representative at trial testified as follows:

> Q. Who controls the day-to-day operations at the Marquee?
>
> A. Roof Deck Entertainment, LLC.
>
> Q. Who exercises actual control over hiring, training, and supervising the employees, including the security staff?
>
> A. Roof Deck Entertainment, LLC.

---

[4] Per the Management Agreement, Cosmo is the owner of the real property that houses the Marquee Nightclub. As Cosmo leased the space to Master Tenant, the latter had legal possession of the Marquee Nightclub such that per the terms of the Management Agreement, Master Tenant (and not Cosmo) retained Marquee to operate the nightclub.

Ex Q, 134:22-135:3.

In April 2014, David Moradi commenced a suit against Marquee and Cosmo (but not the Master Tenant). Appendix, Ex. B. Per the Complaint, Mr. Moradi alleged that he was assaulted by security personnel while a guest at the Marquee Nightclub. Appendix, Ex. B ¶ ¶ 9-18. By virtue of this assault, Moradi sought monetary damages, including loss of income. Appendix, Ex. B

Defendant Aspen Specialty Ins. Co. ("Aspen"), an insurer for both Marquee and Cosmo, appointed the same defense counsel to defend both Marquee and Cosmo. Appendix, Ex. C; see also Appendix, Ex. D. After conducting a preliminary investigation, but before appearing in the case, defense counsel sent Aspen a detailed report dated September 18, 2014 in which he advised that "Plaintiff has already stated he sustained $15-$20 million of losses from his hedge fund as a result of this incident. Appendix, Ex. C, p 6.

Defense counsel proceeded to file an Answer on behalf of both Marquee and Cosmo. Appendix, Ex. D. By jointly representing both parties, no cross or counter claims were pursued between the parties. *Id*. <u>By doing so, the relative fault of Marquee and Cosmo was never raised, pled or adjudicated.</u>

On December 10, 2015, Moradi made a settlement demand of $1,500,000. Appendix, Ex. G. At that time, defense counsel had advised both Aspen and Defendant National Union Fire Ins. Co. of Pittsburgh, PA ("AIG") in multiple reports that Moradi was making a loss of income claim of $300,000,000. Appendix, Ex E, p 4; Ex F. Despite being aware of these claims, Aspen and AIG declined to accept the demand or even engage in settlement discussions. Appendix, Ex H.

In advance of trial, the parties filed various motions to address what exposure, if any, Cosmo faced. Appendix, Exs. N, O, P. In joint filings made on behalf of Marquee and Cosmo, Marquee conceded that Cosmo had no express or implied authority to control the Marquee Nightclub such that Moradi was not a business invitee of the Cosmo. Appendix, Ex. P, 5:20-6:4 Given this, Marquee conceded that Cosmo was "at most an alleged passive tortfeasor" with no active role in any aspect of the operations of the Marquee Nightclub. Appendix, Ex. O, 4:27-5:3; see also Ex N, 4:26-5:1. Trial testimony from the Marquee representative was in accord that Marquee alone (and not Cosmo) operated and managed the Marquee Nightclub. Appendix, Ex. O, 3:15-24.

Despite this lack of control or management, the Trial Court held that Cosmo was legally vicariously liable for the conduct of Marquee by virtue of a finding of non-delegable duty. Marquee Appendix, Ex. 3, 14:13-16:25. In light of this ruling, Cosmo was held to be jointly liable for the conduct of Marquee notwithstanding the fact that Cosmo had no active role in managing or operating the venue.

Trial commenced in March 2017 against both Marquee and Cosmo, the latter on the basis of vicarious liability only. As both Cosmo and Marquee were represented by the same attorney, no crossclaims were asserted between the parties. The jury returned a verdict in April 2017 in excess of $150,000,000 jointly against Marquee and Cosmo. Appendix, Ex. R.

Given that Marquee and Cosmo were jointly represented with no cross or counter claims pled between them, the verdict form did not seek to allocate fault between the parties. *Id*. Given this, no findings were made in the underlying proceeding regarding the allocation of fault between Marquee and Cosmo. *Id*.

St. Paul, who issued an excess insurance policy to Cosmo, indemnified Cosmo for the judgment via a settlement.[5] Marquee Appendix, Ex 2. St. Paul then commenced the instant action in which it seeks recovery from Marquee for the sums paid on behalf of Cosmo.

Procedural History

This matter was commenced in July 2017. The instant motion is the third motion Marquee has filed as Marquee previously filed two essentially identical motions before it filed an Answer. Both prior motions were denied. See, e.g., Appendix, Ex. S.

Undeterred, Marquee has filed the same motion, now labeled as a Motion for Summary Judgment. Per the motion, Marquee again attempts to conflate Cosmo with the Master Tenant, despite the fact that only the latter is a party to the Management Agreement.

In previously denying Marquee's motion, this Court noted the following:

> Mr. Salerno: . . . When they say they're not a party to the contract and then they say they signed it, I think that's somewhat tongue-in-cheek. At page 89 of the Nightclub Management Agreement, they are the project owner. The project owner is defined throughout this

[5] Zurich, who is not a party to this litigation, issued a primary policy to Cosmo.

> agreement, and so are their insurance requirements and the relationship to those, as I went through.
>
> THE COURT: But there's -- project owner, I appreciate, and it's defined all the way through. But they didn't agree to the whole contract. They only agreed to put -- acknowledged and agreed to be bound, solely with respect to the provisions of blah, blah, blah.

Appendix, Ex. T, 24:6-15.

As the rationale for denying the earlier motions equally applies to Marquee's third bite at the proverbial apple, it is properly denied.

Meanwhile, in addressing the merits of St. Paul's claims against Marquee, this Court made the following observation:

> Ultimately, it's a purely legal issue. There is nothing to be done. I mean, the Court either says, you've got a claim under express indemnity because you're bound by this contract, or you're not bound by this contract. You're not a party. You didn't sign it, saying you would be bound by those provisions.

Appendix, Ex. T, 27:3-7.

Given that St. Paul's claims against Marquee present a legal issue based on undisputed facts, this Court may properly adjudicate the merits of St. Paul's countermotion.

<u>Discussion</u>

A. <u>Cosmo Is Not A Party To The Management Agreement.</u>

As before, Marquee's motion is largely premised on the contention that Cosmo is a party to the Management Agreement (and therefore bound by it) such that St. Paul's subrogation claims are barred by virtue of provisions contained in the agreement regarding the scope of express indemnity and when subrogation rights are waived. As before, Marquee's argument is misplaced.

The Management Agreement identifies the following parties:

- Marquee is defined as the "Operator"
- Master Tenant is defined as "Owner"
- Cosmo is defined as the "Property Owner"

Appendix, Ex. A, pp 2, 15-17.

As reflected in the agreement itself:

- Cosmo is the Owner/Landlord

- Master Tenant is the Master Tenant
- Marquee is the Operator/Manager of the nightclub.

Meanwhile, the Management Agreement expressly provides as follows:

> THIS NIGHTCLUB MANAGEMENT AGREEMENT is made and entered into effective as of the 21st day of April, 2010, between Nevada Restaurant Venture 1 LLC, a Delaware limited liability company ("Owner"), and Roof Deck Entertainment LLC, a Delaware limited liability company ("Operator").
>
> . . .
>
> D. Operator, through its principals and employees, is experienced in the management and operation of nightclubs, bars, lounges, pool deck areas, cabanas, and associated facilities and operations and desires to manage and operate the Nightclub Venues on the terms and conditions hereinafter set forth.
>
> E. Owner desires to retain Operator to manage and operate the Nightclub Venues on behalf of Owner on terms and conditions hereinafter set forth

Appendix, Ex. A, p. 2.

Of significance, the provisions quoted above omit any mention of Cosmo/Property Owner as a party to the agreement. That omission was intentional and by design.

Recognizing that Cosmo is <u>not</u> a party to the Management Agreement, Marquee argues that Cosmo is nonetheless bound by the agreement by virtue of the provisions of an unexecuted lease agreement that was contemplated between Cosmo and the Master Tenant. In so doing, Marquee offers no case law or facts to support how a party that is intentionally omitted as a signatory to an agreement (Cosmo) can nonetheless be bound by provisions that the non-signatory intentionally and deliberately never agreed to. It cannot.

It is fundamental contract law that for a contact to bind a party, that party must agree to it. See generally, *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration."). Given this, a waiver of subrogation only applies to a party who agreed to it and <u>not</u> to others. 73 Am. Jur. 2d Subrogation § 73 ("Such [subrogation] waivers only apply to parties who had agreed to such a waiver, and a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears."); see, e.g., *Willis Realty Assocs. v. Cimino Const.*

Co., 623 A.2d 1287, 1289 (Me. 1993): *Gulf Ins. Co. v. Quality Bldg. Contractor, Inc.*, 58 A.D.3d 595, 597, 871 N.Y.S.2d 366, 368 (2009); *St. Paul Fire & Marine Ins. Co. v. FD Sprinkler Inc.*, 76 A.D.3d 931, 932, 908 N.Y.S.2d 637, 639 (2010) ("The subcontractors, who are neither signatories nor parties to the main contract between the owner and the general contractor, cannot avail themselves of the waiver-of-subrogation clause contained therein."); *Fortin v. Nebel Heating Corp.*, 12 Mass. App. Ct. 1006, 1007, 429 N.E.2d 363, 364 (1981) (waiver of subrogation in contract between owner and general contractor did not extend to subcontractor who was not a party to that agreement).

Here, Cosmo expressly did not agree to be bound by the purported waiver of subrogation provision. The signature line where Cosmo executed the Management Agreement specifically states as follows:

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

Appendix, Ex. A, p 89.

As the waiver of subrogation provision (which appears in section 12.2.6 of the Management Agreement) is not one of the sections Cosmo agreed to be bound by, it has no bearing on St. Paul's claims. Appendix, Ex A, p 63

Meanwhile, the indemnity provision included in Section 13.1 of the Management Agreement expressly provides that it applies to "the negligence or misconduct of Operator . . . not otherwise covered by the insurance required to be maintained hereunder." Appendix, Ex A, p 63. Per the Management Agreement, Cosmo was not required to maintain any insurance. Given this, the limitation in the indemnity provision itself does not apply to St. Paul and the policy it issued.

The draft lease agreement does not alter this analysis. To the extent that Cosmo agreed to procure coverage for Master Tenant, Cosmo's agreement to do so has no bearing on this suit since Master Tenant was not a party to the underlying lawsuit such that the sums at issue do not pertain to it. Meanwhile, per the Management Agreement entered into between Marquee and Master Tenant, no obligation existed for Cosmo to procure insurance coverage for itself. Given this, to the extent that Cosmo agreed procure coverage for the Master Tenant and elected to insure itself, its decision to do so has no bearing on the merits of St. Paul's rights to subrogation

B. <u>No Waiver Exists Given The Jury's Finding That Marquee's Conduct Was Intentional.</u>

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

In this case, Marquee was held liable for assault and battery. Appendix, Ex. R. Given this, any damages arising from or relating to these claims cannot be the subject of a waiver of subrogation provision.[6]

Marquee’s assertion of this provision is particularly egregious because Marquee accepted Cosmo’s tender of defense and indemnity, recognizing that it was responsible for the Moradi claim. Marquee defended Cosmo in the Moradi action through its insurers, which provided joint counsel for Marquee and Cosmo. Appendix, Exs. C, D. The appointment of joint counsel prejudiced Cosmo’s interests in the litigation as, among other things, it insulated Marquee from any assessment of Marquee’s liability vis-à-vis Cosmo.

When Marquee accepted Cosmo’s tender of defense and indemnity, and appointed joint counsel to defend Marquee and Cosmo under a unified defense, Marquee effectively bought the

[6] The Verdict Form does not allocate damages to any specific count or legal theory. At a minimum, therefore, questions of fact exist as to which damages were awarded via these counts.

claim. To find otherwise would allow an indemnitor (Marquee) to accept a tender, defend, manipulate the proceedings to the detriment of the indemnitee (Cosmo), and then when the indemnitee gets hit with an astronomical judgment, deny the very indemnity obligation that allowed it to manipulate the defense to its advantage. The fundamental unfairness of such gamesmanship is patent, and alone compels the conclusion that Marquee waived any "waiver of subrogation" provision when it accepted Cosmo's tender. Accordingly, Marquee is precluded and barred from relying on a waiver of subrogation provision to shield it from its own gross misconduct.

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

Marquee argues that St. Paul's statutory contribution claim fails as a matter of law because (1) Cosmo intentionally contributed to Mr. Moradi's injuries; and (2) Cosmo's sole recourse against Marquee is pursuant to the terms of the Management Agreement so as to preclude a right to contribution under the Uniform Contribution Act. While St. Paul agrees with Marquee that Cosmo has a right to indemnity from Marquee via the Management Agreement to which St. Paul is subrogated, the agreement is not the exclusive manner of recovery given that Cosmo is not bound by it. Meanwhile, the contention that Cosmo was held to be liable for intentional conduct is unfounded and belied by the evidence before this Court. Given this, Marquee's attack is baseless, misstating both the underlying facts and Nevada law on statutory contribution.

First, Mr. Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct and <u>not</u> by any affirmative acts or unreasonable conduct on the part of Cosmo. Per the Court, Cosmo was held merely vicariously liable for Marquee's actions and Mr. Moradi's resulting damages. Marquee Appendix 3, 14:13-16:25. Contrary to Marquee's assertions, the Special Verdict does <u>not</u> find Cosmo intentionally caused or contributed to Mr. Moradi's injuries as it includes no allocations. See Appendix, Ex. R.

Regardless, the verdict was never reduced to a judgment because the parties ultimately settled the Moradi action. In so doing, all parties (Moradi, Marquee, Cosmo) expressly agreed that the parties are compromising disputed claims, that defendants Marquee and Cosmo admitted no fault, and that no part of the settlement was for punitive damages. See *Terrell v. Cent. Washington*

Asphalt, Inc., 2016 WL 8738266 (D. Nev. 2016) (where complaint alleges both negligent and intentional claims, settlement whereby defendants do not admit liability, and which expressly states no payment for punitive damages, is insufficient to support finding that defendants intentionally caused or contributed to the injury such as to preclude contribution claim under NRS 17.255).

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

Second, Marquee fundamentally misapplies NRS Section 17.265, which operates only to preclude an indemnitor bound by the terms of a written contract it agreed to from attempting to end-run its indemnity obligation by seeking contribution from the very party it agreed to indemnify. It does not, as Marquee contends, preclude a party that is a third party beneficiary under an express indemnity agreement from seeking, in the alternative, equitable contribution. Given this, to the extent that recovery via the express indemnity claim is unavailable, Cosmo is entitled to contribution via statute.

In this case, St. Paul has asserted claims based both in express indemnity and statute. These claims are <u>not</u> mutually exclusive.

The express indemnity claim is based on the fact that Cosmo is an intended third party beneficiary of the provision itself. Given this, Cosmo has the right to enforce the indemnity provision. *Morelli v. Morelli*, 102 Nev. 326 (1986) (recognizing that a nonparty to a contract has standing to enforce the contract only when the nonparty is an intended third-party beneficiary); see also *De Los Reyes v. Bank of America, N.A.*, 2016 WL 8735707 (D. Nev. 2016) (ruling that an intended third party beneficiary has standing to enforce a contract provision).

As addressed herein, Cosmo is not a party to the Management Agreement. Given this, Cosmo's rights are not limited to those set forth in the Management Agreement. Given this, St. Paul is entitled to pursue in the alternative a claim for contribution against Marquee for the amount of St. Paul's settlement payment that exceed Cosmo's fair share. *Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524 (1985) (holding NRS 17.265 "merely provides that no contribution exists where indemnity exists.")

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

Section 17.265 goes on to say, in a clause later added by the legislature for clarification, that one who owes indemnity may not pay its indemnity obligation and then turn around and sue the very party it paid to indemnify for contribution in connection with the amounts it was required to pay that party in indemnity ("indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation.") In other words, if St. Paul succeeds on its express indemnity claim and Marquee is ordered to pay St. Paul, as Cosmo's subrogee, the amount of St. Paul's settlement contribution, Marquee may not then pursue Cosmo/St. Paul for contribution on the amount of the settlement payment indemnified by Marquee. Obviously, the legislature added this last clause to preclude parties from improperly using the Uniform Contribution Act as a loophole to ameliorate their indemnity obligations. See *Id*. at 528.

D. Marquee Owes A Duty To Indemnify St. Paul.

The express indemnity provision in the Management Agreement provides as follows:

> Operator shall indemnify, hold harmless and defend Owner and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("Owner Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by Operator of any term or condition of this Agreement, or (ii) the negligence or willful

> misconduct of Operator or any of its owners, principals, officers, directors, agents, employees, Staff, members, or managers ("Operator Representatives") and not otherwise covered by the insurance required to be maintained hereunder.

Appendix, Ex A, p. 64.

Meanwhile, NRS 12.225 provides as follows:

> 1. [W]here two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> 2. The right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability, and the tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share. No tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability.

Contribution is a creature of statute. *Doctors Co. v. Vincent*, 120 Nev. 644, (2004). Under the statute, the remedy of contribution allows one tortfeasor to extinguish joint liabilities through payment to the injured party, and then seek partial reimbursement from a joint tortfeasor for sums paid in excess of the settling or discharging tortfeasor's equitable share of the common liability.

In this case, it is undisputed that Marquee acted both with negligence and willful misconduct. Appendix V. It is likewise undisputed that per Marquee, Cosmo was "at most an alleged passive tortfeasor" with no active role in any aspect of the operations of the Marquee Nightclub. Appendix, Ex N, 4:26-5:1; Ex. O, 3:15-24, 4:27-5:3; Ex. P, 5:20-6:4.[7]

Despite this lack of control or management, the Trial Court held that Cosmo was legally vicariously liable for the conduct of Marquee by virtue of a finding of non-delegable duty, and therefore jointly liable. Marquee Appendix 3, 14:13-16:25. In light of this ruling, Cosmo's liability was based on ruling that it was a joint tortfeasor by virtue of vicarious liability and nothing more.

Based on these facts, Cosmo is entitled to indemnity either per the Management Agreement and/or per statute.

---

[7] While Marquee suggests that Cosmo may have been held liable for its own intentional conduct, the fact that it played no active role in the operation and/or management of the nightclub coupled with the concession that Cosmo's sole exposure was based on derivative, vicarious liability undermines this position. Of significance, as the Verdict Form does not provide otherwise, Marquee's musings on this issue have no factual basis.

Under the Management Agreement, Cosmo is entitled to indemnity given that it faced liability arising from Marquee's negligence and willful misconduct. As the Management Agreement did not obligate Cosmo to procure its own insurance, the carve out in the express indemnity for damages "not otherwise covered by the insurance required to be maintained hereunder" has no bearing on St. Paul's claims and is irrelevant.

Alternatively, based on these same circumstances, Cosmo is entitled to indemnity per statute. See *Hunt/PENTA v. Aon Risk Services South, Inc.*, 2018 WL 8786380 (D. Nev. 2018), explaining that a right to contribution exists where two or more persons become jointly or severally liable in tort for the same injury to a person even though judgment has not been recovered against all or any of them. As Cosmo is not a party to the Management Agreement, it did not agree to limit its recovery to the terms and provisions of the Management Agreement. Given this, St. Paul's claims are meritorious.

By virtue of the undisputed facts, it is respectfully submitted that St. Paul is entitled to indemnity from Marquee. Accordingly, St. Paul requests that an order issue holding that Marquee is obligated to indemnity St. Paul for the sums it paid to resolve the suit.

E. <u>This Brief Is Timely Filed.</u>

Per this Court's website, the Local Rules provide that the deadline to file and serve Oppositions and Counter-Motions is ten (10) court days from the date the Motion was filed. Absent from the Local Rules available via the Court's website is any change or modification to this deadline. This brief is being filed in conformance with these rules. Declaration of William Reeves.

In connection with efforts to explore a briefing schedule first raised with counsel Marquee one week after it filed its motion, Marquee simultaneously agreed to an extended briefing schedule while opining that the Opposition is untimely. Appendix, Ex. V. The latter position is based on an apparent March 2019 Administrative Order that seeks to modify these rules in light of changes to the NRCP (which does not address motion deadlines).

Based on the view that the Administrative Order has the effect of accelerating the deadline to oppose motions to ten (10) calendar days (not Court or business days), Marquee apparently intends to argue that this brief is untimely. Appendix, Ex. V. In so doing, Marquee must concede that an extension was requested on Calendar Day 7 and that it held on responding to this inquiry until Calendar Day 11 so as to take the position that this brief is untimely. Appendix, Ex. V.

In this case, the Local Rules that remain on the Court's website expressly provide that the deadline to file an Opposition is ten (10) court days. Notwithstanding the apparent Administrative Order, these rules remain in force and effect, and are therefore binding. Declaration of William Reeves.

Regardless, the law abhors a forfeiture. *Matter of W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972,* __ Nev. __, 426 P.3d 599 (2018). In this case, by agreeing to a briefing schedule in response to an inquiry made within one week of the filing of its motion, Marquee is estopped from claiming this brief is untimely, especially given the lack of any conceivable prejudice by the filing of this brief. Appendix, Ex. V

To the extent this Court believes otherwise, request is made that it convene an evidentiary hearing to address the circumstances giving rise to the filing of this brief and the exchange between counsel.

Conclusion

Based on the foregoing, it is respectfully submitted that Marquee's motion be denied and that St. Paul's counter-motion be granted.

Dated: September 27, 2019

MORALES FIERRO & REEVES

By: /s/ William C. Reeves

Ramiro Morales
William C. Reeves
Marc J. Derewetzky
MORALES FIERRO & REEVES
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Attorneys for Plaintiff

PROOF OF SERVICE

I, William Reeves, declare that:

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

On the date specified below, I served the following document:

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY MARQUEE AND COUNTERMOTION RE: DUTY TO INDEMNIFY

CONSOLIDATED APPENDIX OF EXHIBITS (A-V)

DECLARATION OF WILLIAM REEVES

RESPONSE TO STATEMENT OF FACTS OFFERED BY MARQUEE

Service was effectuated in the following manner:

______ BY FACSIMILE:

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

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

Dated: September 27, 2019

William Reeves

DECL
Ramiro Morales [Bar No.: 007101]
William C. Reeves [Bar No.: 008235]
Marc J. Derewetzky [Bar No.: 006619]
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Attorneys for Plaintiff
St. Paul Fire & Marine Ins. Co.

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI DECLARATION OF WILLIAM REEVES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MARQUEE'S MOTION FOR SUMMARY JUDGMENT DATE: October 15, 2019 TIME: 9:30 a.m.

I, William Reeves, declare as follows:

1. I am an attorney with Morales Fierro & Reeves, counsel for Plaintiff St. Paul Fire & Marine Ins. Co. ("St. Paul") in this matter.

2. Included in the Consolidated Appendix of Exhibits filed herewith are true and correct copies of the following documents:

Exhibit A	Excerpts of Nightclub Management Agreement
Exhibit B	Complaint filed in the underlying case
Exhibit C	September 18, 2014 Letter
Exhibit D	Answer filed in the underlying case
Exhibit E	November 13, 2015 Defense Report
Exhibit F	December 7, 2015 Email
Exhibit G	December 10, 2015 Offer
Exhibit H	December 18, 2015 Letter

Exhibit I	November 2, 2016 Letter
Exhibit J	February 13, 2017 Notice
Exhibit K	March 9, 2017 Letter
Exhibit L	March 21, 2017 Letter
Exhibit M	March 21, 2017 Letter
Exhibit N	Trial Brief Re: Liability filed March 15, 2017
Exhibit O	Reply Brief filed March 23, 2017
Exhibit P	Opposition Brief filed April 12, 2017
Exhibit Q	Excerpts of Trial Proceedings
Exhibit R	Verdict Form filed April 26, 2017
Exhibit S	Motion To Dismiss filed June 25, 2018
Exhibit T	Excerpts of October 30, 2018 Hearing
Exhibit U	Order Re: Defendants' Motion to Dismiss
Exhibit V	Correspondence Between Counsel

3. Copies of all documents were either produced in this case or filed with this Court. As to the latter documents, request is made that this Court take judicial notice of them.

4. An issue has arisen regarding the purported timeliness of this brief. In connection with efforts to explore a briefing schedule, counsel for Marquee simultaneously agreed to an extended schedule while opining that this Opposition is untimely as it should have been filed ten (10) calendar days after the motion was filed. I disagree with this position as the Local Rules that remain posted on this Court's website expressly provide that parties are afforded ten (10) court days (not calendar days) to file Oppositions.

5. Counsel for Marquee provided me with a copy of an apparent March 2019 Administrative Order that seeks to modify these rules in light of changes to the NRCP. I am unfamiliar with the Order as I have never previously received a copy. More importantly, the Order is belied by the Local Rules posted on this Court's website as no mention is made of any changes to the deadlines for motions.

6. I attempted to meet and confer with counsel for Marquee regarding this issue. In so

doing, I pointed out that the inquiry as to a brief scheduled was made on calendar Day 7 and that counsel failed to respond to the inquiry until calendar Day 11. As set forth in the correspondence (Appendix, Ex. V), concerns exist regarding whether the timeline was strategic and contemplated.

7. Regardless, by agreeing to a briefing schedule in response to an inquiry made within one week of the filing of its motion, it is respectfully submitted that Marquee is estopped from now claiming this brief is untimely, especially given the lack of any conceivable prejudice. If this Court believes otherwise, request is made that it convene an evidentiary hearing to address the circumstances surrounding the filing of this brief.

I declare that the foregoing is true and correct based on my own personal knowledge and under penalty of perjury. Executed in Concord, California on the date specified below.

Dated: September 27, 2019

William C. Reeves

Electronically Filed
9/27/2019 2:28 PM
Steven D. Grierson
CLERK OF THE COURT

RSPN
Ramiro Morales [Bar No.: 007101]
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St. Paul Fire & Marine Ins. Co.

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI RESPONSE TO STATEMENT OF FACTS OFFERED BY MARQUEE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT DATE: October 15, 2019 TIME: 9:30 a.m.

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

Plaintiff St. Paul Fire & Marine Ins. Co. responds to Roof Deck Entertainment, LLC dba Marquee Nightclub's Statement of Undisputed Facts as follows:

Responses

Fact No. 1: This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). [FAC¶6].

Response: Agreed.

Fact No. 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].

Response: Agreed.

Fact No. 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].

Response: Agreed. Note that Nevada Restaurant Venture I, LLC ("Master Tenant"), was not named as a Defendant in the suit.

Fact No. 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].

Response: Agreed.

Fact No. 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].

Response: Irrelevant. In Pretrial motions, Marquee conceded that Cosmo had no express or implied authority to control the Marquee Nightclub such that Moradi was not a business invitee of the Cosmo. Appendix, Ex. P, 5:20-6:4 Given this, Marquee conceded that Cosmo was "at most an alleged passive tortfeasor" with no active role in any aspect of the operations of the Marquee Nightclub. Appendix, Ex. O, 4:27-5:3; see also Ex N, 4:26-5:1. Trial testimony from the Marquee representative was in accord that Marquee alone (and not Cosmo) operated and managed the Marquee Nightclub. Appendix, Ex. Q, 134:22-135:3; Ex. O, 3:15-24. Despite this lack of control or management, the Trial Court held that Cosmo was legally vicariously liable for the conduct of Marquee by virtue of a finding of non-delegable duty. Marquee Appendix, Ex. 3, 14:13-16:25. Cosmo's exposure, therefore, was limited to being held vicariously liable for the conduct of Marquee.

Fact No. 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].

Response: To be clear, the Trial Court held that Cosmo was legally vicariously liable for the conduct of Marquee by virtue of a finding of non-delegable duty. Marquee Appendix, Ex. 3, 14:13-16:25.

Fact No. 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].

Response: Agreed.

Fact No. 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].

Response: Agreed.

Fact No. 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].

Response: Undisputed that the case settled.

Fact No. 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].

Response: The Management Agreement was entered into between by and between Marquee (Operator) and the Master Tenant (Owner). Appendix, Ex. A, p 2. Cosmo, while a beneficiary of certain terms of the Management Agreement, is not a party to the agreement. Appendix, Ex. A, p 2.

Fact No. 11: Cosmopolitan leased the premises to its related entity, NRV1. [FAC ¶10].

Response: Agreed that Cosmo leased the premises to the Master Tenant. Cosmo, however, is not a party the Management Agreement. Appendix, Ex. A, p 2.

Fact No. 12: Cosmopolitan is identified as the Project Owner in the Recitals section of the NMA. [Bonbrest Decl., Ex. 1, at T000064].

Response: Per the Agreement:

- Marquee is defined as the "Operator"
- Master Tenant is defined as "Owner"
- Cosmo is defined as the "Property Owner"

Appendix, Ex. A, pp 2, 15-17.

Fact No. 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].

Response: Irrelevant as Cosmo/Property Owner is an entity that is separate and distinct from Master Tenant/Owner.

Fact No. 14: Cosmopolitan and NRV1 are related entities. [FAC ¶10]

Response: Irrelevant as Cosmo/Property Owner is an entity that is separate and distinct from Master Tenant/Owner.

Fact No. 15: Cosmopolitan and Marquee are separate and unrelated entities. [FAC ¶¶4, 10].

Response: Agreed.

Fact No. 16: Cosmopolitan is the Project Owner of the hotel casino and resort premises, including the Marquee Nightclub venue. [Bonbrest Decl., Ex. 1, at T000064].

Response: Disputed. Cosmo is the owner of the premises. Master Tenant is the tenant in possession of the premises. Marquee is the operator of the nightclub that operates out of the premises.

Fact No. 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].

Response: Agreed that Marquee entered into a contract with the Master Tenant whereby Marquee agreed to solely and exclusively operate and manage the nightclub. Cosmo is <u>not</u> a party to the agreement. Appendix, Ex. A, p 2. and had no active role in the operation and/or management of the nightclub. Appendix, Ex N, 4:26-5:1; Ex. O, 3:15-24, 4:27-5:3; Ex. P, 5:20-6:4; Ex Q, 134:22-135:3.

Fact No. 18: The NMA provides:

1. Definitions

…

"**Losses**" shall mean any and all liabilities, obligations losses damages, penalties, claims actions suits, costs, expenses and disbursements of a Person not reimbursed by insurance, including, without limitation, all reasonable attorneys' fees and all other reasonable professional or consultants' expenses incurred in investigating, preparing for serving as a witness in, or defending against any action or proceeding whether actually commenced or threatened.

[Bonbrest Decl., Ex. 1, at T000072].

Response: Irrelevant as Cosmo is not a party to the Management Agreement.

Fact No. 19: The NMA provides:

12. Insurance

12.1 [NRV1's1 Insurance. During the Term of this Agreement, [NRV1] shall provide and maintain the following insurance coverage, at its sole cost and expense ... :

…

12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage with a combined single limit of not less than Two Million Dollars ($2,000,000) for each occurrence, and at least Four Million Dollars ($4,000,000) in the aggregate, including excess coverage; and

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

12.2 [Marquee's] Insurance.

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

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

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

…

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

…

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

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

[Bonbrest Decl., Ex. 1, at T000124 – T000126].

Response: Irrelevant as Cosmo is not a party to the Management Agreement.

Fact No. 20: The NMA provides:

13. Indemnity

13.1 By [Marquee]. [Marquee] shall indemnify, hold harmless and defend [NRV1] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("Owner Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [Marquee] of any term or condition of this Agreement, or (ii) the negligence or willful misconduct of [Marquee] or any of its owners, principals, officers, directors, agents, employees, Staff, members, or managers ("[Marquee] Representatives") and not otherwise covered by the insurance required to be maintained hereunder.

[Marquee's] indemnification obligation hereunder shall include liability for any deductibles and/or self retained insurance retentions to the extent permitted hereunder, and shall terminate on the termination of the Term; provided however that such indemnification obligation shall continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

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

[Bonbrest Decl., Ex. 1, at T000126 - T000127].

Response: Irrelevant as Cosmo is not a party to the Management Agreement.

Fact No. 21: The NMA provides:

20. Third Party Beneficiary

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

[Bonbrest Decl. Ex. 1, at T000141].

Response: Irrelevant as Cosmo is not a party to the Management Agreement.

Fact No. 22: The NMA provides:

28. Attorneys' Fees

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

[Bonbrest Decl., Ex. 1, at T000144].

<u>Response</u>: Irrelevant as Cosmo is not a party to the Management Agreement.

<u>Fact No. 23</u>: Marquee is an insured under National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("National Union Policy"). [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].

<u>Response</u>: Agreed that AIG insures both Marquee and Cosmo.

<u>Fact No. 24</u>: 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].

<u>Response</u>: Agreed that Cosmo (but not Marquee) is an insured.

<u>Fact No. 25</u>: 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].

<u>Response</u>: Disputed as Aspen and AIG insure both Marquee and Cosmopolitan. Zurich and St. Paul only insure Cosmopolitan (not Marquee).

<u>Fact No. 26</u>: Cosmopolitan was an additional insured under the policies issued by Aspen and National Union. [FAC ¶¶ 15, 24, 30, 33, 40-41].

<u>Response</u>: Agreed that Aspen and AIG insure both Marquee and Cosmopolitan.

<u>Fact No. 27</u>: 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].

Response: Irrelevant as Cosmo is not a party to the Management Agreement and never agreed to waive its rights to recover.

Dated: September 27, 2019

MORALES FIERRO & REEVES

By /s/ William C. Reeves

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY AIG AND REQUEST FOR DISCOVERY PER NRCP 56(d)

Additional Documents: Consolidated Appendix (A-V); Declaration of Marc Derewetzky, Response to Facts

Date: October 15, 2019
Time: 9:30 a.m.

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Introduction

Defendant National Union Fire Insurance Company of Pittsburgh, PA ("AIG")[1] jointly defended two insureds - Nevada Property 1, LLC, dba the Cosmopolitan ("Cosmo") and Roof Deck Entertainment, LLC dba Marquee ("Marquee") – in an underlying personally injury action through counsel with a disqualifying conflict. AIG further rejected multiple reasonable settlement demands within its limits that would have eliminated its insureds' exposure. Instead of settling, AIG chose to gamble with its insureds' money by taking dangerous, high exposure claims to trial, despite its own defense counsel's warnings, before any settlement demand was made, that the claims had a reasonable value in excess of $300,000,000.

But when AIG's ill-conceived gamble failed, resulting in a massive verdict against both of AIG's insureds substantially in excess of every pretrial settlement demand, it refused to fully fund a post-judgment settlement demand. As a result, St. Paul was compelled to pay millions that it never should have had to pay to rescue its own insured, Cosmo, from AIG's bad faith. St. Paul, standing in the shoes of Cosmo, now seeks to hold AIG accountable.

This Court previously denied AIG's motion to dismiss St. Paul's First Amended Complaint ("FAC") on the identical grounds raised in AIG's summary judgment motion, but without prejudice to AIG citing matters outside the pleadings: i.e., St. Paul's policy and AIG's own insured's Nightclub Management Agreement ("Management Agreement"). One would think, therefore, that its arguments would focus on these documents. But no. In reality, AIG's motion mentions the St. Paul policy only in passing, while the Management Agreement is not addressed at all. Given this, AIG summary judgment motion is but an improper "second bite at the apple." See, e.g., *State Engineer v. Eureka County*, 133 Nev. 557 (2017).

AIG here again argues that Nevada law does not permit one insurer to pursue subrogated claims against another, and even if it did, that St. Paul lacks the requisite "superior equities." But Nevada law recognizes subrogation in these circumstances and St. Paul plainly has superior equities because (1) its insured was only passively liable while AIG's insured's negligence and willful

[1] Issues relating to Defendant Aspen Specialty Insurance Company are addressed in separate cross-motions for summary judge currently pending before the court.

misconduct actually caused the injuries; (2) AIG prejudiced St. Paul's and Cosmo's rights by defending Cosmo through conflicted counsel; (3) AIG rejected multiple reasonable policy limits demands while St. Paul had no opportunity to settle pre-verdict; and (4) the St. Paul policy is excess to the AIG policy by virtue not only of the plain terms of the Management Agreement but also because AIG consistently represented that the St. Policy was excess to its own policy, and acted as it if were by intentionally not involving St. Paul in the case until the eve of trial. And St. Paul's contractual subrogation claim does not require superior equities. This Court has already rejected these identical arguments and should do so again.

Subrogation allows an insurer that pays for an injury to another caused by a third party to step into the injured party's shoes to recover the amount paid from the wrong doer. Thus, the burden of the loss is placed on the party that caused it, where it belongs. Here, St. Paul paid the settlement on behalf of Cosmo which resulted from AIG's wrongful refusal to pay for damages resulting from its bad faith conduct. St. Paul, therefore, is subrogated to Cosmo's rights to pursue AIG for those damages.

AIG again argues that St. Paul has no claim because its insured, Cosmo, suffered no damage. Nonsense. It is a bedrock principle of subrogation that the entity bringing the claim has paid another's loss, so the subgrogee *rarely* has any damage. AIG also repeats its arguments that Nevada law does not recognize equitable contribution or equitable estoppel. The Court already reject these same arguments – and AIG is *still* wrong.

If, however, the Court is inclined to grant the motion, it should allow St. Paul, under Nevada Rule of Civil Procedure 56(d), to obtain discovery on a number of issues relating to the equities of this case, including (1) the conflict of interest in AIG retaining a single firm to represent Marquee and Cosmo jointly; (2) underlying plaintiff's settlement offers and their rejection; and (3) representations that St. Paul's policy would respond excess to AIG's policy.[2]

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[2] St. Paul served discovery on AIG shortly after the Rule 16 conference, when discovery opened under the Rules. The Court has stayed the discovery pending a motion to the Discovery Commissioner seeking an order phasing discovery. On the other hand, St. Paul has agreed to the authenticity of the Management Agreement and St. Paul's policy, which AIG erroneously claims were necessary to support the arguments in its Motion to Dismiss.

Accordingly, for the reasons set forth herein, it is respectfully submitted that AIG's motion be denied.[3]

Background Facts

This dispute arises out of a $160,500,000 verdict entered against both Cosmopolitan and Marquee in connection with the *Moradi* matter ("Underlying Action"). Exhibit R. In the Underlying Action, the jury found that Moradi was injured by Marquee personnel at the Marquee Nightclub so as to sustain lost income in excess of $100,000,000. Exhibit R. There was no evidence presented at trial that Cosmo was directly liable for Moradi's injuries and no evidence that Cosmo had any role in hiring, training or supervising the Marquee personnel. Declaration of Marc J. Derewetzky in Support of Opposition to AIG's Motion For Summary Judgment, filed concurrently herewith ("Derewetzky Decl."), ¶ 25. No Cosmo employee or manager testified at trial. Derewetzky Decl., ¶ 25. Prior to trial, the Court denied Cosmo's motion for summary judgment finding instead that Cosmo had a non-delegable duty to exercise reasonable care so as not to subject others to an unreasonable risk of harm. Derewetzky Decl., ¶ 25. Accordingly, at trial Cosmo was found jointly and severally liable with Marquee to Moradi not as a result of any act or omission by Cosmo, but vicariously. Exhibit R.

AIG's own "undisputed facts" unequivocally state that Cosmo's liability was vicarious only. See AIG's Undisputed Fact 2 (Moradi was attacked by Marquee employees); AIG Undisputed Fact 5 (Moradi asserted that Cosmo faced exposure for breaching its non-delegable duty); AIG Undisputed Fact 6 (the Court held as a matter of law that Cosmo "had a non-delegable duty and can be vicariously held responsible for the conduct of the Marquee security officers. . .").

At all times relevant herein, Marquee managed and operated the Club Marquee for the benefit of Cosmo. Exhibit A. Pursuant to that written contract, Marquee agreed to defend and indemnify Cosmo for any and all claims while also agreeing that Cosmo would be named as an additional insured under any liability policies Marquee procured. Exhibit A.

AIG issued liability policies to Marquee pursuant to which Cosmo qualified as an

[3] A separate issue has arisen regarding the purported timeliness of this brief. This issue is addressed in the separate Opposition to Marquee's motion filed herewith.

additional insured. AIG Undisputed Fact 18. In response to a tender, Aspen agreed to provide a joint defense to both Marquee and Cosmo while AIG, based on the large exposure, agreed to do the same. Exhibits L, M.

AIG provided a single set of attorneys to represent Cosmo and Marquee jointly, despite the fact that Cosmo was entitled to be indemnified by Marquee pursuant to contract, thus improperly waiving Cosmo's rights. Exhibit A; Derewetzky Decl., ¶ 26. AIG mishandled the claims and then failed to accept reasonable settlement offers within their limits. Exhibits G, H, I K; Derewetzky Decl., ¶ 27. Aspen and AIG failed to inform either Cosmopolitan or St. Paul of opportunities to settle before the offers expired. Derewetzky Decl., ¶ 28. These offers included a statutory offer of judgment for $1.5 million dated December 10, 2015 and offers to settle for $26 million (the undisputed amount of the combined Aspen and AIG limits) presented on November 2, 2016 and March 9, 2017, shortly before trial commenced. Exhibits G, H, I, K . And throughout the Underlying Action, AIG consistently represented that its coverage for Cosmopolitan was primary to St. Paul's coverage and, therefore, that AIG was responsible for defending and resolving the Underlying Action. Derewetzky Decl., ¶ 29.

Rather than accept a settlement demand within its limits that would have insulated both Marquee and Cosmo, AIG elected to reject the demands and instead unreasonably take its chances that they would do better at trial. AIG lost this gamble spectacularly, by virtue of the jury awarding damages in excess of $160,000,000. Derewetzky Decl., ¶ 30. Exhibit R.

Having lost its gamble AIG then took the position that its exposure was capped at the limits of its policy ($26,000,000 when combined with the limits Aspen claimed were available), and that they would pay the alleged policy limit to protect Marquee but not Cosmo. Derewetzky Decl., ¶ 31. Throughout, AIG conducted itself by word and deed as though its policy was obligated to pay the Moradi claims before St. Paul was required to pay, rendering the St. Paul policy excess to the AIG policy. Derewetzky Decl., ¶ 32. But AIG failed to avail itself of opportunities to spend its limits to protect *both* of its insureds, opportunities that were never presented to St. Paul. Derewetzky Decl., ¶ 32; Exhibits I, K. With a joint and several judgment hanging over its named insured's head, St. Paul funded Cosmo's portion of the settlement. Derewetzky Decl., ¶ 32. St.

Paul now seeks reimbursement from Aspen, AIG and Marquee for the sums incurred and paid.

LEGAL STANDARDS

I. Summary Judgment Standard

Under Rule 56(a) of the Nevada Rules of Civil Procedure, "[s]ummary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact." *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). However, "the nonmoving party . . . bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id*. Rather, "[t]he nonmoving party 'must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.' The nonmoving party 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" *Id.*

II. Application of NRCP 56(d)

Rule 56(d) of the Nevada Rules of Civil Procedure[4] provides:

> When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;

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[4] The NRCP was recently amended to change Rule 56(f) to Rule 56(d). Therefore, cases discussing this rule may refer to old Rule 56(f) which is now Rule 56(d).

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Entry of summary judgment is proper only "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (emphasis added). Nevada Rule of Civil Procedure 56(d) allows the Court to refuse summary judgment, continue a hearing or "make such other order as is just" when a party opposing summary judgment demonstrates that it cannot "for reasons stated present by affidavit facts essential to justify the party's opposition." Nev. R. Civ. P. 56(f); see also *Texas Partners v. Conrock Co*., 685 F.2d 1116, 1119 (9th Cir. 1982) (reversing summary judgment where plaintiffs were not afforded opportunity to proceed with discovery). Rule 56(d) provides a device for litigants to avoid summary judgment when they have not yet had sufficient time to develop affirmative evidence. *Burlington Northern Santa Fe Ry. Co. v. The Assiniboine,* 323 F.3d 767, 773 (9th Cir. 2003); *Aviation Ventures, Inc. v. Joan Morris, Inc.,* 110 P.3d 59, 62-63, 121 Nev. 113 (Nev. 2005) (finding court abused its discretion by not permitting the non-movant to engage in discovery pursuant to Rule 56(f), now Rule 56(d), to allow it an opportunity to marshal facts to oppose a motion for summary judgment).

The timing of a summary judgment motion is particularly significant when considering a Rule 56(d) request for more time. Thus, where a summary judgment motion is brought early in the litigation, a Rule 56(d) motion for additional time should be granted *as a matter of course*. *Burlington Northern*, 323 F.3d at 774. In *Burlington Northern*, the Ninth Circuit reviewed the trial court's grant of a motion for summary judgment filed by plaintiff less than one month after the plaintiff initiated suit. The Ninth Circuit reversed, holding that the defendant's Rule 56[d] motion should have been granted insofar as the discovery sought was dispositive of a pivotal question in the action. *Id*. On the issue of timing, the Ninth Circuit counseled: "Where … a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56[d] motion fairly freely." *Id*. at 773.

Nevada courts agree with the Ninth Circuit and readily find that it is an abuse of discretion to refuse a party discovery to oppose a summary judgment motion where either the requesting party has not been dilatory or the case is at an early stage of the proceedings. See, e.g., *Halimi. H.R. Blacketor*, 105 Nev. 105, 106, 770 P.2d 531 (1989); *Harrison v. Falcon Products, Inc*., 103 Nev. 558, 560, 746 P.2d 642 (1987); *Aviation Ventures*, 110 P.3d at 62-63.

A Rule 56(d) request for time to conduct discovery should be granted where the party making the request: (1) submits an affidavit setting forth the specific facts that they hope to obtain from discovery; (2) that the facts sought exist; and (3) that these facts are essential to oppose summary judgment. *State of Cal. v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998); *Aviation Ventures*, 110 P.3d at 62 ("a motion for a continuance under NRCP 56[d] is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact"). Due to the infancy of this action, the specificity required of Plaintiff in describing the facts likely to be discovered is not a stringent requirement. See *Burlington Northern*, 323 F.3d at 774 (explaining that, "where… no discovery whatsoever has taken place, the party making a Rule 56[d] motion cannot be expected to frame its motion with great specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid").

Argument

I. The Court Should Bar AIG From Taking A Second Bite Of The Apple.

That AIG is seeking a second bite of the apple is undeniable. Large portions of its motion have been lifted nearly verbatim from its failed motion to dismiss. See, Motion to Dismiss at 7:18-8:10 and MSJ at 15:1-21; Motion to Dismiss at 12:8-14:7 and MSJ at 17:1-19-2. And AIG has taken the opportunity to "improve" its arguments by citing cases not cited in the motion to dismiss even though these cases were available to it previously.[5] Moreover, the Court denied the motion to dismiss without prejudice to allow AIG to include arguments based on the St. Paul policy and

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[5] See, e.g., MSJ at 14:16-21, citing *Everest Natl. Ins. Co. v. Evanston Ins. Co.* (unpublished opinion of U.S. District Court); *CSE Ins. Group v. Northbrook Prop & Cas. Co. and Century Surety Co. v. United Pacific Ins. Co.* (both California Appellate Court opinions), none of which were cited in the motion to dismiss.

Management Agreement which were unavailable to AIG for use in its motion to dismiss. Exhibit O. But the St. Paul policy is barely mentioned in the summary judgment motion and the Management Agreement is not even cited. Thus, AIG is simply repeating its Motion to Dismiss arguments here.

The Nevada Supreme Court frowns on litigants' effort to obtain a second bite of the apple after the requested relief has been denied. In *State Engineer v. Eureka County*, 133 Nev. 557 (2017), the State Engineer failed to rely upon substantial evidence in finding that Kobeh Valley Ranch, LLC (KVR) would be able to mitigate conflicts to prior water rights when approving KVR's applications to appropriate water. The Nevada Supreme Court held that the district court had properly vacated the permits and that KVR was not entitled to a second bite at the apple after previously failing to present sufficient evidence of mitigation. *Id.* Indeed, cases in which relief was denied because a litigant was seeking a second bite at the apple are legion. See, e.g., *Todd v. State of Nevada,* 113 Nev. 18, 22 (1997) (refusing to grant new trial to discourage defense counsel from remaining silent in the face of trial court errors or misconduct, for tactical reasons, in order to get a "second bite at the apple" if a verdict is returned against their clients); and *In re Negrete*, 183 B.R. 195 (1995). Similarly, this Court should not permit AIG to have a second bite at the apple here. Because neither the St. Paul policy nor the Management Agreement adds to AIG's failed Motion to Dismiss arguments, the Summary Judgment Motion should similarly be denied.

II. <u>St. Paul Is Subrogated To Cosmopolitan's Claims</u>.

As in its unsuccessful Motion to Dismiss the FAC, AIG's Summary Judgment Motion provides a full-frontal assault on the doctrine of subrogation arguing both that subrogation is not available under Nevada law and, even if it is, that St. Paul does not qualify as Cosmo's subrogee. These arguments evidence a lack of basic understanding of subrogation. Accordingly, St. Paul's opposition begins with a brief discussion of the history and purpose of the doctrine. St. Paul then explains why it is subrogated to Cosmo's claims. Finally, St. Paul addresses the claims for equitable contribution and equitable estoppel, which do not depend on subrogation.[6] Contrary to AIG's

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[6] AIG challenges St. Paul's right to stand in Cosmo's shoes, but does not question that Cosmopolitan would have had claims against AIG for providing conflicted counsel and for failing to accept reasonable settlement demands within AIG's limits had not St. Paul paid to settle the claims against Cosmo.

assertions, subrogation, contribution and estoppel are all remedies available to St. Paul under the facts of this case and the applicable law. Therefore, AIG's motion must be denied.

A. The Law of Subrogation

1. The Meaning and Purpose of the Doctrine

Although St. Paul addressed the doctrine of subrogation at some depth previously, because AIG has again questioned the very existence of the doctrine generally as well as specifically under Nevada law, St. Paul must supply some context.

"Subrogation is not a cause of action in and of itself," but rather an equitable remedy that allows one party to assert the cause of action of another. 73 Am. Jur. 2d Subrogation § 75; *Pulte Home Corp. v. Parex, Inc*., 174 Md. App. 681, 742, 923 A.2d 971, 1005 (2007), *aff'd*, 403 Md. 367, 942 A.2d 722 (2008). Under this doctrine, when an insurer pays for an injury to another caused by a third party, then the insurer has the right to step into the injured party's shoes to recover the amount paid from the wrong doer. *Id*. Thus, the burden of the loss is placed on the party that caused it, where it belongs. 73 Am. Jur. 2d Subrogation § 2; *Kim v. Lee*, 145 Wash. 2d 79, 88, 31 P.3d 665, 669 (Wash. 2001) ("Subrogation is fundamentally an equitable concept designed 'to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it.'").

Foundational to the operation of subrogation is that the party who would have been injured was not in fact injured, because the insurer paid for the injury. Given the effectiveness of subrogation in placing the burden of wrongdoing on the wrongdoer, the courts have repeatedly held that it is to be liberally and expansively applied, even where it has not been applied before. As explained in a well-respected secondary source:

> Subrogation, as a doctrine, is not fixed and inflexible nor is it static, but rather, it is sufficiently elastic to meet the ends of justice. Furthermore, the doctrine is not constrained by form over substance, nor is it within the form of a rigid rule of law. Thus, the mere fact that the doctrine has not been previously invoked in a particular situation is not a prima facie bar to its applicability.

73 Am. Jur. 2d Subrogation § 7 "Flexibility and Scope"; *see also*, *e.g*., *Gearing v. Check Brokerage Corp*., 233 F.3d 469, 472 (7th Cir. (Ill.) 2000) ("doctrine of subrogation should be applied 'where it

effectuates a just resolution of the rights of the parties, irrespective of whether the doctrine has previously been invoked in the particular situation.'").

To argue that subrogation should not be applied in a particular context simply because it has not been applied there before (as AIG does here) is to misunderstand the basis of the doctrine in natural justice, equity, and good conscience. 73 Am. Jur. 2d Subrogation § 7 ("the object of subrogation to do complete and perfect justice between the parties without regard to form or technicality, the remedy will be applied in all cases where demanded by the dictates of equity, good conscience, and public policy.").

AIG must argue that subrogation does not apply because its contentions rely exclusively on form and technicality and, therefore, it could not prevail against a subrogation claims. Here the dictates of equity and good conscience should control and, therefore, subrogation is an appropriate means to obtain a just (equitable) result.

2. Equitable Subrogation

Equitable subrogation arises by operation of law based on the legal consequences of the acts and relationships between the parties. 73 Am. Jur. 2d Subrogation at § 5. As such, "it is a broad doctrine . . . given a liberal application; the doctrine of equitable subrogation is highly favored in the law." *Id.* at § 5 *citing U.S. Bank Nat. Ass'n v. Hylton*, 403 N.J. Super. 630, 637, 959 A.2d 1239, 1243 (Ch. Div. 2008). Accordingly, "'equitable subrogation' includes every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity and good conscience should have been discharged by the latter." *Id.*

3. Contractual, or "Conventional" Subrogation

Contractual subrogation developed later, and has its basis in an agreement of the parties granting the right to pursue reimbursement from the responsible third party in exchange for payment of a loss. 73 Am. Jur. 2d Subrogation § 4; *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 646 (Tex. 2007). As contractual subrogation is based on contract, it is governed by the terms of the agreement.[7] 73 Am. Jur. 2d Subrogation § 4. ("A contractual subrogation clause expresses the

[7] The St. Paul policy states: "If any Insured has rights to recover from any other person or organization all or part of any payment we have made under this policy, those rights are transferred to us." AIG Exhibit 3; see also FAC ¶

parties' intent that subrogation should be controlled by agreed contract terms, not external rules imposed under the common law." *Puente v. Beneficial Mortg. Co. of Indiana*, 9 N.E.3d 208 (Ind. Ct. App. 2014)).

One significant difference between equitable and contractual subrogation is that "a subrogee invoking contractual subrogation can 'recover without regard to the relative equities of the parties'" or before the insured has been made whole. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647 (Tex. 2007); *see*, *e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C.*, 646 A.2d 966, 971 (D.C. 1994) ("the superior equities doctrine, although applicable to equitable subrogation claims, has no application in cases of conventional subrogation and assignment.")

Both types of subrogation may exist independently and simultaneously alongside each other, *i.e.*, they are not mutually exclusive, and the non-existence of one does not preclude the other. 73 Am. Jur. 2d Subrogation § 3; *Roberts v. Total Health Care, Inc.*, 109 Md. App. 635, 648, 675 A.2d 995, 1001 (1996), *aff'd*, 349 Md. 499, 709 A.2d 142 (1998); *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1538 (10th Cir. 1996). Thus, a party may assert claims for equitable and contractual subrogation simultaneously where it has grounds to do so, and as St. Paul has done here.

B. Nevada's Long History of Applying Subrogation Where It Serves Justice

1. Nevada Recognizes That Subrogation Applies As An Equitable Remedy Whenever It is Just

In accord with jurisdictions nationally, Nevada courts have long applied the doctrine of subrogation expansively and flexibly in the interests of justice. More than one hundred years ago, in *Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250, 251 (1915), the court expanded subrogation by holding a party who paid off a mortgage is subrogated to rights under that mortgage. While no prior Nevada opinion on point existed, the court relied on national authority, including cases from Utah, New York, Iowa, Minnesota, Texas, Ohio, Maryland, Michigan, Nebraska, Washington and others to find that subrogation should be broadly permitted in accord with the modern trend, stating:

42 ("The St. Paul Policy contains a subrogation provision which transfers all of Cosmo's rights of recovery against any other person or organization to St. Paul for all or part of any payment made by St. Paul under the St. Paul Policy.")

> Subrogation is, in point of fact, simply a means by which equity works out justice between man and man. Judge Peckham says, in *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102, that "it is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties;" and the ***courts incline rather to extend than to restrict the principle***, and the doctrine has been ***steadily growing and expanding*** in importance.

Laffranchini, supra at 252 (1915) (emphasis added). Thus, "[s]ubrogation . . . applies to a great variety of cases, and is broad enough to include ***every*** instance in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter . . ." *Id*. at 252 (emphasis added). There is no Nevada case holding that subrogation is unavailable in the insurance context. "Every instance" means *every* instance. As the Nevada Supreme Court recently stated:

> . . . equitable subrogation is also an equitable remedy that requires the court to balance the equities based on the facts and circumstances of each particular case. *Murray v. Cadle Co*., 257 S.W.3d 291, 300 (Tex.App.2008). Subrogation's purpose is to "grant an equitable result between the parties." 2 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 10.6, at 26 (5th ed.2007). This court has expressly stated that district courts have full discretion to fashion and grant equitable remedies, *Bedore v. Familian*, 122 Nev. 5, 11–12 & n. 21, 125 P.3d 1168, 1172 & n. 21 (2006), and we will review a district court's decision granting or denying an equitable remedy for abuse of discretion

A*m. Sterling Bank v. Johnny Mgmt. LV, Inc*., 126 Nev. 423, 428, 245 P.3d 535, 538–39 (2010). That a court may apply subrogation principles in any context to achieve an equitable result is well-established under Nevada law, and will be reviewed only for abuse of discretion. *See also*, *Zhang v. Recontrust Co., N.A.*, 405 P.3d 103 (Nev. 2017).

For this reason, *Laffranchini*, the court's first subrogation opinion, has been cited favorably by the Nevada Supreme Court as recently as 2012 in *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573, 289 P.3d 1199, 1209 n.8 (2012), where the court observed that it "has recognized the doctrine of equitable subrogation in a variety of situations" including workers compensation (*AT & T Technologies, Inc. v. Reid*, 109 Nev. 592, 855 P.2d 533 (1993)), negotiable instruments (*Federal Ins. Co. v. Toiyabe Supply*, 82 Nev. 14, 409 P.2d 623 (1966)), sureties (*Globe Indem. v. Peterson–McCaslin*, 72 Nev. 282, 303 P.2d 414 (1956)) and mortgages (*Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250 (1915)). In addition to these contexts, the Court has also held that a developer and general contractor's builders risk insurer may subrogate against a subcontractor when the subcontractor was required to indemnify and provide additional insured coverage to the developer and general contractor. *Lumbermen's Underwriting All. v. RCR Plumbing, Inc.*, 114 Nev. 1231, 1232, 969 P.2d 301, 302 (1998).

These were all specific areas where the Court had not previously spoken and yet found the doctrine of equitable subrogation applied. Indeed, the Nevada federal district court as recently as last year concluded that current Nevada law supports equitable subrogation by an excess carrier against a primary carrier for bad faith failure to settle. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 (D. Nev. June 9, 2016) ("*Colony I*"); *see also*, *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. July 5, 2018) ("*Colony II*"). In those cases, a primary auto insurer rejected settlement demands within its limits. The case later settled in excess of primary limits with the participation of the excess carrier. The excess carrier sued the primary carrier for the sum it paid based on bad faith failure to settle through equitable subrogation. The primary carrier argued, like AIG, that Nevada had not "recognized" the right of an excess carrier to do so. The court rejected this contention and based its holding on the following definition of equitable subrogation as articulated by the Nevada Supreme Court:

> [E]quitable subrogation is "an equitable remedy that requires the court to balance the equities based on the facts and circumstances of each particular case. Subrogation's purpose is to 'grant an equitable result between the parties.' This court has expressly stated that district courts have full discretion to fashion and grant equitable remedies." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.,* 245 P.3d 535, 538 (Nev. 2010) (internal citations omitted).

Colony I, at *3.

Notably, AIG does not actually cite any cases barring subrogation between carriers. This is because such a rule makes no sense, so any cases they could cite would be poorly-reasoned outliers which would undermine their position. As explained above, to forbid subrogation would be to reward wrongdoers like AIG, and to undermine the insurance industry. There is no Nevada public policy in favor of either. Accordingly, established Nevada rules regarding subrogation support subrogation between insurers generally and between AIG and St. Paul here.

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2. Nevada Permits Contractual Subrogation

Without citing authority, AIG rejects the *Colony* holdings that Nevada law supports equitable subrogation based on Nevada's long history of employing that doctrine whenever justice so requires, but then embraces the same decision to overstate a blanket contention that a contractual subrogation claim cannot be maintained. AIG's position is incorrect.[8] Nevada law does not bar all contractual subrogation claims, but only in very rare and narrow circumstances. For, example in *Canfora v. Coast Hotels & Casinos, Inc*., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005), the Nevada Supreme Court enforced a contractual subrogation clause which required that where an employee received benefits from a third party for which it had been paid by its employer-insurer, it must reimburse the employer-insurer. The court held:

> In this case, the language in the subrogation clause could not be more plain. The clause unequivocally provides that when an employee receives the same benefits from the plan and a negligent third party, the recipient "must reimburse the plan for the benefits provided." Since the subrogation clause is unambiguous, the Canforas are bound by the terms of the document.

Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005).

The court specifically distinguished a prior case -- *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986) -- where it had denied contractual subrogation:

> We have previously prohibited an insurer from asserting a subrogation lien against medical payments of its insured as a matter of public policy. In *Maxwell v. Allstate Insurance Co*., we were concerned about the injured party recovering less than their full damages. However, we have held that where an insured receives "a full and total recovery, *Maxwell* and its public policy concerns are inapplicable."

Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 778, 121 P.3d 599, 604 (2005).

The *Colony* court reached the result it did because it misapplied *Maxwell*, which was the only Nevada case included in the *Colony* court's reasoning on this point. In *Maxwell,* the insurer

[8] Although contractual subrogation is nearly universally accepted throughout the country, contractual subrogation will not be allowed where a statute reflects a public policy contrary to that particular type of subrogation. 73 Am. Jur. 2d Subrogation § 4 ("Subrogation clauses in contracts do not violate public policy; however, despite the parties' contractual agreement, it will not be recognized where a statute expresses a public policy against the enforcement of those rights."). There is no such statute in Nevada.

was attempting to subrogate to an insured's *medical payments damages* at a time when it was unclear that the insured had already been made whole. The court found that *in the context of medical payments,* contractual subrogation clauses were void as against public policy; it did not decide all contractual subrogation clauses in every context are void. This specific, narrow public policy was reflected in NRS 41.100, which prohibited not only subrogation, but assignment, loan receipts, or trusts regarding *medical payments* made by insurance companies. There is no public policy against contractual subrogation generally, either in Nevada or in any jurisdiction of which St. Paul is aware.

It is unsurprising then that the California cases cited by *Colony -- 21st Century Ins. Co. v. Superior Court*, 47 Cal. 4th 511, 518, 213 P.3d 972, 976 (2009), and *Progressive W. Ins. Co. v. Yolo Cty. Superior Court*, 135 Cal. App. 4th 263, 37 Cal. Rptr. 3d 434 (2005) -- were also both med-payments claims. The court in *21st Century* stated that "Med-pay Carrier Defendants must seek recovery for personal injury claims through contractual reimbursement rights against their insureds, because they are not allowed to assert subrogation claims directly against third party tortfeasors." *Id*. at 518. "The rule is based on the premise that personal injury claims are not assignable, and therefore a med-pay insurer generally has no right to sue the tortfeasor directly and has no standing to intervene." *Id*. These principles have no bearing on subrogation in this case, which involves the payment of a judgment against the insured that resulted from its insurer's breach of contract and bad faith.

Likewise, those sections of *Progressive W. Ins. Co. v. Yolo Cty. Superior Court*, 135 Cal.App.4th 263, 37 Cal.Rptr. 3d 434 (2005), cited by the *Colony* court for the proposition that contractual subrogation generally adds nothing to equitable subrogation do not mean that contractual subrogation is never available. Rather, it means that in most circumstances those rights granted by equitable subrogation are so broad that the insurer does not gain additional rights by contract. Further, the *Progressive* court took this position because California is one of the few jurisdictions that apply equitable limitations to contractual subrogation. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal.App.4th 1098, 1110, 49 Cal.Rptr.3d 785, 793 (2006). This is not the case in most of the country, where contractual subrogation can expand those rights available in equity, as explained above. Indeed, even the California appellate courts have opined that it makes more sense for contractual subrogation to not be bound by equitable limitations, even while they are themselves bound by precedent to the contrary, at least for now. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal.App.4th 1098, 1110, 49 Cal Rptr.3d 785, 793 (2006) (stating that the position that contractual subrogation should not require the doctrine of superior equities as applied in other jurisdictions was persuasive while being bound by California precedent to apply it). Therefore, these opinions cannot circumscribe St. Paul's right to contractual subrogation in this case.

C. AIG's "Superior Equities" Argument Fails

AIG's motion makes three arguments as to why St. Paul should not be allowed to pursue a claim against it for breach of the duty to settle. In the first two arguments, AIG claims that no right to subrogation exists under Nevada law. These arguments fail for the reasons discussed above. AIG's third argument, assuming a right to subrogate does exist, is that St. Paul cannot pursue subrogation because it lacks "superior equities." AIG's argument is based primarily on an analysis of the AIG and St. Paul policies in a vacuum, without reference to any of the underlying facts that inform the equities between the parties. In fact, St. Paul has the far superior equities.

AIG contends that superior equities cannot exist between excess insurers with the same obligations to the insured. Interestingly, it is in this argument that most of AIG's references to the St. Paul policy may be found. But equity is a doctrine of fundamental fairness that transcends the parties' legal relationships. Properly framed the question here is not so much what the policies say as whether fundamental fairness requires that St. Paul be placed in a superior position to AIG with respect to resolution of claims for which St. Paul stands in Cosmo's shoes, including for AIG's defending Cosmo with conflicted counsel and for AIG's failure to settle the claims against Cosmo within its limits when it had the opportunity. The answer, resoundingly, is yes, because it was AIG that placed Cosmo in peril, not St. Paul. AIG's attempt to mischaracterize the very nature of the claims must be rejected.

St. Paul has superior equities because: (1) the underlying agreements and conduct of the parties demonstrate St. Paul's coverage for Cosmo was intended to be excess by the parties; (2) AIG caused this loss by breaching its covenant of good and fair dealing with Cosmo by (a) breaching the duty to settle; and (b) breaching the duty to provide an adequate defense; and (3) Cosmo itself did nothing wrong but was held only vicariously liable for Marquee's wrongful acts, which, because Marquee's acts in fact caused the injuries, makes Marquee's coverage with AIG primary to Cosmo's with St. Paul. AIG's argument that St. Paul should have settled the case simply ignores that fact that St. Paul had no opportunity to do so in part because AIG did not inform St. Paul of the settlement opportunities. For all of these reasons, AIG's motion should be denied.

1. St. Paul Has Superior Equities Because It Is Excess to AIG's Coverage for Cosmopolitan

a. St. Paul is Excess Based on the Management Agreement

AIG argues that its policy and St. Paul's policy insure Cosmo at the same level and, therefore, that St. Paul cannot have superior equities. This assertion is simply incorrect for a number of reasons. Factually, Cosmopolitan is a named insured on the St. Paul policy and an additional insured on the AIG policy. In this context, courts turn to the language of the underlying agreements pursuant to which additional insured coverage was provided to determine the priority of that coverage. Here, the language of the Management Agreement could not be more clear. Section 12.2.5 states: "All insurance coverages maintained by [Marquee] shall be primary to any insurance coverage maintained by any Owner Insured Parties (the "Owner Policies"), and any such Owner Policies shall be excess of, and not contribute toward, [Marquee] Policies. . . ." Exhibit A. Cosmo is identified in the Management Agreement as the "Owner". Plainly, the Management Agreement provides that the St. Paul policy ("Owner Policy") is to be excess to the AIG (Marquee) policy. There can be no reasonable dispute that the parties intended St. Paul's coverage to be excess.

The indemnity provisions of the Management Agreement yield the same result. When an underlying agreement indicates that one party is to bear the risk of loss before the other, that party's insurance is primary, and the other's excess. *Rossmoor Sanitation, Inc. v. Pylon, Inc.,* 13 Cal.3d 622 (1975); *Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co.*, 123 Cal.App.4th 278 (2004); *Zurich Am. Ins. Co. v. Acadia Ins. Co.*, 243 F. Supp. 3d 1201, 1208 (D. Colo. 2017). The indemnity agreement at section 13.1 of the Management Agreement, which shifts the risk of loss from Cosmo to Marquee, further supports the argument that St. Paul is excess to AIG. Exhibit A. It provides that Marquee shall indemnify the Restaurant and its parents (Cosmo) and members against any and all losses incurred as a result of Marquee's breach or Marquee or its employees' or staff's negligence or willful misconduct. There is an exception for liability covered by required insurance, but the St. Paul policy is *not* required insurance. Cosmo is not obligated under the Management Agreement to obtain any insurance,[9] so the insurance provision does not apply to the St. Paul policy. Exhibit A. Therefore, because this claim arose out of the negligent or willful acts of Marquee's employees, and Cosmo was only vicariously liable and did not itself commit any negligent or will act, Marquee owes Cosmo indemnity. This shifts the risk of loss not only to Marquee, but also its insurers, including AIG. *Rossmoor Sanitation, Inc. v. Pylon, Inc.,* 13 Cal.3d 622 (1975); see also *Hartford Casualty Ins. Co. v. Mt. Hawley Ins. Co.,* 123 Cal.App.4th 278, 292 (2004); *Wal-Mart Stores, Inc. v. RLI Ins. Co.,* 292 F.3d 583(8th Cir. 2002).

AIG argues that "losses" as defined in the Management Agreement to exclude sums "reimbursed" by insurance, means that the indemnity provision does not apply to losses covered by insurance for Marquee or NRV1. That is not a reasonable interpretation because it renders the insurance language of the indemnity provision meaningless, and also undermines the priority provisions set forth in the insurance requirements.[10] Indeed, the language in the indemnity clause refers to losses "covered" by insurance, whereas the losses definition relates to sums "reimbursed" by insurance. "Reimbursement" refers to an insurer's obligations under an indemnity-style policy as opposed to a true general liability policy. Under an indemnity policy, an insured must first pay a

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9 Section 12.1 of the Management Agreement requires NRV1 to obtain certain insurance. Exh. A. NRV1 is *not* Cosmo. Cosmo and NRV1 are different entities. NRV1 is the entity that leased the nightclub from Cosmo. There is no requirement in the Management Agreement that Cosmo obtain any insurance.

10 Under Nevada law, the interpretation of an insurance contract is a question of law for the court. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 14, 252 P.3d 668, 672 (2011). "The contract will be read as a whole and given a construction which will accomplish the object of providing indemnity for the losses covered by the policy." *American Excess v. MGM Grand*, 102 Nev. 601, 604 (Nev. 1986). Nevada courts view a policy's language "from the perspective of one not trained in law and give plain and ordinary meaning to the terms." *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003) (quotations). "Any ambiguity or uncertainty in an insurance policy must be resolved against the insurer and in favor of the insured. . . . The contract will be given a construction which will fairly achieve its object of providing indemnity for the loss to which the insurance relates." *National Union v. Reno Executive Air*, 100 Nev. 360, 365 (1984).

sum, whether it be damages for its liability or whatever the coverage provides, and then the insurer indemnifies it for that sum by reimbursing it; under a typical general liability policy, the insurer must pay the sum in the first instance to protect the insured. *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005) ("It is a general principle under insurance law, that the obligation to pay under a liability policy arises as soon as the insured incurs the liability for the loss, in contrast to an indemnity policy where the obligation is to reimburse the insured for a loss that the insured has already satisfied.").

In the context of the liability policies in this case and the judgment against Cosmo at issue here, no sum was "reimbursed" because Cosmo did not pay anything in the first instance, rendering the insurance language of the "losses" definition inapplicable in this case. Rather, only the insurance proviso of the indemnity provisions is relevant, and it does not apply given that St. Paul's coverage for Cosmo was not required under the Management Agreement. Only insurance for Marquee and NRV1, a separate but related entity to Cosmo, was.

Accordingly, when read as a whole, the insurance requirements and indemnity provision of the Management Agreement deem St. Paul's coverage to be excess to AIG's. This means that St. Paul's policy responds after AIG's, making it a higher level excess carrier than AIG, and giving St. Paul equitable superiority by requiring that the AIG policy exhaust before St. Paul has any obligation to its insured, Cosmo.

b. As the Excess Carrier St. Paul Has Equitable Superiority As a Matter of Law and May Subrogate Against the Lower Level AIG Policy

Despite AIG's protestations to the contrary, it is plain that the St. Paul policy covering Cosmo is excess to AIG's additional insured coverage for the same entity. An excess carrier (St. Paul) may seek subrogation against a lower level insurer (AIG) for bad faith failure to settle because a lower level insurer has a duty to respond to a loss before the excess carrier.

Cases allowing an excess carrier to proceed against a lower level carrier are legion. Litig. & Prev. Ins. Bad Faith § 7:9 ("The courts are all but unanimous in holding that a paying excess carrier, as subrogee of the insured's rights, may maintain an action against a primary carrier for the latter's bad faith, excess liability resulting from breach of its settlement duties, or defense duties, or both.

The vehicle used has largely been that of equitable subrogation."); *see*, *e.g.*, *National Sur. Corp. v. Hartford Cas. Ins. Co*., 493 F.3d 752, 757 n.2 (6th Cir. 2007) (explaining subrogation between primary and excess insurers is the "overwhelming majority" rule and citing cases from twenty-seven jurisdictions in support).

It is also well-established that a higher level excess carrier has a right to subrogate against lower level excess carriers. 1 Practical Tools for Handling Insurance Cases § 8:2 (Thomson Reuters 2018) ("Equitable subrogation can apply to second-level excess Carrier Defendants who assert an equitable subrogation claim against a first-level insurer."); *see*, *e.g.*, *Central Illinois Public Service Co. v. Agricultural Ins. Co*., 378 Ill.App.3d 728 (2008) (higher level excess insurer had claim for bad faith failure to settle against lower level excess insurer that exerted control over the litigation). This is but a logical extension of the principle that a lower level carrier must respond to the loss before a higher level carrier, given the higher level carrier's superiority.

Thus, because the St. Paul policy is excess to the AIG policy, St. Paul has the right to subrogate against AIG.

2. St. Paul Has Superior Equities Due To AIG's Improper Claim Handling And Ill-Advised Rejection of Policy Limits Settlement Demands

St. Paul was not notified about the *Moradi* action until February 13, 2017, so it could not have accepted either the December 10, 2015 $1.5 million Offer of Judgment or the November 2, 2016 $26 million written settlement demand. Exhibit J. As to the March 9, 2017 $26 million demand, AIG "failed" to report it to St. Paul until *after the demand had expired* and trial had commenced. Derewetzky Decl., ¶ 33. AIG has not offered any *evidence* that St. Paul was ever in a position to settle the claims against Cosmo within its limits. Nor is there any evidence that had St. Paul offered its limits at any time after it was notified about the *Moradi* action, its limits alone would have settled the case. To the contrary, after it became known that Cosmo had a policy with St. Paul, it is unlikely that Moradi would have settled for just the limits of the St. Paul policy as evidenced by the fact that the settlement demand post-verdict was for the limits of all insurance, including the St. Paul policy. Derewetzky Decl., ¶ 34.

The record contains no allegation of any other settlement demand by plaintiff or any other opportunity to settle before the $160,500,000 verdict was rendered. AIG's allegations in this regard are just that, allegations, with absolutely no evidentiary support. Thus, AIG cannot meet its burden of showing that with respect to the opportunity to settle, it had the superior equities.

The same is true for AIG's mishandling of Cosmo's defense. As St. Paul had the right but not the duty to control the defense, and did not exercise that right, it is not responsible for the mishandling of that defense. In contrast, AIG voluntarily assumed Cosmo's defense, so it now owns the consequence of its various failures. This is the case even if, as AIG incorrectly contends, the St. Paul policy is not excess to AIG's.

Notably, events played out this way because AIG itself, contrary to its current position, knew St. Paul was a higher-level excess carrier and did not want St. Paul interfering in the handling of the defense. Derewetzky Decl., ¶ 35. AIG's argument, ludicrous as it sounds, is that a carrier (AIG) can provide a conflicted defense for years, fail to assert all of its insureds' rights to their detriment (e.g., failing to assert Cosmo's indemnity rights against Marquee) and refuse at least two opportunities to settle within limits and nevertheless have superior equities to a carrier that was not even tendered to, and was kept in the dark about the litigation to prevent it from interfering in AIG's determination to gamble with Cosmo's and St. Paul's money. Merely stating the proposition demonstrates its absurdity. This is not the law. Rather, equity requires that the party responsible for the loss (AIG) should be made to bear it. This is another area in which St. Paul should be permitted to conduct discovery under Rule 56(d) if the Court is otherwise persuaded by AIG's argument.

3. <u>St. Paul Has Priority Because Marquee Caused the Loss</u>

Cosmo's additional insured coverage on the AIG policy is also primary to Cosmo's coverage with St. Paul because Marquee caused the underlying loss. "It is well settled that when two policies of insurance cover a loss, and one of them insures an employer liable only by respondeat superior, while the other covers the employee whose active negligence caused the loss, and where the employer has a right of indemnity against the negligent employee, the insurer of the employee must bear the entire loss." *Berkeley v. Fireman's Fund Ins. Co*., 407 F. Supp. 960, 969 (W.D. Wash. 1975); *see also Guideone Mut. Ins. Co. v. Utica Nat'l Ins. Grp.*, 213 Cal. App. 4th 1494, 1503, 153

Cal. Rptr. 3d 463, 469 (2013).

Here, Marquee's employees actually committed the beating that caused the underlying claimant's injuries. In contrast, Cosmo was merely found to have a non-delegable duty to prevent that danger as a landowner. That means that Marquee and AIG are responsible for the loss before Cosmo and St. Paul.

AIG argues that Cosmo's non-delegable duty means that Cosmo must have committed independent acts for which it was held directly liable, so as between Marquee and Cosmo, neither is more responsible for the loss than the other, and Cosmo's liability is not vicarious. AIG's argument contradicts its own assertion in the motion that Cosmo was only vicariously liable. Motion, at 3:10-15 ("The Court held as a matter of law that Cosmo, as owner of the property, 'had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers. . .").

Frankly, to the extent it is unclear whether or not Cosmo's liability is vicarious (if it had liability), the lack of clarity is a result of AIG's improper handling of the defense. Thus, because AIG could have obtained whatever special verdicts were necessary to clarify the issue, the consequences of any lack of clarity on this issue must fall on them. *See*, *e.g.*, *Duke v. Hoch*, 468 F.2d 973 (5th Cir. (Fla.) 1972) (burden on insurer to prove judgment against its insured included damages for non-covered acts); *Magnum Foods, Inc. v. Cont'l Cas. Co*., 36 F.3d 1491, 1499 (10th Cir. 1994) ("Because CNA controlled Magnum's defense in the state litigation, CNA bears the burden of demonstrating the basis of the jury's punitive damage award.").

4. St. Paul Had No Opportunity to Settle the Underlying Action

AIG attempts to muddy the waters by arguing that if St. Paul was concerned about Cosmo's exposure it should have settled the case against Cosmo. As here, AIG's superior equities argument is rife with factual assertions that are unsupported and at best disputed, if not wholly inaccurate. AIG offers no evidence, for example, that St. Paul had an opportunity to settle because there is none. St. Paul was only notified about the Underlying Action on February 13, 2017, shortly before trial began, and *after* AIG had already rejected an offer to settle the entire case against both Cosmo and Marquee within the AIG limits. As to the March 9, 2017 offer within the AIG limits, although St. Paul had been notified about the case on February 13, 2017, AIG concealed the March 9 offer from St. Paul until after it had expired. Derewetzky Decl., ¶ 36. St. Paul had no knowledge, and therefore no reasonable opportunity to settle. And AIG would not even be arguing this point had it not insisted that the defense of Marquee and Cosmo be handled by a single firm which never informed Cosmo that its representation of both defendants created a conflict that at a minimum entitled Cosmo to independent counsel. Under these circumstances, equity requires AIG, which permitted the excess limits judgment, to have paid Cosmo's share of the post-verdict settlement (which St. Paul was compelled to pay to protect Cosmo) as a result of its wrongful, inequitable and bad faith conduct. Instead, it used the leverage of that $160 million judgment hanging over the head of Cosmo to improperly compel St. Paul to pay. Having placed Cosmo in the path of harm and actually exacerbating Cosmo's exposure through conflicted defense counsel and rejection of reasonable settlement offers within limits, AIG can hardly in fairness argue that the excess judgment against Cosmo was St. Paul's fault.

AIG's superior equities argument fails for all of these reasons, and the motion fails for the additional reason that, as discussed above, St. Paul had a viable claim for contractual subrogation, for which it need not demonstrate equitable superiority. Even so, if the Court is persuaded by AIG's arguments, St. Paul should be permitted an opportunity to conduct discovery on these issues pursuant to NRCP Rule 56(d), and AIG's motion should be denied or stayed on that basis.

D. AIG's Argument That Subrogation Fails Because Cosmopolitan Has No Damages Is Fundamentally Contrary to the Nature of Subrogation

AIG repeats essential verbatim the argument from its failed motion to dismiss that St. Paul is not entitled to subrogation because it paid to settle the case, and thus, Cosmopolitan suffered no damages. Discovery would undoubtedly reveal that AIG has on innumerable occasions pursued subrogation where it had paid on behalf of its insured, precisely as St. Paul is doing here. St. Paul requests leave to conduct such discovery under Rule 56(d) if the Court were to find AIG's position otherwise persuasive.

AIG's argument creates a trap into which courts sometimes fall, but that is only possible if there is also a misunderstanding of the fundamental nature of subrogation. As explained above, the reason the doctrine of subrogation was introduced into the common law was because of, not despite, the fact that the insurer had paid the insured for its damages. *See*, *e.g.*, *Troost v. Estate of DeBoer*, 155 Cal. App. 3d 289, 294, 202 Cal. Rptr. 47, 50 (Ct. App. 1984) ("Payment by the insurance company does not change the fact a loss has occurred."); *Maryland Cas. Co. v. Acceptance Indem. Ins. Co*., 639 F.3d 701, 706 (5th Cir. 2011) (the law "does not bar contractual subrogation simply because the insured has been fully indemnified."). If by paying to protect the insured the insurer obviated subrogation, then subrogation would not exist at all. *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal.App.4th 23, 34, 105 Cal.Rptr.3d 606, 615 (2010) ("Under Cleveland's view, no insurer could *ever* state a cause of action for subrogation in order to recover amounts it paid on behalf of its insured, because of the very fact that it had paid amounts on behalf of its insured.") (emphasis in original). Yet subrogation clearly does exist in Nevada, including in the insurance context.

In a further attempt to confuse this Court, AIG misrepresents the *unpublished* opinion in *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co*., No. F070598, 2018 WL 2276815 (Cal. Ct. App. May 18, 2018). All this Court really needs to know about *California Capital* is that subrogation was not denied based on the argument that the insured had suffered no damages. Rather, the insurer obtained an *assignment* of its insured's breach of contract and bad faith claims against another insurer. The court there held that the assigned claims were not actionable because the assignee had been fully defended and indemnified and thus had not suffered and damage. As discussed above, subrogation is a completely different animal as it allows the insurer to pay the insured's loss and prosecute the claims the insured would have had if its own insurer had not paid.[11]

The Court should not be misled by AIG's no damages argument, based on a single, unpublished decision. St. Paul's payment does not obviate its right to subrogation. It creates it. Therefore, because St. Paul paid for the insured's damages caused by AIG's bad faith, St. Paul is entitled to subrogation.

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[11] Capital did attempt to argue subrogation under its indemnity cause of action, and the court held that even if that was appropriate, it would still fail because Capital could not allege equitable superiority. The court did not, as AIG claims, deny subrogation based on a no damages argument.

III. St. Paul Is Entitled To Seek Equitable Contribution

AIG attacks St. Paul's cause of action for equitable contribution by arguing that (1) the Nevada Supreme Court has not recognized it, and (2) even if the cause of action were viable, there can be no equitable contribution because AIG's policy is exhausted.

Although it is true that the Nevada Supreme Court has not addressed the duty of an insurer to contribute to an insured's defense by another insurer, Nevada federal courts have repeatedly concluded that the Supreme Court would recognize such a claim.[12] *See, e.g., Great American Ins. Co. of New York v. North American Specialty Ins. Co*., 542 F.Supp.2d 1203, 1211 (D. Nev. 2008). As another court noted:

> [T]his Court may turn to California law for guidance, which is what the Nevada Supreme Court often does when faced with issues of first impression. *Id. (citing Volvo Cars of North America, Inc. v. Ricci*, 137 P.3d 1161, 1164 (Nev. 2006)). In California, "here two or more Carrier Defendants provide primary insurance on the same risk for which they are both liable for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer or Carrier Defendants, without regard to principles of equitable subrogation." *Travelers Cas. and Sur. Co. v. American Intern. Surplus Lines Ins. Co.*, 465 F.Supp.2d 1005, 1026 (S.D. Cal. 2006) (quoting *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 1289 (Cal. App. 1 Dist. 1998)). Equitable contribution "is the right to recover, not from the party primarily liable for the loss, but from a co-obligor who shares such liability with the party seeking contribution." *Id.*

Admiral Ins. Co. v. Illinois Union Ins. Co., No. 208CV01300RCJRJJ, 2010 WL 11579447, at *3 (D. Nev. May 24, 2010).

Even assuming AIG were correct that the Nevada Supreme Court has not *yet* recognized equitable contribution among insurers, it would be improper for this Court to dismiss a new and novel claim at the pleading stage,[13] for the reasons discuss above. *See, e.g., Elec. Constr. & Maint.*

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[12] *Ardmore Leasing Corp. v. State Farm Mut. Auto. Ins. Co.*, 106 Nev. 513 (1990) involved a claim for equitable contribution wherein State Farm sought contribution from a leasing company and its insurer. The trial court granted summary judgment in favor of the insurer State Farm. The Nevada Supreme Court reversed, but on the grounds that there were triable issues of fact that precluded summary judgment. The Court did not object that the cause of action for contribution was improper under Nevada law.

[13] Although AIG filed a nominal summary judgment motion, it is still essentially an attack on the pleadings since no discovery has been permitted, the current motion is essential a renewal of the earlier Motion to Dismiss and this motion references only St. Paul's allegations.

Co., Inc. v. Maeda Pac. Corp., 764 F.2d 619, 623 (9th Cir.1985).

AIG's argument that exhaustion of its policy limits bars contribution lacks merit and actually highlights another aspect of AIG's bad faith. AIG insured *both* Marquee and Cosmo and had the same duties to both, including to indemnify *both* against certain claims. But AIG beached its obligations to Cosmo when it agreed to pay its limits only on behalf of Marquee. It paid nothing on behalf of its other insured, Cosmo. This is true because St. Paul did not insure Marquee. Thus, if AIG paid anything on behalf of Cosmo, St. Paul would have been obligated to pay only the balance of what Cosmo owed, leaving a shortfall in the payment on behalf of Marquee.

On the other hand, the exhaustion argument ignores the problem that AIG decided unilaterally to forgo multiple opportunities to settle all claims against both its insureds within its own limits, prejudiced Cosmo's rights and then choose to exhaust the policy limits to protect only Marquee while contributing nothing for Cosmo. AIG essentially contends that dumping its policy to protect Marquee insulates it from contribution to Cosmo's settlement amount.

California Courts have consistently upheld the principle that good faith the insurer give equal consideration to all insureds. *Lheto v. Allstate Ins. Co.,* 31 Cal.App.4th 60, 75 (1994) (insurer's disbursement of entire policy limit on behalf of additional insured did not discharge its obligations to the named insured; rather it constituted a breach of contract); *see also Strauss v. Farmers Insurance Exchange,* 26 Cal.App.4th 1017, 1021-1022 (1994) (same). Under these principles, AIG's claim that its policy is exhausted does not bar an equitable contribution claim against it because its exhaustion was improper, not to say inequitable.

IV. St. Paul Has A Valid Equitable Estoppel Claim

AIG lamely argues that is entitled to summary judgment on St. Paul's seventh cause of action, for equitable estoppel because St. Paul has no valid claims for equitable subrogation or contribution. For all of the reasons discussed above, AIG is just dead wrong.

In addition, a claim of equitable estoppel may be made separate from equitable subrogation and contribution. The doctrine of equitable estoppel "provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment." *Strong v. Cnty. of Santa Cruz*, 15 Cal.3d 720, 125 Cal.Rptr. 896, 543 P.2d 264, 266 (1975) cited with approval in *Cheqer, Inc. v. Painters and Decorators Joint Comm., Inc., 98 Nev. 609, 655 P.2d 996, 998–99* (1982). Nevada law expressly allows affirmative claims for equitable estoppel:

> Respondent contends, nevertheless, that equitable estoppel is a defense, not a cause of action for money damages. Although some jurisdictions agree with respondent's contention, we have not so limited the power of the courts of this state to seek and do equity. *See Nevada Pub. Emp. Ret. Bd. v. Byrne,* 96 Nev. 276, 607 P.2d 1351 (1980).

Mahban v. MGM Grand Hotels, Inc.,100 Nev. 593, 691 P.2d 421, 424 (1984).

In its Motion to Dismiss, AIG argued that St. Paul may not bring claim for equitable estoppel because it is not an affirmative claim for relief but rather a "defense to a defense" and fleetingly makes the same assertion here, even though it, too, cites *Mahban,* in essence conceding that equitable estoppel may be brought as an affirmative claim. Once it has been given an opportunity to conduct discovery, St. Paul will have no difficulty proving this, and all of its claims.

CONCLUSION

For all the foregoing reasons, St. Paul respectfully requests the Court deny AIG's motion for summary judgment.

Dated: September 27, 2019

MORALES FIERRO & REEVES

By: /s/ Marc J. Derewetzky
Ramiro Morales
William C. Reeves
Marc J. Derewetzky
MORALES FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Attorneys for Plaintiff

<u>PROOF OF SERVICE</u>

I, William Reeves, declare that:

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

On the date specified below, I served the following document:

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY AIG

CONSOLIDATED APPENDIX OF EXHIBITS (A-V)

DECLARATION OF MARC DEREWETZKY

RESPONSE TO STATEMENT OF FACTS OFFERED BY AIG

Service was effectuated in the following manner:

______ BY FACSIMILE:

<u>XXXX</u> BY ODYSSEY (Notice Only): I caused such document(s) to be electronically served through Odyssey for the above-entitled case to the parties listed on the Service List maintained on the Odyssey website for this case on the date specified below.

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

Dated: September 27, 2019

William Reeves

Electronically Filed
9/27/2019 2:28 PM
Steven D. Grierson
CLERK OF THE COURT

DECL
Ramiro Morales [Bar No.: 007101]
William C. Reeves [Bar No.: 008235]
Marc J. Derewetzky [Bar No.: 006619]
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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI DECLARATION OF MARC J. DEREWETZKY IN SUPPORT OF PLAINTIFF'S OPPOSITIONS TO AIG'S AND MOTION FOR SUMMARY JUDGMENT DATE: October 15, 2019 TIME: 9:30 a.m.

I, Marc J. Derewetzky, declare:

1. I am an attorney duly licensed before all of the court of the State of Nevada and this court, and am an attorney employed by Morales Fierro & Reeves, counsel of record for plaintiff St. Paul Fire & Marine Insurance Company (“St. Paul”) herein. I have personal knowledge of all facts set forth in this Declaration and, if called as a witness in this matter, I could and would competently testify thereto. I make is declaration in support of St. Paul’s oppositions to National Union Fire Insurance Company of Pittsburgh, Pa’s (“AIG”) and Roof Deck Entertainment, LLC, d/b/a Marquee Nightclub’s (“Marquee”) motions for summary judgment and St. Paul’s counter-motion to Marquee’s motion.

2. Filed concurrently herewith is a document entitled Consolidated Appendix of Exhibits In Support of Plaintiffs' Opposition To Motions For Summary Judgment Filed By AIG and Marquee (“Appendix”), to which are appended Plaintiff’s Exhibits.

3. Attached to the Appendix as Exhibit A is a true and correct copy of excerpts of the

Nightclub Management Agreement between Nevada Restaurant Venture I, LLC and Marquee.

4. Attached to the Appendix as Exhibit B is a true and correct copy of the complaint in that certain action styled *David Moradi v. Nevada Property I, LLC dba The Cosmopolitan of Las Vegas*, Eighth Judicial District Court of the State of Nevada, Case No. A-14-698824-C ("Underlying Action").

5. Attached to the Appendix as Exhibit C is a true and correct copy of a September 18, 2014 letter from Martin Kravitz and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance.

6. Attached to the Appendix as Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action.

7. Attached to the Appendix as Exhibit E is a true and correct copy of a November 13, 2014 letter from Martin Kravitz and Tyler Watson of Kravitz Schnitzer & Johnson to Edward Kotite of Aspen Insurance.

8. Attached to the Appendix as Exhibit F is a true and correct copy of a December 7, 2015 e-mail from Tyler Watson of Kravitz Schnitzer & Johnson to Edward Kotite of Aspen and Robin Green of AIG.

9. Attached to the Appendix as Exhibit G is a true and correct copy of Plaintiff's Offer of Judgment in the Underlying Action dated December 10, 2015 in the amount of $1,500,000.

10. Attached to the Appendix as Exhibit H is a true and correct copy of a December 18, 2015 letter from Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle

11. Attached to the Appendix as Exhibit I is a true and correct copy of a November 2, 2016 letter from of Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.

12. Attached to the Appendix as Exhibit J is a true and correct copy of an e-mail dated February 13, 2017 from Crystal Calloway to BSIclaims and First Report.

13. Attached to the Appendix as Exhibit K is a true and correct copy of a March 9, 2017 letter from of Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.

14. Attached to the Appendix as Exhibit L is a true and correct copy of a March 21, 2017 letter from Robin Green of AIG to Randy Conner of the Cosmopolitan of Las Vegas.

15. Attached to the Appendix as Exhibit M is a true and correct copy of a March 21, 2017 letter from Robin Green of AIG to John R. Ramirez of Roof Deck Entertainment, LLC and the Restaurant Group.

16. Attached to the Appendix as Exhibit N is a true and correct copy of Defendants' Trial Brief for Determination of Several Liability under NRS 41.141 in the Underlying Action dated March 15, 2017.

17. Attached to the Appendix as Exhibit O is a true and correct copy of Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability under NRS 41.141 in the Underlying Action dated March 23, 2017.

18. Attached to the Appendix as Exhibit P is a true and correct copy of Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty dated April 12, 2017.

19. Attached to the Appendix as Exhibit Q are true and correct copies of excerpts of the Trial Transcript in the Underlying Action from the afternoon of April 18, 2017.

20. Attached to the Appendix as Exhibit R is a true and correct copy of the Special Verdict for Plaintiff in the Underlying Action dated April 26, 2017.

21. Attached to the Appendix as Exhibit S is a true and correct copy of Defendant Rook Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's First Amended Complaint in this action dated June 25, 2018.

22. Attached to the Appendix as Exhibit T is a true and correct copy of the transcript of the October 30, 2018 hearing on Defendants' Motions to Dismiss St. Paul's First Amended

Complaint.

23. Attached to the Appendix as Exhibit U is a true and correct copy of this Court's Order dated July 1, 2019 denying Defendants' Motions to Dismiss St. Paul's First Amended Complaint.

24. Attached to the Appendix as Exhibit V is a true and correct copy of an exchange of e-mails between Willian Reeves, counsel for Plaintiff and various counsel for AIG and Marquee from September 23 to September 25, 2019.

25. There was no evidence presented at trial in the Underlying Action that Cosmo was directly liable for Moradi's injuries and no evidence that Cosmo had any role in hiring, training or supervising the Marquee personnel. No Cosmo employee or manager testified at trial in the Underlying Action. Prior to trial, the Court denied Cosmo's motion for summary judgment finding instead that Cosmo had a non-delegable duty to exercise reasonable care so as not to subject others to an unreasonable risk of harm.

26. AIG provided a single attorney to represent Cosmo and Marquee jointly, despite the fact that Cosmo was entitled to be indemnified by Marquee pursuant to contract, thus improperly waiving Cosmo's rights. Exhibits A, L and M.

27. Aspen and AIG mishandled the claims and then failed to accept reasonable settlement offers within their limits. Exhibits G, H, I, K.

28. Aspen and AIG failed to inform either Cosmopolitan or St. Paul of opportunities to settle before the offers expired. These offers included a statutory offer of judgment for $1.5 million dated December 10, 2015 and offers to settle for $26 million (the undisputed amount of the combined Aspen and AIG limits) presented on November 2, 2016 and March 9, 2017, shortly before trial commenced. Exhibits G, H, I, K.

29. Throughout the Underlying Action, AIG consistently represented that its coverage for Cosmopolitan was primary to St. Paul's coverage and, therefore, that AIG was responsible for defending and resolving the Underlying Action.

30. Rather than accept a settlement demand within its limits that would have insulated both Marquee and Cosmo, AIG elected to reject the demands and instead unreasonably take its

chances that they would do better at trial. Exhibits G, H, I, K. AIG lost this gamble spectacularly, by virtue of the jury awarding damages in excess of $160,000,000. Exhibit R.

31. Having lost its gamble AIG then took the position that its exposure was capped at the limits of its policy ($26,000,000 when combined with the limits Aspen claimed were available), and that they would pay the alleged policy limit to protect Marquee but not Cosmo.

32. Throughout, AIG conducted itself by word and deed as though its policy was obligated to pay the Moradi claims before St. Paul was required to pay, rendering the St. Paul policy excess to the AIG policy. But AIG failed to avail itself of opportunities to spend its limits to protect *both* of its insureds, opportunities that were never presented to St. Paul. Exhibits I, K. With a joint and several judgment hanging over its named insured's head, St. Paul funded Cosmo's portion of the settlement.

33. St. Paul was not notified about the *Moradi* action until February 13, 2017, so it could not have accepted either the December 10, 2015 $1.5 million Offer of Judgment or the November 2, 2016 $26 million written settlement demand. Exhibit J. As to the March 9, 2017 $26 million demand, AIG "failed" to report it to St. Paul until *after the demand had expired* and trial had commenced.

34. The settlement demand post-verdict was for the limits of all insurance, including the St. Paul policy.

35. AIG, contrary to its current position, knew St. Paul was a higher-level excess carrier and did not want St. Paul interfering in the handling of the defense.

36. As to the March 9, 2017 offer within the AIG limits, although St. Paul had been notified about the case on February 13, 2017, AIG concealed the March 9 offer from St. Paul until after it had expired.

DECLARATION IN SUPPORT OF REQUEST FOR RELIEF UNDER NRCP RULE 56(d)

St. Paul respectfully submits this Declaration in support of its request to conduct discovery of evidence to support its opposition to AIG's summary judgment motion. St. Paul served written discovery on August 22, 2019, as soon as discovery opened according to the Rules. By way of response, AIG requested that the Court phase discovery with the first phase limited to authentication of the St. Paul policy and the Nightclub Management Agreement. The Court stayed discovery to allow AIG to seek an order phasing discovery from the discovery commissioner. AIG's motion is currently scheduled for hearing on October 23, 2019. Accordingly, St. Paul has been afforded *no opportunity* to conduct discovery into any aspect of this case.

St. Paul's opposition to AIG's summary judgment motion identifies a number of issues with respect to which discovery is requested in the event that the Court otherwise determines there is no genuine issue of fact and that AIG is entitled to judgment as a matter of law. The specific areas of inquiry are as follows:

- AIG's retention of a single set of lawyers to defend Marquee and Cosmo jointly without seeking a conflict waiver or informing Cosmo of actual conflicts;
- Express and implied representations by AIG that its policy would respond prior to St. Paul's policy such that St. Paul's policy was de facto excess;
- Whether St. Paul had a reasonable opportunity to settle the Underlying Action before the jury rendered a verdict against Marquee and Cosmo for $160,500,000.
- AIG's history of pursuing subrogation claims where it has paid the loss on behalf of its insured such that its insured has no damages;
- AIG's concealment from St. Paul of the March 9, 2017 settlement offer from the underlying plaintiff;
- AIG's efforts at concealment generally for the purpose of preventing St. Paul from "interfering" in AIG's handling of the Underlying Action.

St. Paul's First Amended Complaint seeks relief based on claims for equitable subrogation, equitable contribution and equitable estoppel. AIG argues that St. Paul's claims require St. Paul to have "equitable superiority" and that St. Paul does not. The requested discovery is central to this intensely fact-specific argument.

Because this case is only in its very preliminary stages and St. Paul has not been permitted to conduct *any* discovery, St. Paul is unable to identify areas of inquiry with greater specificity. However, the law recognizes that greater deference to a Rule 56(d) request is given under these circumstances. *Burlington Northern Santa Fe Ry. Co. v. The Assiniboine,* 323 F.3d 767, 774 (9th Cir. 2003) (where a summary judgment motion is brought early in the litigation, a Rule 56(d) motion for additional time should be granted *as a matter of course*). Accordingly, St. Paul respectfully requests that it be permitted to conduct discovery pursuant to Rule 56(d) before the Court rules on AIG's summary judgment motion.

I declare under penalty of perjury under the laws of the State of Nevada and the United States of America that the foregoing is true and correct. Executed this 27th day of September, 2019 at Concord, CA.

Marc J. Derewetzky

RSPN
Ramiro Morales [Bar No.: 007101]
William C. Reeves [Bar No.: 008235]
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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI RESPONSE TO NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DATE: October 15, 2019 TIME: 9:30 a.m.

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

Plaintiff St. Paul Fire & Marine Ins. Co. responds to National Union Fire Insurance Company of Pittsburgh PA's Statement of Undisputed Facts as follows:

Responses

Fact No. 1: This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). [FAC ¶ 6].

Response: Agreed.

Fact No. 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].

Response: Agreed.

Fact No. 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].

Response: Agreed. Note that Nevada Restaurant Venture I, LLC ("Master Tenant") was not named as a defendant in the Underlying Action.

Fact No. 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].

Response: Agreed.

Fact No. 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].

Response: Irrelevant. In pretrial motions, Marquee conceded that Cosmo had no express or implied authority to control the Marquee Nightclub such that Moradi was not a business invitee of the Cosmo. St. Paul Appendix, Ex. P, 5:20-6:4. Given this, Marquee conceded that Cosmo was "at most an alleged passive tortfeasor" with no active role in any aspect of the operations of the Marquee Nightclub. St. Paul Appendix, Ex. O, 4:27-5:3; see also Ex. N, 4:26-5:1. Trial testimony from the Marquee representative was in accord that Marquee alone (and not Cosmo) operated and managed the Marquee Nightclub. St. Paul Appendix, Ex. Q, 134:22-135:3; Ex. O, 3:15-24. Despite this lack of control or management, the Trial Court held that Cosmo was legally vicariously liable for the conduct of Marquee by virtue of a finding of non-delegable duty. Marquee Appendix, Ex. 3, 14:13-16:25. Cosmo's exposure, therefore, was limited to being held vicariously liable for the conduct of Marquee.

Fact No. 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].

Response: To be clear, the Trial Court held that Cosmo was legally vicariously liable for the conduct of Marquee by virtue of a finding of non-delegable duty. Marquee Appendix, Ex. 3, 14:13-16:25.

Fact No. 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].

Response: Agreed.

Fact No. 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].

Response: Agreed that following the initial verdict, Moradi made a settlement demand to Marquee and Cosmo.

Fact No. 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].

Response: Agreed.

Fact No. 10: National Union and St. Paul contributed the same amount towards the settlement of the Underlying Action. [FAC ¶ 67-70].

Response: Agreed, but irrelevant because St. Paul's payment was the result of AIG's failure to accept settlement demands within its own limits and AIG's defense of Cosmo through conflicted counsel.

Fact No. 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]

Response: Agreed.

Fact No. 12: Marquee is an insured under the National Union Excess Policy. [FAC ¶ 30; Perkins Decl., Ex. 1].

Response: Agreed that Marquee and Cosmo were insureds of AIG.

Fact No. 13: The National Union Excess Policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. [Perkins Decl., Ex. 1].

Response: Object that the document speaks for itself and is the best evidence of its contents. St. Paul disagrees to the extent the actual language of the policy differs from the language presented here. NRS 52.235, 52.245.

Fact No. 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].

Response: Object that the document speaks for itself and is the best evidence of its contents. St. Paul disagrees to the extent the actual language of the policy differs from the language presented here. NRS 52.235, 52.245.

Fact No. 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].

Response: Object that the document speaks for itself and is the best evidence of its contents. St. Paul disagrees to the extent the actual language of the policy differs from the language presented here. NRS 52.235, 52.245.

Fact No. 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].

Response: Irrelevant. By breaching the duty to settle, AIG is liable for the resulting damages regardless of limits. See First Amended Complaint ("FAC"), ¶¶ 84-95. Also, object that the document speaks for itself and is the best evidence of its contents. St. Paul disagrees to the extent the actual language of the policy differs from the language presented here. NRS 52.235, 52.245.

Fact No. 17: National Union's contribution towards the settlement of the Underlying Action exhausted the National Union Excess Policy. [Perkins Decl., Ex. 1; FAC ¶ 68].

Response: Irrelevant. By breaching the duty to settle, AIG is liable for the resulting damages. See First Amended Complaint ("FAC"), ¶¶ 84-95.

Fact No. 18: Cosmopolitan was an additional insured to the National Union umbrella policy with respect to the Underlying Action. [FAC ¶ 33].

Response: Agreed and that coverage for Cosmo under the AIG policy was primary to St. Paul's coverage.

Fact No. 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].

Response: Agreed that AIG provide Marquee and Cosmo a conflicted joint defense, never explained the conflict to Cosmo or sought a waiver, and as a result, waived Cosmo's rights.

Fact No. 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].

Response: Agreed.

Fact No. 21: Cosmopolitan is an insured under the St. Paul Excess Policy. [FAC ¶ 40; Salerno Decl., Ex. 3].

Response: Agreed that Cosmo is an insured and that its coverage under the St. Paul policy was excess to AIG's coverage.

Fact No. 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].

Response: Agreed but irrelevant, as AIG should have settled the claims against Cosmo within its limits when it had the opportunity instead of allowing a $160,500,000 judgment to be entered against Cosmo.

Fact No. 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].

Response: Objection. Irrelevant because the St. Paul policy is excess to the AIG policy under equitable principles as set forth in detail in St. Paul's summary judgment opposition. Also, the document speaks for itself and is the best evidence of its contents. St. Paul disagrees to the extent the actual language of the policy differs from the language presented here or is paraphrased or quoted out of context. NRS 52.235, 52.245.

Fact No. 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].

Response: Objection. Irrelevant because the St. Paul policy is excess to the AIG policy under equitable principles as set forth in detail in St. Paul's summary judgment opposition. Also, the document speaks for itself and is the best evidence of its contents. St. Paul disagrees to the extent the actual language of the policy differs from the language presented here or is paraphrased or quoted out of context. NRS 52.235, 52.245.

Dated: September 27, 2019

MORALES FIERRO & REEVES

By /s/ Marc J. Derewetzky
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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI CONSOLIDATED APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT FILED BY AIG AND MARQUEE DATE: October 15, 2019 TIME: 9:30 a.m.

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

Plaintiff St. Paul Fire & Marine Ins. Co. hereby offers the following Appendix of Exhibits in support of its Opposition to Motions For Summary Judgment filed by AIG And Marquee:

Exhibit A	Excerpts of Nightclub Management Agreement
Exhibit B	Complaint filed in the underlying case
Exhibit C	September 18, 2014 Letter
Exhibit D	Answer filed in the underlying case
Exhibit E	November 13, 2015 Defense Report
Exhibit F	December 7, 2015 Email
Exhibit G	December 10, 2015 Offer
Exhibit H	December 18, 2015 Letter
Exhibit I	November 2, 2016 Letter
Exhibit J	February 13, 2017 Notice

Exhibit K	March 9, 2017 Letter
Exhibit L	March 21, 2017 Letter
Exhibit M	March 21, 2017 Letter
Exhibit N	Trial Brief Re: Liability filed March 15, 2017
Exhibit O	Reply Brief filed March 23, 2017
Exhibit P	Opposition Brief filed April 12, 2017
Exhibit Q	Excerpts of Trial Proceedings
Exhibit R	Verdict Form filed April 26, 2017
Exhibit S	Motion To Dismiss filed June 25, 2018
Exhibit T	Excerpts of October 30, 2018 Hearing
Exhibit U	Order Re: Defendants' Motion to Dismiss
Exhibit V	Correspondence Between Counsel

Dated: September 27, 2019

MORALES FIERRO & REEVES

By /s/ William C. Reeves

William C. Reeves
MORALES FIERRO & REEVES
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Las Vegas, NV 89106
Attorneys for Plaintiff

Exhibit A

NIGHTCLUB MANAGEMENT AGREEMENT

between

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

as OWNER

and

Roof Deck Entertainment LLC,
a Delaware limited liability company,

as OPERATOR

NIGHTCLUB MANAGEMENT AGREEMENT

THIS NIGHTCLUB MANAGEMENT AGREEMENT is made and entered into effective as of the 21st day of April, 2010, between **Nevada Restaurant Venture 1 LLC, a Delaware limited liability company** ("**Owner**"), and **Roof Deck Entertainment LLC, a Delaware limited liability company** ("**Operator**").

RECITALS

A. Nevada Property 1 LLC, a Delaware limited liability company (the "**Project Owner**") is the owner of that certain real property located in Las Vegas, Nevada, legally described on Exhibit "A" attached hereto (the "**Property**") upon which Project Owner is developing a multi use, multi-tower resort and casino development project consisting of some or all of, among other things, hotel operations, condominium components, condo-hotel units, fractionalized ownership units, time-share units, gaming operations, multiple food and beverage outlets, nightclub, spa/fitness center and other ancillary uses (the "**Project**").

B. Project Owner intends to include certain Nightclub Venues (as defined in Section 1 below) as part of the Project, to be located in various locations of the Project as more generally depicted on the site plans attached hereto as Exhibit "B" (collectively, the "**Premises**"). The Project will further include certain Bungalows and Bungalow Cabanas (as defined below) and other facilities.

C. Prior to (or concurrently with) the execution of this Agreement, Project Owner or its Affiliate, as landlord, and Owner, as tenant, has (or will) will enter into a certain lease agreement in the form attached hereto as Exhibit "D" whereby Owner will lease the Premises from Project Owner (the "**Lease**").

D. Operator, through its principals and employees, is experienced in the management and operation of nightclubs, bars, lounges, pool deck areas, cabanas, and associated facilities and operations and desires to manage and operate the Nightclub Venues on the terms and conditions hereinafter set forth.

E. Owner desires to retain Operator to manage and operate the Nightclub Venues on behalf of Owner on terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the promises and the mutual agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Owner and Operator agree as follows:

1. Definitions

For the purposes of this Agreement, the following terms shall have the following meanings:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) First Line Tech Support;

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

(6) connection to central reservations.

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

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

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

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

"**Project Coordinator**" shall have the meaning given to such term in Section 17;

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

"**Project Owner**" shall have the meaning given to such term in Paragraph A of the Recitals to this Agreement;

"**Project Owner Operating Standards**" shall have the meaning given to such term in Section 17.2;

"**Property**" shall have the meaning given to such term in Paragraph A of the Recitals of this agreement;

"**Public Relations Campaign**" shall have the meaning given such term in Section 15.2.2;

"**Quarterly Statement**" shall have the meaning given to such term in Section 4.4.4;

"**Queuing Bar**" shall have the meaning given to such term in Section 3.4;

"**Queuing Bar Fee**" shall have the meaning given to such term in Section 3.4;

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

"**Reimbursable Expenses**" shall mean the actual reasonable out-of-pocket costs incurred by Operator from and after the Effective Date for travel to Las Vegas (and other locations at the request or with the consent of Owner) and lodging expenses in Las Vegas (and such other places) incurred by Operator in connection with the ongoing operation of the Nightclub Venues to the extent permitted, and subject to, the Owner's (or Owner's Affiliates') company travel policy attached hereto as Exhibit "C;" provided that such travel policy shall only apply for travel (i) for Persons other than Operator's Principals or (ii) which is not otherwise included in the Operator G&A Allocation. Any travel or lodging expenses incurred by Operator for trips to Las Vegas for purposes other than primarily for the Nightclub Venues shall be reasonably allocated by Owner and Operator among the Nightclub Venues and the other nightclub, bar, lounge, restaurant or other facilities owned, operated, licensed or managed by Operator, Operator's Principals or their respective Affiliates in Las Vegas, with the Nightclub Venues benefiting from such trips. Reimbursable Expenses shall not include any matters or charges included in Operator Pre-Opening Expenses;

"**Required Investment Amount**" shall mean the aggregate amount of all costs, charges and expenses incurred by Owner in accordance with the Construction Budget and the Pre-Opening Budget (and deviations therefrom as may be expressly permitted hereunder) prior to the Opening Date in constructing, installing, fixturing, equipping, finishing, marketing, permitting, promoting and otherwise preparing to open for business at the Nightclub Venues, including without limitation the Premises Work, the Construction Costs, the FF&E Costs, inventory, initial Working Capital and the Pre-Opening Expenses;

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

minimis adverse impact on the Nightclub Venue Operations (any of A-G inclusive shall be a "**Mitigation Event**"), then the Option Net Profit Threshold Amount shall be equitably adjusted. In the event Operator believes that a Mitigation Event has occurred, it shall notify Owner of the same (and, with respect to a Mitigation Event involving a force majeure event, shall endeavor to notify Owner of the same within thirty (30) days following the commencement of such force majeure Mitigation Event), and the Parties shall, within thirty (30) days after such notice, meet to discuss and endeavor to reasonably agree upon whether a Mitigation Event has occurred and, if so, the appropriate equitable mitigation, if any, to the Option Net Profits Threshold Amount. If the Parties are unable to agree upon the equitable mitigation within sixty (60) days following the date of Operator's notice to Owner of the occurrence of a Mitigation Event, either Party may submit all unresolved matters relating to such equitable mitigation to arbitration as provided in Exhibit "F" (with the arbitrator instructed to consider all relevant facts and circumstances as the parties may present in support of their respective positions).

2.2.4 Nothing contained in this Section 2.2 shall be deemed to limit or otherwise affect the right of either Party to terminate this Agreement pursuant to Article 14, and notwithstanding that Operator may have satisfied the requirements for, and exercised its right to extend the Term for an Option Term as set forth above, in the event either Party has the right to terminate this Agreement pursuant to Article 14 and such Party exercises such termination right, this Agreement shall terminate in accordance with the provisions of Article 14.

3. Retention of Operator; Operator's Duties

3.1 Engagement; Duties. Owner hereby engages Operator, as an independent contractor, to develop, operate and manage the Nightclub Venues in accordance with all Laws and the Nightclub Standards and on the terms set forth in this Agreement for the account of, and on behalf of, Owner. The Nightclub shall be operated under the Trade Name. Subject to the terms of this Agreement, Operator shall have full responsibility for and have decision-making authority in all aspects of the day-to-day operation, direction, management and supervision of the Nightclub Venues. Operator accepts such engagement and agrees to operate, manage and supervise the Nightclub Venues and the Nightclub Venues Operations, including all Staff, in accordance with this Agreement. Operator shall cause the Nightclub Venues to present an image and character consistent with, and provide security in accordance with, the Standards. Subject to the provisions of this Agreement, Operator shall, without limitation, perform the following (the cost of performance of which shall be Operating Expenses except as otherwise set forth herein):

3.1.1 subject to the provisions of Section 7.1 and to all Laws and applicable contracts, Operator shall determine the labor policies for the Nightclub Venues and be responsible for, without limitation, the recruiting, hiring, training, compensation, supervision and discharge of the Staff. All Staff shall be hired and retained in the name of Operator, it being understood that Operator, and not Owner, shall be the employer of all Staff. Operator shall institute and maintain commercially reasonable procedures to ensure that its Staff complies with the Standards and all employee policies and manuals of the Project Owner and/or Owner, and shall undertake commercially reasonable corrective actions in the event of any non-compliance with the same. If requested or required by Owner or Project Owner, Operator shall cause its Staff to attend any employee training program(s) offered by Owner and/or Project Owner. This Agreement is not intended to create an express or implied joint-employer, alter-ego, successor employer or single employer relationship between any of Owner or Operator as those terms are used under the National Labor Relations Act or any other Law. Operator shall have exclusive authority over all labor relations matters pertaining to its employees. Owner shall not have any contrary contained herein, in no event shall Owner be obligated to fund any amounts (a) required to pay any portion of the Management Fee or Base Rent, that are not consistent with the then applicable Annual Operations Budget (or the permitted deviations therefrom pursuant to Section 6.4) or (b) at any time Operator is in default under this Agreement beyond applicable notice and grace periods. In no event shall Owner be obligated to fund during the Term of this Agreement an aggregate amount in excess of Seven Hundred Fifty Thousand Dollars ($750,000.00) outstanding at any time (the "**Maximum Additional Funding Amount**"). Except as aforesaid, Owner shall provide and make the requested funds available for the use specified in the Funding Notice within the forty-five (45) day time period (each such funding event is referred to herein as an "**Additional Funding Installment**"). As used herein, "**Additional Funding Total**" shall mean the total amount of funds funded by Owner in connection with the Nightclub Venues Operations pursuant to this paragraph from and after the Opening Date and outstanding from time to time. The outstanding balance of the Additional Funding Total shall be treated as a loan made as of the date of each such Additional Funding Installment during the Fiscal Year in which the funding of such Additional Funding Installment is made, and shall accrue a preferred return of the Base Rate. The aggregate outstanding amount of the Additional Funding Total, together with all outstanding accrued preferred return thereon, shall be referred to herein as the "**Additional Funding Total Balance.**" The Additional Funding Total Balance shall be repaid to Owner pursuant to Section 4.2 above.

10.3 Cash Drawers. Owner shall provide Operator with cash for cashier drawers in amounts adequate for the initial operation of the Nightclub Venues and all funds so provided shall be deemed to be Pre-Opening Expenses. After the initial opening of the Nightclub Venues, Operator shall be responsible for maintaining adequate cash drawer balances to reflect the needs and operations of the Nightclub Venues.

10.4 Disputed Nightclub Venue Charges. If a guest of the Project complains about or refuses to pay all or any portion of any charge at the Nightclub Venues because of an issue concerning Operator's services or product, Operator shall use commercially reasonable efforts to address such complaints or refusals. If Owner determines that an excessive number of patrons are disputing bills, complaining about quality or service or refusing to pay a portion of their bills attributable to charges at the Nightclub Venues, then Operator shall, upon ten (10) days' prior written notice from Owner, meet with Owner to discuss possible procedures for improving quality and service.

11. No Partnership

Nothing in this Agreement shall constitute or be construed as creating a tenancy, employment, partnership, or joint venture between the Owner and Operator. Operator and Owner agree that Operator will perform its services under this Agreement as an independent contractor. Neither Party nor any of the respective agents will be considered employees or agents of the other Party hereunder or its Affiliates as a result of this Agreement.

12. Insurance

12.1 Owner's Insurance. During the Term of this Agreement, Owner shall provide and maintain the following insurance coverage, at its sole cost and expense (and not as an Operating Expense):

12.1.1 Personal property insurance covering Owner's personal property located on the Premises and all alterations, improvements and betterments existing or added to the Premises;

12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage, with a combined single limit of not less than Two Million Dollars ($2,000,000) for each occurrence, and at least Four Million Dollars ($4,000,000) in the aggregate, including excess coverage; and

12.1.3 Any coverage required under the terms of the Lease to the extent such coverage is not the responsibility of Operator to provide pursuant to <u>Section 12.2</u> below.

12.2 <u>Operator's Insurance</u>.

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

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

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

12.2.1.3 Workers compensation insurance which complies with the applicable workers compensation laws governing the State of Nevada;

12.2.1.4 Employers' liability insurance, with minimum coverages as follows: each accident - $1,000,000; disease (each employee) - $1,000,000; disease (policy limit) - $1,000,000;

12.2.1.5 Automobile liability insurance (any auto or owned, hired and non-owned vehicles), with a minimum coverage of $1,000,000 for combined single limit per accident for bodily injury and property damage;

12.2.1.6 Employee dishonesty insurance, with a minimum coverage of $1,000,000; and

12.2.1.7 Employment practices liability insurance, including third party coverage, with minimum coverages of $2,000,000 for each claim, and $2,000,000 in the aggregate.

12.2.2 Notwithstanding anything to the contrary contained herein, if the types of coverage or the minimum coverages for any or all of the Operator Policies as set forth herein is less than the coverage requirements required by owners or landlords of other high revenue nightclubs in Las Vegas, Nevada or by Owner's reasonable internal insurance requirements, or any lender of the Project, the scope and coverage to be maintained by Operator for each such coverage shall be the greater of the minimum coverage required herein and the minimum coverage so required by Owner or such lender.

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

12.2.4 All Operator Policies shall be issued by a carrier approved in advance by Owner (which approval shall not be unreasonably withheld), provided, that such carrier shall have a current A.M. Best Company rating of at least a-VII and shall be licensed in the State of Nevada. Owner may require Operator to utilize one or more carriers selected by Owner or participate in such pooled insurance programs with Project Owner and/or other operators of retail locations in the Project as Owner may reasonably designate, so long as the coverage and cost is competitive with what Operator could otherwise obtain. Except as prohibited by applicable Laws, the minimum coverages of the various Operator Policies may be adjusted by Owner from time to time as set forth above upon thirty (30) days written notice delivered to Operator notifying Operator of the adjustments required to the coverage amounts.

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

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

12.2.7 Not later than fifteen (15) days before the Effective Date and at least annually thereafter, Operator shall deliver to Owner certificates of insurance evidencing that all of the Operator Policies have been obtained and are in full force and effect and providing that the insurance company will endeavor to provide Owner with not less than thirty (30) days prior written notice of any cancellation or modification of any of the Operator Policies (or ten days in the case of non payment of premiums), including any changes to the coverage amounts. Failure by Operator to provide and maintain all Operator Policies as required herein, or failure to provide the certificates of insurance, shall be considered a default of this Agreement.

13. Indemnity

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

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

14. Termination

14.1 By Owner. In addition to other termination rights in this Agreement, Owner shall have the right to terminate this Agreement upon the occurrence of any one or more of the following events:

14.1.1 The default by Operator under this Agreement. In the event of a default, Owner shall be entitled to all rights and remedies available at law or in equity including, without limitation, the right to damages and injunctive relief. The following shall constitute a default by Operator:

(a) Operator becomes the subject of any Bankruptcy;

(b) Operator making a Transfer, or purported Transfer, in violation of Section 16.1 below;

(c) A breach by Operator of Section 36;

(d) Any breach by Operator of any provision of this Agreement which expressly contains a specific cure period where Operator fails to cure such breach within the applicable cure period, including, without limitation, Section 5.2 or Section 8.8;

(e) Without opportunity to cure, conviction of Operator, or any of Operator Principals, of any felony, including without limitation criminal fraud, embezzlement, forgery or bribery, as defined under the laws of the United States, the State of Nevada or any other state, or any other crime that the Gaming Authorities could serve as a basis for loss or suspension of any of Operator's or Owner's licenses or permits as provided in Section 8.8.1 hereof, including but not limited to gaming or liquor licenses unless Operator promptly disassociates itself from such Person;

(f) Without opportunity to cure, in the event of any loss or suspension of any gaming, liquor or other material license of Owner or any loss of any liquor license finding of suitability or other material license or permit required in order for Operator to provide its services hereunder, in each case, by reason of the acts or omission of Operator or its Principals;

"OWNER"

Nevada Restaurant Venture 1 LLC,
a Delaware limited liability company

By: Nevada Property 1 LLC,
a Delaware limited liability company

Its: Managing Member

By: ____________________
Name: John Unwin
Title: Chief Executive Officer
4/21/10

By: ____________________
Name: Jeff Burge
Title: Chief Financial Officer
4/21/10

"PROJECT OWNER"

Acknowledged and agreed to be bound solely with respect to the provisions of Sections 3.3, 3.4, 3.5.3, 3.8, 4.1, 4.5, 4.6, 6.1, 8.6, 8.8.1, 9.10, 10.2, 13.2, 14.1.7, 14.1.8, 14.2.3, 15.2, 35, 39.1 and 39.2

Nevada Property 1 LLC,
a Delaware limited liability company

By: ____________________
Name: John Unwin
Title: Chief Executive Officer
4/21/10

By: ____________________
Name: Jeff Burge
Title: Chief Financial Officer
4/21/10

"OPERATOR"

Roof Deck Entertainment LLC,
a Delaware limited liability company

By: Richard Wolf

Name: Richard Wolf

Title: Authorized Signatory

"OPERATOR'S PRINCIPALS"

Acknowledged and agreed with respect to the provisions of Sections 8.7 (2nd and 5th sentences only), 8.8 (4th sentence only), 15.2.1, 15.3.2, 15.3.3, 15.4, 36 and 37.5

____
Noah Tepperberg

____
Jason Strauss

____
Marc Packer

Richard Wolf
Richard Wolf

"OPERATOR"

Roof Deck Entertainment LLC,
a Delaware limited liability company

By: ______________________________

Name: ____________________________

Title: _____________________________

"OPERATOR'S PRINCIPALS"

Acknowledged and agreed with respect to the provisions of Sections 8.7 (2nd and 5th sentences only), 8.8 (4th sentence only), 15.2.1, 15.3.2, 15.3.3, 15.4, 36 and 37.5

____
Noah Tepperberg

____
Jason Strauss

____
Marc Packer

____
Richard Wolf

"OPERATOR"

Roof Deck Entertainment LLC,
a Delaware limited liability company

By: ______________________________

Name: ____________________________

Title: _____________________________

"OPERATOR'S PRINCIPALS"

Acknowledged and agreed with respect to the provisions of Sections 8.7 (2nd and 5th sentences only), 8.8 (4th sentence only), 15.2.1, 15.3.2, 15.3.3, 15.4, 36 and 37.5

____
Noah Tepperberg

____
Jason Strauss

____
Marc Packer

____
Richard Wolf

"OPERATOR"

Roof Deck Entertainment LLC,
a Delaware limited liability company

By: ______________________________

Name: ____________________________

Title: _____________________________

"OPERATOR'S PRINCIPALS"

Acknowledged and agreed with respect to the provisions of Sections 8.7 (2nd and 5th sentences only), 8.8 (4th sentence only), 15.2.1, 15.3.2, 15.3.3, 15.4, 36 and 37.5

____
Noah Tepperberg

____
Jason Strauss

____
Marc Packer

____
Richard Wolf

EXHIBIT "D"

Lease

[to be attached]

Lease

LANDLORD

Nevada Property 1 LLC

TENANT

Nevada Restaurant Venture 1 LLC

Nightclub Venues

LEASE

THIS LEASE is entered into as of this 21st day of April, 2010 by and between Nevada Property 1 LLC, a Delaware limited liability company, hereinafter called "Landlord", and Nevada Restaurant Venture 1 LLC, a Delaware limited liability company, hereinafter called "Tenant".

RECITALS

A. Landlord is the owner of that certain real property legally described on Exhibit A attached hereto located in Las Vegas, Nevada ("Property").

B. Landlord intends to develop on the Property a certain multi-use, multi-tower resort and casino development project consisting of, among other things, hotel operations, condominium components, condo-hotel units, gaming operations, multiple food and beverage outlets, nightclub, spa/fitness center and other ancillary uses ("Project").

C. Landlord intends to include certain nightclub venues ("Nightclub Venues") in the Project consisting of (i) the nightclub consisting of a primary area of approximately 12,388 square feet, together with certain ancillary areas (the "Nightclub"); (ii) the adult deck (i.e., the "Upper Deck" as depicted on Exhibit "B" attached hereto) consisting of approximately 24,762 square feet (the "Adult Deck"), inclusive of the eight (8) "VIP cabanas" located immediately south of the seven dipping pools (collectively the "Cabanas"), the bar or bars located on the Adult Deck (collectively the "Bar") and the Pools (including the dipping pools) located within the Adult Deck; (iii) the ultra lounge consisting of approximately 7,038 square feet (the "Ultra Lounge"); (iv) the VIP ultra lounge consisting of approximately 4,342 square feet (the "VIP Lounge"); (v) certain service kitchen and dishwashing facilities (the "Food/Beverage Facilities"); (vi) certain storage areas and ancillary areas; (vii) subject to certain priority reservation and use rights, the Bungalow Cabanas; and (viii) subject to Owner's reasonable right of access through such corridor to access certain storage areas, that certain corridor consisting of approximately 1,292 square feet, all as depicted on the site plans attached hereto as Exhibit "B" (collectively, the "Premises"). The Bungalows (as defined in the RMA) located on and/or adjacent to the Adult Deck are not part of the Premises or the Nightclub Venues.

D. Tenant desires to lease the Premises for the operation of the Nightclub Venues, and Landlord is willing to lease the Premises to Tenant, all in accordance with the terms and conditions set forth herein.

E. Tenant has simultaneously entered into a Nightclub Management Agreement with Roof Deck Entertainment LLC, a Delaware limited liability company (the "Operator") attached hereto as Exhibit "C" (the "RMA"). Landlord hereby acknowledges and agrees that Tenant and Operator have entered into the RMA, pursuant to which Operator shall manage and operate the Nightclub Venues on behalf of Tenant.

NOW THEREFORE, in consideration of the promises and the mutual agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Landlord and Tenant agree as follows:

Exhibit B

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CLERK OF THE COURT

COMP
RUTH L COHEN, ESQ.
Nevada Bar No. 1782
PAUL S. PADDA, ESQ.
Nevada Bar No. 10417
RACHEL N. SOLOW, ESQ
Nevada Bar No. 9694
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Fax: (702) 366-1940
Web: caplawyers.com
Attorneys for Plaintiff

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:

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AA002417

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").

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

IV.

FACTUAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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21. As a result of the vicious and unprovoked attack by Defendants' security personnel and manager, David has suffered significant physical, emotional, and financial injuries and incurred losses as a result thereof.

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.

V.

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

23. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 22 above, and incorporates the same as though fully set forth herein.

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.

25. As a direct and proximate cause of the assault and battery described above, Plaintiff has suffered physical, emotional, and financial injuries, including pain and suffering. Plaintiff has incurred the cost of medical treatment for his physical injuries. In addition to general (compensatory) and special damages, Plaintiff is entitled to recover punitive damages in

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

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

VI.

SECOND CAUSE OF ACTION
NEGLIGENCE
(Against All Defendants)

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

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

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

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

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

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

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

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

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

36. The acts, conduct and behavior of Defendants, and each of them, were performed knowingly and intentionally, oppressively and maliciously, by reason of which Plaintiff is 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.

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

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

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

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

46. That the acts of Defendants, and each of them, were done willfully, with malice and oppression and with conscious disregard for Plaintiff's rights and therefore, Plaintiff is entitled to recover punitive damages in an amount deemed appropriate to punish the Defendants for their wrongful and egregious conduct.

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WHEREFORE, Plaintiff, David Moradi, expressly reserving his right to amend this Complaint at or before the time of trial on the actions stated herein to include all damages not yet ascertained, prays for judgment against the Defendants, and each of them as follows:

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

DATED this 4th day of April, 2014.

COHEN & PADDA, LLP

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Nevada Bar No. 1782
PAUL S. PADDA, ESQ.
Nevada Bar No. 10417
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WEB: caplawyers.com
Attorneys for Plaintiff

Exhibit C

Law Offices
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A Professional Corporation

Martin J. Kravitz
Gary E. Schnitzer
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Melanie D. Morgan*

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Christopher J. Halcrow **

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EMAIL ADDRESS: tjwatson@ksjattorneys.com

September 18, 2014

CONFIDENTIAL ATTORNEY/CLIENT PRIVILEGED COMMUNICATION

Via Email: greg.irons@aspen-insurance.com

Greg Irons
Aspen Insurance
125 Summer Street, Suite 130
Boston, MA 02110

Re: David Moradi v. Nevada Property 1, dba The Cosmopolitan of Las Vegas and Roof Deck Entertainment dba Marquee Nightclub
Case No. A-14-698824-C

Dear Mr. Irons:

Thank you for referring the above-referenced matter to our office for handling. This letter will serve as an initial evaluation of the case against Nevada Property 1, LLC (d/b/a The Cosmopolitan of Las Vegas) and Roof Deck Entertainment, LLC (d/b/a Marquee Nightclub). It contains a summary of pleadings and developing facts, a preliminary analysis of liability and damage issues, a budget, and a proposed course of action. For ease of reference, we have organized this letter into three main sections - the Introduction, Litigation Strategy, and the Conclusion.

I. INTRODUCTION

The Introduction includes the background information for Plaintiff's case. In Part A, we set forth the factual background of this matter. This contains a summary of the allegations in the Complaint, the facts as they appear from the reports and surveillance videos, and an identification of witnesses. Part B identifies the procedural history of this matter. This includes the pleadings and legal briefs filed, an explanation on Clark County's mandatory arbitration program, an assessment of the presiding judge, and an assessment of Plaintiff's attorney.

A. Factual Background

1. *Plaintiff's Version of Events*

On April 4, 2014, David Moradi filed a Complaint against Nevada Property 1, LLC (d/b/a The Cosmopolitan of Las Vegas) and Roof Deck Entertainment, LLC (d/b/a Marquee Nightclub) alleging claims in assault and battery, negligence, intentional infliction of emotional distress and false imprisonment. Specifically, Moradi alleges that on or about April 8, 2012, he was a patron at Marquee Nightclub located in the Cosmopolitan. Moradi claims he gave a "cocktail waitress" his American Express Centurion Card (commonly called the "Black Card") and identification. He alleged he and his friends spent approximately three hours at Marquee ordering "expensive champagne." He claims his waitress was "impressed by the quality of the champagne" and asked to have some. Moradi claims he let her drink the champagne. He claims she became drunk as a result.

Moradi alleged he requested his bill ($10,000) so he could leave. When Moradi signed the bill, he claims the waitress returned his Black Card and identification to him. However, instead of leaving, he ordered three more drinks. Moradi stated he paid for the drinks with cash. He claims his friends consumed the drinks and then he told the waitress he was leaving. Moradi alleges the waitress became "hostile and belligerent." She demanded Moradi give his Black Card and identification again. According to Moradi, the waitress threatened to get security involved if he did not comply. Moradi refused because he was "concerned she was perpetrating a fraud."

Moradi alleges two members of Marquee's security detail came to his table with the matter. He claims the Marquee security officers and manager demanded he provide credit card and identification. Plaintiff further alleges they did not want him to provide his credit card and identification for a second time because he had already eaten. It is also alleged that the security officers and manager never explained why they were asking for the identification credit card.

Plaintiff alleges when he told the security officers and manager he was leaving, they said "okay". When he began to walk away, the security officers and manager followed him. When he tried to leave, the security officers and manager told him he had to go the other direction. When Plaintiff refused, security officers forcefully grabbed him, shook him, and pushed him against his will.

Moradi alleges he was forced out an unknown door of Marquee into a room between the nightclub and the pool. He claims the security officers threw him head first against a wall, causing injuries to his head. He claims the security officers and manager picked him up and dragged him into the pool area against his will. Plaintiff alleges the security officers and manager shoved him to the ground smashing his head forcefully into the concrete. Plaintiff claims he feared for his life and agreed to provide the officers his credit card and identification.

Upon returning to the Wynn, Plaintiff claims a VIP host was alarmed with the injuries Plaintiff sustained to his head. Accordingly, a Wynn driver took Plaintiff to Desert Springs Hospital. At the hospital, plaintiff claims he was diagnosed with depression. Further, he alleges right eye and head swelling, right black eye, concussion, sore arms, sore knees, difficulty walking, bending, difficulty concentrating, confusion, disorientation, and anxiety.

Plaintiff also claims he sought treatment from Las Vegas Neurosurgeon Dr. Derek A. Duke, M.D. Plaintiff alleges Dr. Duke diagnosed Plaintiff with a traumatic brain injury.

2. *Our Version of Events*

According to the Guest Misconduct report, on April 8, 2012 at approximately 4:30 AM General Manager Ramon Mata ("Mata") was alerted of the guest issue by cocktail server Shanna Crane. Crane reported that upon presenting the check to a guest at Table 53, later identified as David Moradi, Moradi proceeded to grab his identification out of her hand before she could verify, as specifically requested on the back of the credit card. Upon requesting he give back the identification, Moradi refused and became verbally abusive, prompting Crane to request Mata's assistance. Mata then approached Plaintiff and explained that for his own protection he needed to show identification. Specifically, Marquee was required to verify his identification with his credit card. Plaintiff remained uncooperative, at which point Mata requested they continue their conversation in a quieter location. Plaintiff initially complied, following Mata off the exit ramp; however, upon reaching the walkway, he became irate and reverted back to the yelling at Mata. Observing what appeared to be an escalating situation, Front Door\Security Manager Daniel Melendez took notice and stood nearby. Melendez saw the Plaintiff was becoming increasingly confrontational and aggressive.

Both Melendez and Mata reported that Plaintiff head-butted Mata, striking him above the right eye. Melendez responded by pulling the Plaintiff towards himself, away from Mata, as Security Officer Glenn Hayes attempted to secure Plaintiff's arm. Plaintiff ignored verbal direction to "stop resisting". Plaintiff struggled with the officers and grabbed a nearby pillar and curtain. Plaintiff bent himself at the waist to begin accelerating forward. As Plaintiff was leading with his head, Melendez reached over the top of Plaintiff's shoulder and attempted to stand him up, while also trying to slow his forward momentum. The Plaintiff was taken out the door into the Gaming Canopy where he was taken to the ground and secured in a prone position. When he stopped fighting, he was released and assisted to his feet. At this point, Security Director David Long was called to the scene. Even at this time, Plaintiff was still cursing at the staff. Marquee security officers noticed a small cut adjacent to Plaintiff's right eye. Accordingly, an EMT was called to the scene. The EMT treated the affected area and offered to transport the Plaintiff to a local hospital. Plaintiff declined transport.

Plaintiff was accompanied to Marquee by an Independent Host named Tony Marcum. When Marcum arrived on the scene, he convinced Plaintiff to provide his identification and the bill was properly closed out. Thereafter, Assistant Security Manager Ricardo Wade and Security Officer Hayes escorted Marcum and Moradi out of the venue.

3. *Surveillance Footage*

The surveillance footage in this case is a cause for concern. The incident report indicates the entire event took approximately 15-20 minutes. In contrast, only two minutes of video footage has been preserved. Specifically, there is 50 seconds of video inside Marquee (4:37:51-4:38:41) which shows Plaintiff and Mata talking to each other. The footage is from a significant distance and the interaction is difficult to make out. Still, it does appear that Plaintiff attempts to head-butt Mata as stated in the incident report. Next, there is over a minute of footage from the hallway between Marquee and the pool area (4:38:45-4:39:59). This video shows three Marquee security officers taking Plaintiff to the pool area. Of note, one of the individuals in the video looks like he has Plaintiff in a choke-hold. While the officers involved state the hold was actually to prevent Plaintiff from falling, it looks bad. Also, the video pretty clearly captures Plaintiff's head hitting the door as he is being ushered outside.

In addition to the existing video being problematic, the non-existing video is even worse. In this jurisdiction, the discovery commissioner expects retention of all camera angles for an hour before and an hour after the incident – even if these camera angles do not capture the event. Here, we do not even have the full video of the incident. In this case it was required that we retain all video of Plaintiff entering Marquee, his time at his table, his interactions with the staff, his full confrontation with Mata and the full physical altercation. It is cause for concern that there is no video of Plaintiff's detention at the pool area as this is likely where he sustained most of his injuries. Further, upon conducting a site inspection, this office learned that pool area cameras would have likely captured this event. However, since Marquee did not request the video from the Cosmopolitan, the video no longer exists.

The failure to retain the surveillance footage will become a significant issue in this case. Once Plaintiff's counsel becomes aware of this issue, Plaintiff will file a Motion for Spoliation which will be granted. This means the jury will be instructed that we failed to preserve evidence (or that we willfully destroyed evidence). Further, the jury will be told they are allowed to assume the video would have been harmful to the defense.

4. *Witnesses*

We have identified 6 employees who may have information related to this case. Each of them are listed below, along with a brief description of the information that they have personal knowledge of.

a. Ramon Mata – Marquee General Manager

We expect Mr. Mata to testify about Plaintiff's refusal to show identification and provide a correct signature for payment. He will also testify that Moradi told him to "fuck off" several times and attempted to leave without providing a proper signature. Mr. Mata will testify Plaintiff threatened to "kick [his] ass" and threatened to have Mr. Mata fired. He will further testify Plaintiff head-butted him.

b. Daniel Melendez – Marquee Front Door Manager

We expect Mr. Melendez to testify about observing the incident and responding to Mr. Mata's request for an officer to observe the confrontation. He will further testify he observed Plaintiff head-butt Mr. Mata. Accordingly, Mr. Melendez will testify that he and Mr. Hayes put Plaintiff in a "Mach 2" procedure. However, Plaintiff got one arm free, and began to run head-first forward. This is what caused him to hit his head on the door.

c. Glenn Hayes – (former) Marquee Security Officer

We expect Mr. Hayes to testify he responded to Mr. Mata's radio call for officers to observe the bill dispute with Plaintiff. When he arrived, he noticed Plaintiff slapping a bill away from Mr. Mata's hand. He observed Plaintiff head-butt Mr. Mata.

Mr. Hayes no longer works for Marquee. He was terminated after the Cosmopolitan trespassed him from the property.

d. David Long – (former) Security Director

We expect Mr. Thompson to testify about the facts and circumstances of this incident. However, Mr. Long no longer works for Marquee. As a former employee, his testimony could prove critical.

e. Ricardo Wade - Assistant Security Manager

We expect Mr. Thompson to testify about his understanding of the events which gave rise to this litigation.

f. Shanna Crane – (former) Marquee Cocktail Server

We expect Ms. Crane to testify about her interactions with Plaintiff and whether she observed any part of Mr. Mata or security's interactions with Plaintiff. As she no longer works for Marquee, this office will need to most current contact information and will need to interview her.

B. Procedural Status

1. *Demand for Security and Answer*

On August 19, 2014, we served a demand for security on Plaintiff's counsel. This case has been assigned to Department 20, Judge Jerome Tao in the Eighth Judicial District Court. Once Plaintiff posts his security for this case, we will file our answer to the Complaint.

2. *Court Mandatory Arbitration Program*

As you know, Clark County has a mandatory arbitration program. This generally places civil cases that do not involve equitable claims with a value lower than $50,000.00 into the alternative dispute resolution program. However, it also allows for a plaintiff to request exemption from the court mandated arbitration program if it can objectively demonstrate that the damages will likely exceed $50,000.00. As Plaintiff is claiming significant damages in the form of lost wages, this matter will likely be exempted from the program.

3. *Presiding Judge*

As mentioned above, this matter has been assigned to Judge Tao. Judge Tao is a former criminal attorney with little understanding regarding civil matters. This causes him to issue strange and unpredictable ruling. However, he is not considered "pro-plaintiff." As there are several judges on the bench that have strong plaintiff bias, we do not recommend preempting him.

4. *Plaintiff's Attorney*

Plaintiff retained the office of Cohen & Padda, LLP. This firm markets itself as a personal injury firm. However, Ruth Cohen, Esq. spent most of her career as a federal prosecutor. Ms. Cohen has extensive trial experience and is viewed as a competent attorney. Paul S. Padda, Esq. began his practice as a federal prosecutor in Washington, D.C. in 1995. He has been licensed in Nevada since 2007.

II. LITIGATION STRATEGY

The Litigation Strategy section is organized into three Parts. Part A identifies the current demands made by Plaintiff. Part B sets forth Plaintiff's causes of action, and provides the factual support for each of the claims. It also includes an assessment of the strengths and weaknesses of each claim. Part C reports of our anticipated discovery and investigation plan to develop information related to the defense of this matter.

A. Demand by Plaintiff

This office is unaware of any prior demands; however, Plaintiff has already stated he sustained $15-20 million of loss from his hedge fund as a result of this incident.

B. Preliminary Liability Evaluation

Plaintiff asserted the following four causes of action in this matter: (1) assault and battery, (2) negligence, (3) intentional infliction of emotional distress and (4) false imprisonment. The Discussion below addresses the legal standard of each of these claims, along with an analysis of the likely outcome with the facts known to this point. Most likely, discovery will alter this analysis after we learn new facts about this incident. In that case, we will revise this letter accordingly.

1. *Assault and Battery*

Nevada has not formally defined the elements of battery. Thus, in turning to the Restatements, it defines battery as an intentional act that causes a direct or indirect harmful or offensive contact with the person of another. Restatement (Second) of Torts § 13 (2009). Here, Plaintiff's action for battery exists only if the underlying false imprisonment stands. Plaintiff is asserting the acts that occurred during the alleged false arrest constituted battery because it was an offense of contact with his person. Our defense will concentrate on the validity of detaining Plaintiff after he struck Mata.

However, the analysis does not end once we establish Plaintiff head-butted Mata. This is because the amount of force used still needs to be proportionate. Plaintiff will argue that even if it was proper for security to detain him, placing him in a choke hold, slamming his head into a door and smashing his face into the concrete still constitutes an assault and battery. As mentioned above, the lack of video in this matter will make it difficult to defend. Nevertheless, the testimony of a security expert, if favorable, will go a long way to producing a viable defense.

2. *Negligence*

In Nevada, a defendant is negligent when said defendant owes a duty of care, breaches that duty, the breach is the legal cause of the injury, and the plaintiff suffered damages. *Scialabba v. Brandise Construction Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). As to the question of duty, a proprietor owes the general duty to use reasonable care to keep the premises in a reasonably safe condition for use. *Hall v. SSF, Inc.*, 112 Nev. 1384, 1393, 930 P.2d 94, 99 (1996). A defendant need only show that one of the negligence elements is "clearly lacking as a matter of law" to be entitled summary judgment. *Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007).

A negligence claim must be supported by damages that are proximately caused by the breach of duty. *Scialabba*, 112 Nev. at 968, 921 P.2d at 930. In a negligence cause of action based on personal injury, a Plaintiff may allege general damages (pain and suffering) and special damages (typically medical specials and lost wages). It is axiomatic that a plaintiff must suffer a personal injury or property damage to satisfy the damage element of a negligence claim. See, e.g. *Terracon Consultants Western, Inc. v. Mandalay Resort Group,* 206 P.3d 81, 87 (Nev. 2009) (distinguishing the economic loss doctrine as a limit to tort recovery).

Plaintiff claims Defendant breached its duty to the general public when it allowed a cocktail waitress to become intoxicated and instigate a dispute with a patron. Further, Plaintiff claims security personnel acted in an unreasonable manner in the performance of their duties and that security personnel received improper training to carry out those duties. It is unknown whether the cocktail waitress involved in this case was intoxicated. According to Marquee managers, cocktail waitresses are trained to "host" the patrons. This means cocktail waitresses will accept drinks from patrons, but are instructed not to drink the contents. As soon as a cocktail waitress leaves a patron's table, she is told to give the drink to a busser. Accordingly, it will be important to interview the cocktail waitress involved in this case to determine the nature of her testimony and whether she presents as a reliable witness.

Plaintiff further claims negligent security and training. As discussed above, there are several aspects of this case that present cause for concern. First, the video in this case shows three Marquee security officers taking Plaintiff to the pool area and one of the individuals appears to have Plaintiff in a choke-hold. While Marquee officers have an explanation for this, it does not look good. Also, the video pretty clearly captures Plaintiff's head hitting the door as he is being ushered outside. Lastly, we are missing the video of what occurs outside, which is where Plaintiff likely sustained his black eye and concussion. These issues present a fairly strong negligent security case for Plaintiff.

As it relates to negligent training, this office will need additional information regarding the nature and scope of the training provided.

3. *Intentional Infliction of Emotional Distress*

In Nevada, a claim for intentional infliction of emotional distress is present when (1) defendant's conduct was extreme or outrageous with either the intention of, or reckless disregard for causing emotional distress to plaintiff and (2) plaintiff suffered severe or extreme emotional distress as the actual or proximate result of defendant's conduct. *Dillard Dep't Stores, Inc. v. Beckwith,* 115 Nev. 372, 989 P.2d 882 (1999); *Miller v. Jones,* 114 Nev. 1291, 970 P.2d 571 (1998). In cases where emotional distress damages are not secondary to physical injuries, but rather precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of "serious emotional distress" causing physical injury or illness must be presented. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382 (1998). The less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from emotional distress. *Chowdry v. NLVH, Inc.*, 109 Nev. 478, 851 P.2d 459 (1993); C.A. Nelson v. City of Las Vegas, 99 Nev. 548, 665 P.2d 1141 (1983).

Plaintiff's claim for intentional infliction of emotional distress ("IIED") is weak for several reasons. First, the video in this case does appear to show Plaintiff head-butting Mata. Further, even if the jury does not believe the head-butt occurred, the jury will likely believe the security officers watching the event perceived Plaintiff to have head-butted Mata. Therefore, it is unlikely the jury would view security's conduct as extreme and outrageous. Additionally, even if the jury viewed the security officers' conduct as over-the-top, it is not likely for a jury to conclude that this conduct was intended to harm Plaintiff emotionally. In fact, security officers restraining and ejecting a patron, even if the force uses is viewed as excessive, is not closely related to any likely emotional harm.

Plaintiff will also bear the burden of establishing he suffered severe emotional distress. It is unlikely Plaintiff will present any compelling evidence to support his claimed emotional harm. Still, this claim allows us to obtain an independent examination with George K. Henry, Ph.D./ABPP-CN[1] who will opine as to whether Plaintiff is suffering any diminished mental capacity and whether he is being honest about his injuries. This testimony will likely prove to be very beneficial to our defense.

4. *False Imprisonment*

The false imprisonment claim is based on Plaintiff's allegation that Defendants detained him in a private room on the premises without cause. False imprisonment is a restraint of one's liberty without any sufficient cause. *Lerner Shops of Nev., Inc. v. Marin*, 83 Nev. 75, 78, 423 P.2d 389, 400 (1967). An action for false arrest requires the plaintiff to prove that the defendant restrained him under the probable imminence of force without legal cause or justification. *Garton v. City of Reno*, 102 Nev. 313, 314-15, 720 P.2d 1227, 1228 (1986), see also, Nev. Rev. Stat. § 200.460 (criminal statute on false imprisonment). However, it is generally acknowledged that submission to the mere verbal direction of another, unaccompanied by force or threats of any character, does not constitute false imprisonment. *Grayson Variety Store, Inc. v. Shaffer*, 402 S.W.2d 424 (Ky.1966).

Additionally, plaintiff bears the burden to prove the delay following his valid arrest was unlawful. *Yada v. Simpson*, 112 Nev. 254, 256, 913 P.2d 1261, 1262 (1996) (superseded by statute on other grounds). Failure to make a prima facie case of false imprisonment justifies the dismissal of this

[1] Additional detail regarding Dr. Henry is discussed below.

claim. *Garton*, 102 Nev. at 315, 720 P.2d at 1229. Probable cause to arrest exists when the police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that the suspect has committed a crime. *State v. McKellips*, 118 Nev. 465, 472, 49 P.3d 655, 660 (2002) (citation omitted). An arrest occurs when a peace officer or a private person takes a person into custody. Nev. Rev. Stat. § 171.107. A private person may arrest another for a public offense committed or attempted in his presence. Id. §§ 171.126,171.136(2)(b).

Arrests based on probable cause allow the arresting person to detain the suspect beyond the presumptive 60 minute time limit for temporary detentions for the purposes of conducting an investigation. See, *McKellips*, 118 Nev. at 471, 49 P.3d at 660 (officer has 60 minutes to either release or arrest detained individual). "In any event, temporary illegal detention is cured after the detention becomes lawful." *Robertson v. State*, 84 Nev. 559, 562, 445 P.2d 352, 353 (1968) (citation omitted).

As mentioned previously, the surveillance video appears to capture Plaintiff head-butting Mata. However, the video quality is poor so we cannot definitively conclude that is what happened based upon video alone. So, to the extent the jury believes Plaintiff did head-butt Mata, Plaintiff's claim of false imprisonment fails. This is because Plaintiff's act of head-butting Mata constitutes a battery. This provided Marquee security with sufficient cause to arrest him. Additionally, the length of his detention is not a cause for concern as the entire event lasted approximately 15-20 minutes. Accordingly, Plaintiff's claim of false imprisonment will likely fail.

C. Discovery and Investigation Plan

We will propound written discovery upon Plaintiff and submit authorizations for him to execute to allow us to obtain his medical records, if any exits. As you are aware, discovery formally opens after the submission of a discovery plan by the parties.

We will need to retain a security expert to testify that the use of force and standard of care was met by the Hotel's employees. The security expert we request authority to retain is Robert Gardner. Mr. Gardner has worked on several matters for this firm previously and has proved to be an excellent witness.

Given Plaintiff's allegations of traumatic brain injury, we recommend retaining George K. Henry, Ph.D./ABPP-CN. Dr. Henry is a Neuropsychologist. Neuropsychology is a field of psychology which focuses on brain function. As Plaintiff is claiming a "brain injury," Dr. Henry will be able to determine whether he is suffering any diminished mental capacity, and more importantly, whether he is telling the truth as to the scope of any claimed brain injury. This office has retained Dr. Henry in the past and he has provided excellent and compelling testimony on our behalf.

The last area of expert testimony we will likely need relates to Plaintiff's claimed loss of millions of dollars from his hedge fund. His claim is not likely meritorious because our initial research shows that hedge funds like Plaintiff's had a very bad year in 2012. This is because his hedge fund was betting against a well performing market. Accordingly, we need to retain an expert in the field of economics to testify that Plaintiff's investments would have performed poorly no matter what. Additionally, Plaintiff's hedge fund seemed to suffer because of negative publicity associated with a law suit filed against it.

Plaintiff will likely depose the security officers and other hotel employees involved with the incident for their version, background and training histories. Once we receive responses to our initial set of written discovery, we will conduct the deposition of Plaintiff. We may also conduct the deposition of any expert witness designated by Plaintiff.

Importantly, this office needs several pieces of evidence from risk management to defend this matter. This includes, but is not limited to the following:

1. The last known contact information for former cocktail server Shanna Crane;
2. Marquee security training manuals;
3. Plaintiff's receipts and payment information for the night of the incident;
4. The identity of the EMT's present during Plaintiff's detention; and
5. Any documentary evidence that Mr. Mata suffered an injury from Plaintiff head-butting him.

III. CONCLUSION

As stated above, we cannot submit our initial discovery until discovery formally opens with the filing of a discovery plan with the Court. This will not happen until Plaintiff posts his security bond. Once this is done, we will file our Answer. Subsequently, Plaintiff will notice the mandatory NRCP 16.1 conference.

Although we will update you on any significant developments, please contact the undersigned, at your convenience, with any questions or comments.

Sincerely,

MARTIN J. KRAVITZ, ESQ.
TYLER J. WATSON, ESQ.

MJK-TJW/ct
cc: Brian Record - brian.record@cosmopolitanlasvegas.com
Kyle Hurley - Kyle.Hurley@taogroup.com

Exhibit D

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

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, an individual,

Plaintiff,

vs.

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

Defendants.

Case No.: A-14-698824-C

Dept. No.: XX

DEFENDANTS' ANSWER TO COMPLAINT

COMES NOW, Defendants, NEVADA PROPERTY 1, LLC, d/b/a The Cosmopolitan of Las Vegas, and ROOF DECK ENTERTAINMENT, LLC, d/b/a Marquee Nightclub ("Defendants") , by and through their attorneys of record, the law firm of Kravitz, Schnitzer & Johnson, Chtd., and for its Answer to Plaintiff's Complaint states:

I.

ARBITRATION EXEMPTION

1. Paragraph 1 of Plaintiff's Complaint contains a legal assertion. No response is required.

2. These Answering Defendants deny the allegations contained in paragraph 2 of Plaintiff's Complaint.

II.

JURISDICTION AND VENUE

3. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 3 of Plaintiff's Complaint and; therefore deny the same.

III.

PARTIES

4. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 4 of Plaintiff's Complaint and; therefore deny the same.

5. These Answering Defendants admit the allegations contained in paragraph 5 of Plaintiff's Complaint.

6. These Answering Defendants admit the allegations contained in paragraph 6 of Plaintiff's Complaint.

7. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 7 of Plaintiff's Complaint and; therefore deny the same.

8. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 8 of Plaintiff's Complaint and; therefore deny the same.

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IV.

FACTUAL ALLEGATIONS

9. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 9 of Plaintiff's Complaint and; therefore deny the same.

10. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 10 of Plaintiff's Complaint and; therefore deny the same.

11. These Answering Defendants deny the allegations contained in paragraph 11 of Plaintiff's Complaint.

12. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 12 of Plaintiff's Complaint and; therefore deny the same.

13. These Answering Defendants deny the allegations contained in paragraph 13 of Plaintiff's Complaint.

14. These Answering Defendants deny the allegations contained in paragraph 14 of Plaintiff's Complaint.

15. These Answering Defendants deny the allegations contained in paragraph 15 of Plaintiff's Complaint.

16. These Answering Defendants deny the allegations contained in paragraph 16 of Plaintiff's Complaint.

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17. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 17 of Plaintiff's Complaint and; therefore deny the same.

18. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 18 of Plaintiff's Complaint and; therefore deny the same.

19. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 19 of Plaintiff's Complaint and; therefore deny the same.

20. These Answering Defendants deny the allegations contained in paragraph 20 of Plaintiff's Complaint.

21. These Answering Defendants deny the allegations contained in paragraph 21 of Plaintiff's Complaint.

22. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 22 of Plaintiff's Complaint and; therefore deny the same.

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

23. In response to the allegations contained in Paragraphs 1 through 22 of Plaintiff's Complaint, these Answering Defendants reassert and re-allege all of its answers and defenses contained in the above paragraphs of this Answer as if copied herein in extenso.

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24. These Answering Defendants deny the allegations contained in paragraph 24 of Plaintiff's Complaint.

25. These Answering Defendants deny the allegations contained in paragraph 25 of Plaintiff's Complaint.

26. These Answering Defendants deny the allegations contained in paragraph 26 of Plaintiff's Complaint.

VI.
SECOND CAUSE OF ACTION
NEGLIGENCE
(Against All Defendants)

27. In response to the allegations contained in Paragraphs 1 through 26 of Plaintiff's Complaint, these Answering Defendants reassert and re-allege all of its answers and defenses contained in the above paragraphs of this Answer as if copied herein in extenso.

28. Paragraph 28 of Plaintiff's Complaint contains a legal assertion. These Answering Defendants deny all other allegations alleged in Paragraph 28 of Plaintiff's Complaint.

29. These Answering Defendants deny the allegations contained in paragraph 29 of Plaintiff's Complaint.

30. These Answering Defendants deny the allegations contained in paragraph 30 of Plaintiff's Complaint.

31. These Answering Defendants deny the allegations contained in paragraph 31 of Plaintiff's Complaint.

32. These Answering Defendants deny the allegations contained in paragraph 32 of Plaintiff's Complaint.

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33. These Answering Defendants deny the allegations contained in paragraph 33 of Plaintiff's Complaint.

34. These Answering Defendants deny the allegations contained in paragraph 34 of Plaintiff's Complaint.

35. These Answering Defendants deny the allegations contained in paragraph 35 of Plaintiff's Complaint.

36. These Answering Defendants deny the allegations contained in paragraph 36 of Plaintiff's Complaint.

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

37. In response to the allegations contained in Paragraphs 1 through 36 of Plaintiff's Complaint, these Answering Defendants reassert and re-allege all of its answers and defenses contained in the above paragraphs of this Answer as if copied herein in extenso.

38. These Answering Defendants deny the allegations contained in paragraph 38 of Plaintiff's Complaint.

39. These Answering Defendants deny the allegations contained in paragraph 39 of Plaintiff's Complaint.

40. These Answering Defendants deny the allegations contained in paragraph 40 of Plaintiff's Complaint.

///

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VIII.
FOURTH CAUSE OF ACTION
FALSE IMPRISONMENT
(Against All Defendants)

41. In response to the allegations contained in Paragraphs 1 through 40 of Plaintiff's Complaint, these Answering Defendants reassert and re-allege all of its answers and defenses contained in the above paragraphs of this Answer as if copied herein in extenso.

42. These Answering Defendants have insufficient knowledge and information with which to form a belief as to the truth or falsity of the allegations contained in paragraph 42 of Plaintiff's Complaint and; therefore deny the same.

43. These Answering Defendants deny the allegations contained in paragraph 43 of Plaintiff's Complaint.

44. These Answering Defendants deny the allegations contained in paragraph 44 of Plaintiff's Complaint.

45. These Answering Defendants deny the allegations contained in paragraph 45 of Plaintiff's Complaint.

46. These Answering Defendants deny the allegations contained in paragraph 46 of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIAVE DEENSE

The negligence of the Plaintiff exceeds that of the Defendants, if any, and the Plaintiff is thereby barred from any recovery.

///

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SECOND AFFIRMATIVE DEFENSE

These Answering Defendants are informed and believe, and thereon allege, the damages suffered by Plaintiff, if any, were the direct and proximate result of the negligence of parties, persons, corporations and/or entities other than these Answering Defendants, and that the liability of these Answering Defendants, if any, are limited in direct proportion to the percentage of fault actually attributable to these Answering Defendants.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff has failed to mitigate his damages.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff failed to name a party necessary for full and adequate relief essential in this action.

FIFTH AFFIRMATIVE DEFENSE

The allegations contained in Plaintiff's Complaint fail to state a cause of action against these Answering Defendants upon which relief can be granted.

SIXTH AFFIRMATIVE DEFENSE

The injuries, if any, suffered by the Plaintiff were caused in whole or in part by the negligence of a third party over which these Answering Defendants had no control.

SEVENTH AFFIRMATIVE DEFENSE

The injuries claimed to have been suffered by the Plaintiff were caused by pre-existing and/or unrelated medical conditions.

EIGHTH AFFIRMATIVE DEFENSE

These Answering Defendants are informed and believe, and thereon allege, that the Complaint was brought without reasonable cause and without a good faith belief that there was a justifiable controversy under the facts of the law which warranted the filing of the Complaint against these Answering Defendants. Plaintiff should therefore be responsible for all Defendants' necessary and reasonable defense costs.

NINTH AFFIRMATIVE DEFENSE

The Plaintiff's cause of action is barred by the doctrine of laches.

TENTH AFFIRMATIVE DEFENSE

There has been an insufficiency of process.

ELEVENTH AFFIRMATIVE DEFENSE

There has been an insufficiency of service of process.

TWELFTH AFFIRMATIVE DEFENSE

The Complaint and any purported cause of action alleged therein are uncertain, vague and ambiguous.

THIRTEENTH AFFIRMATIVE DEFENSE

Defendants acted at all times with due care in the performance of its relevant duties.

FOURTEENTH AFFIRMATIVE DEFENSE

All actions taken by Defendants related to the allegations in the Complaint were consented to by Plaintiff.

FIFTEENTH AFFIRMATIVE DEFENSE

The allegations contained in Plaintiff's Complaint fail to state facts sufficient to warrant an award of punitive or exemplary damages against these Answering Defendants.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff is not entitled to punitive damages in accordance with NRS 42.005 or NRS 42.007.

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Attorneys
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Las Vegas, Nevada 89123

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Las Vegas, Nevada 89123

SEVENTEENTH AFFIRMATIVE DEFENSE

These Answering Defendants are informed and believe, and thereon allege, that the claim for punitive damages is unconstitutional under the United States Constitution and the Nevada Constitution, including but not limited to, the excessive fines, due process and equal protection provisions thereof.

EIGHTEENTH AFFIRMATIVE DEFENSE

These Answering Defendants are informed and believe, and thereon allege, that Plaintiff fails to state facts sufficient to, and that no facts exist which are sufficient to, warrant any claim or claims for punitive and/or exemplary damages.

NINETEENTH AFFIRMATIVE DEFENSE

Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein, insofar as sufficient facts were not available after reasonable inquiry upon the filing of these Answering Defendants' Answer and, therefore, Defendants reserve the right to amend this answer to allege additional affirmative defenses if subsequent investigation warrants.

PRAYER FOR RELIEF

WHEREFORE, Defendants, Nevada Property 1, LLC, d/b/a The Cosmopolitan of Las Vegas, and Roof Deck Entertainment, LLC, d/b/a Marquee Nightclub prays for judgment as follows:

1. That Plaintiff take nothing by way of this Complaint on file herein;
2. For reasonable attorneys' fees and costs of suit; and

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3. For such other and further relief as the Court may deem just and proper under the circumstances.

DATED this 26th day of September, 2014.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

MARTIN J. KRAVITZ, ESQ.
Nevada Bar No. 83
TYLER J. WATSON, ESQ.
Nevada Bar No. 11735
Attorneys for Defendants,
NEVADA PROPERTY 1, LLC, dba The Cosmopolitan of Las Vegas and
ROOF DECK ENTERTAINMENT, LLC dba Marquee Nightclub

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2014, I served a true and correct copy of the foregoing Defendants' Answer to Complaint as follows:

______ **Electronically pursuant to Rule 9 of the N.E.F.C.R.:**

XXX **By United States Postal Service, first class mail, postage prepaid:**

Ruth L. Cohen, Esq.
Paul S. Padda, Esq.
Rachel N. Solow, Esq.
COHEN & PADDA, LLP
4240 W. Flamingo Road, Suite 200
Las Vegas, NV 89103
Attorneys for Plaintiff

An employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.
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Exhibit E

Law Offices

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

A Professional Corporation

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¤ Also Admitted in New York

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EMAIL ADDRESS: tjwatson@ksjattorneys.com

November 13, 2015

CONFIDENTIAL ATTORNEY/CLIENT PRIVILEGED COMMUNICATION

Via Email: Edward.Kotite@aspen-insurance.com

Edward Kotite, Senior Claims Examiner
Aspen Insurance
125 Summer Street, Suite 130
Boston, Massachusetts 02110

Re: David Moradi v. Nevada Property 1, dba The Cosmopolitan of Las Vegas and Roof Deck Entertainment dba Marquee Nightclub
Case No. A-14-698824-C

Dear Mr. Kotite:

Please allow this letter to serve as a status report for the case against Nevada Property 1, LLC (d/b/a The Cosmopolitan of Las Vegas) and Roof Deck Entertainment, LLC (d/b/a Marquee Nightclub). It contains a summary of pleadings and developing facts, a preliminary analysis of liability and damage issues, a budget, and a proposed course of action. For ease of reference, we have organized this letter into three main sections - the Introduction, Litigation Strategy, and the Conclusion. **Please find recent developments, newly added information, and our strategy for future handling of this action.**

I. INTRODUCTION

The Introduction includes the background information for Plaintiff's case. In Part A, we set forth the factual background of this matter. This contains a summary of the allegations in the Complaint, the facts as they appear from the reports and surveillance videos, and an identification of witnesses. Part B identifies the procedural history of this matter. This includes the pleadings and legal briefs filed, an explanation on Clark County's mandatory arbitration program, an assessment of the presiding judge, and an assessment of Plaintiff's attorney.

A. Factual Background

1. Plaintiff's Version of Events

On April 4, 2014, David Moradi filed a Complaint against Nevada Property 1, LLC (d/b/a The Cosmopolitan of Las Vegas) and Roof Deck Entertainment, LLC (d/b/a Marquee Nightclub) alleging claims in assault and battery, negligence, intentional infliction of emotional distress and false imprisonment. Specifically, Mr. Moradi alleges that on or about April 8, 2012, he was a patron at Marquee Nightclub located in the Cosmopolitan. Mr. Moradi claims he gave a "cocktail waitress" his American Express Centurion Card (commonly called the "Black Card") and identification. He alleged he and his friends spent approximately three hours at Marquee ordering "expensive champagne." He claims his waitress was "impressed by the quality of the champagne" and asked to have some. Mr. Moradi claims he let her drink the champagne. He claims she became drunk as a result.

Mr. Moradi alleged he requested his bill ($10,000) so he could leave. When Mr. Moradi signed the bill, he claims the waitress returned his Black Card and identification to him. However, instead of leaving, he ordered three more drinks. Mr. Moradi stated he paid for the drinks with cash. He claims his friends consumed the drinks and then he told the waitress he was leaving. Mr. Moradi alleges the waitress became "hostile and belligerent." She demanded Mr. Moradi give his Black Card and identification again. According to Mr. Moradi, the waitress threatened to get security involved if he did not comply. Mr. Moradi refused because he was "concerned she was perpetrating a fraud."

Mr. Moradi alleges two (2) members of Marquee's security detail came to his table with the matter. He claims the Marquee security officers and manager demanded he provide credit card and identification. Plaintiff further alleges they did not want him to provide his credit card and identification for a second time because he had already eaten. It is also alleged that the security officers and manager never explained why they were asking for the identification credit card.

Plaintiff alleges when he told the security officers and manager he was leaving, they said "okay". When he began to walk away, the security officers and manager followed him. When he tried to leave, the security officers and manager told him he had to go the other direction. When Plaintiff refused, security officers forcefully grabbed him, shook him, and pushed him against his will.

Mr. Moradi alleges he was forced out an unknown door of Marquee into a room between the nightclub and the pool. He claims the security officers threw him head first against a wall, causing injuries to his head. He claims the security officers and manager picked him up and dragged him into the pool area against his will. Plaintiff alleges the security officers and manager shoved him to the ground smashing his head forcefully into the concrete. Plaintiff claims he feared for his life and agreed to provide the officers his credit card and identification.

2. Plaintiff's Medical Treatment and Claimed Medical Damages

Upon returning to the Wynn, Plaintiff claims a VIP host was alarmed with the injuries Plaintiff sustained to his head. Accordingly, a Wynn driver took Plaintiff to Desert Springs Hospital. At the hospital, Plaintiff was given a CT brain scan without contrast. This scan indicated a chronic sinusitis and no "inter-cranial hemorrhage". He was also administered a CT scan of his cervical spine, which was negative for injury.

On April 11, 2012, Plaintiff treated at the Spine and Brain Institute with Dr. Derrek Duke, a neurosurgeon. Dr. Duke's records indicate he reviewed a CT scan of Plaintiff's head and cervical spine. He noted these studies were within "normal limits" and demonstrated only "age-appropriate degenerative changes with no evidence of fracture." Nevertheless, Dr. Duke diagnosed Plaintiff with (1) post concussive syndrome with symptoms of decreased concentration, photopia, severe headache, and lack of concentration; (2) right scalp abrasion, right pre-orbital abrasion, and left posterior auricular abrasion; (3) severe headache; (4) cervical strain/sprain; (5) thoracic strain/sprain; and (6) lumbar strain/sprain. Dr. Duke's records reference the claimed injury Plaintiff sustained at the Marquee nightclub, but does not go as far as to state his alleged symptoms are causally connected to the subject incident. Nevertheless, it is likely his he would testify as such if deposed in this case.

Beginning December 13, 2013, Plaintiff began obtaining significant diagnostic workups with Centennial Medical Imaging. The physician responsible for these extensive diagnostic workups is Keith M. Lewis, M.D. The Centennial Medical Imaging reports state upon conducting a "perfusion weighted imaging technique", Plaintiff was found to have significantly elevated "cerebral blood volume and blood flow in the right anterior frontal lobe when compared to the contralateral left frontal lobe." The report also claims significantly diminished cerebral blood volume and blood flow in the right anterior parietal lobe when compared to the contralateral left anterior parietal lobe. The report claims this information collaborates "evidence of traumatic brain injury in the affected parietal and frontal lobe regions." The Centennial Medical Imaging report also identifies the following impressions: (1) straightening of the cervical lordosis with torticollis to the right; (2) torticollis differential diagnosis is recommended to explore possible intracranial brain changes and physiology as a delayed response to the original trauma; (3) posterior annular tear of the C3-C4 intervertebral disc; (4) posterior disc protrusion of C3-C4 and C4-C5 levels; (5) no significant central spinal canal stenosis or significant neuroforaminal encroachment in the cervical spine; and (6) no intrinsic lesions identified in the cervical spinal cord. At this time, it is unclear if Dr. Lewis will opine that all of these issues are related to the subject incident.

On May 2, 2014, Plaintiff obtained a "neurology evaluation" from Dr. Russell J. Shah, who specializes in neurology and neurophysiology. Dr. Shah diagnosed Plaintiff with (1) concussion/traumatic brain injury; and (2) post traumatic brain syndrome with residual brain memory/focusing impairment, both of which he relates to the subject incident. Dr. Shah recommended biofeedback therapy and prescribed Donzepil medication at 5 mg doses.

On June 13, 2014, Plaintiff underwent a neuropsychological consultation with Dr. Alina K. Fong. Dr. Fong is of the opinion that Plaintiff has moderate to severe "cortical dysfunction". The doctor explains "although Mr. Moradi may have the ability to complete tasks adequately, the amount of energy and resources placed on his neurosystem is greater than what would be expected." The doctor further states "patient's executive functioning is significantly impaired." In summation, Dr. Fong claims Plaintiff will have severe executive functioning problems relating to attention, impulse control, spatial and visional processing, visual search abilities, word retrieval, primary visual processing, complex object recognition, memory and coding and working memory areas. Dr. Fong is of the opinion that Plaintiff most likely experienced a brain injury.

Lastly, Plaintiff disclosed records indicating a neurology evaluation performed by Dr. Paul H. Janda, D.O., board certified neurologist. Dr. Janda's assessment is that Plaintiff suffers from (1) moderate traumatic brain injury; (2) post-concussion syndrome; (3) cervical strain; (4) post traumatic chronic daily headache; (5) post traumatic brain syndrome with residual neurocognitive impairment. Dr. Janda goes on to state that the symptoms relate to the subject incident at Marquee. Dr. Janda goes further to state concern regarding Plaintiff's symptomology two years after the initial event.

The disclosed records show Plaintiff was referred to the vast majority of his doctors by a doctor James Loong, Ph.D. However, no records for Dr. Loong have been disclosed. Accordingly, his records will need to be subpoenaed once a HIIPA release has been provided.

Plaintiff also claims he sought treatment from Las Vegas Neurosurgeon Dr. Derek A. Duke, M.D. Plaintiff alleges Dr. Duke diagnosed Plaintiff with a traumatic brain injury.

Plaintiff Claims the Following Medical Specials:

Desert Springs Hospital	$8,258.00
Flamingo Emergency Physicians	$1,204.00
Radar Medical Group	$3,765.00
Centennial Medical Imaging	$21,390.00
Dr. Jeffrey Rubin	$1,200.00
TOTAL	$35,817.00

3. Plaintiff's Claimed Loss of Future Earning Capacity

Plaintiff has not made any formal demands in this matter. However, Plaintiff recently disclosed prior tax returns showing he earned $10.9 million and $11.4 million in years 2011 and 2012 respectively. This amount is starkly contrasted to his annual earnings for 2013, following the incident, which was approximately $600,000. Plaintiff claims this drop in earnings stems from his decreased cognitive functioning due to his alleged brain injury and an inability to obtain investors because of his "obligation" to disclose his claimed brain injury. As Plaintiff is in his early 30's, this office fully expects Plaintiff will claim, and have expert testimony to support, a $10 million per year loss of future earning/loss of earning capacity claim for the remainder of his approximately 30 remaining working years (an estimated $300 million claim).

4. Marquee's Version of Events

According to the Guest Misconduct report, on April 8, 2012 at approximately 4:30 AM General Manager Ramon Mata ("Mata") was alerted of the guest issue by cocktail server Shanna Crane. Ms. Crane reported that upon presenting the check to a guest at Table 53, later identified as David Moradi, Mr. Moradi proceeded to grab his identification out of her hand before she could verify, as specifically requested on the back of the credit card. Upon requesting he give back the identification, Mr. Moradi refused and became verbally abusive, prompting Ms. Crane to request Mata's assistance. Mr. Mata then approached Plaintiff and explained that for his own protection he needed to show identification. Specifically, Marquee was required to verify his identification with his credit card. Plaintiff remained uncooperative, at which point Mr. Mata requested they continue their conversation in a quieter location. Plaintiff initially complied, following Mr. Mata off the exit ramp; however, upon reaching the walkway, he became irate and reverted back to the yelling at Mr. Mata. Observing what appeared to be an escalating situation, Front Door\Security Manager, Daniel Melendez took notice and stood nearby. Mr. Melendez saw the Plaintiff was becoming increasingly confrontational and aggressive.

Both Mr. Melendez and Mr. Mata reported that <u>Plaintiff head-butted Mata</u>, striking him above the right eye. Mr. Melendez responded by pulling the Plaintiff towards himself, away from Mr. Mata, as Security Officer Glenn Hayes attempted to secure Plaintiff's arm. Plaintiff ignored verbal direction to "stop resisting". Plaintiff struggled with the officers and grabbed a nearby pillar and curtain. Plaintiff bent himself at the waist to begin accelerating forward. As Plaintiff was leading with his head, Mr. Melendez reached over the top of Plaintiff's shoulder and attempted to stand him up, while also trying to slow his forward momentum. The Plaintiff was taken out the door into the Gaming Canopy where he was taken to the ground and secured in a prone position. When he stopped fighting, he was released and assisted to his feet. At this point, Security Director, David Long was called to the scene. Even at this time, Plaintiff was still cursing at the staff. Marquee security officers noticed a small cut adjacent to Plaintiff's right eye. Accordingly, an EMT was called to the scene. The EMT treated the affected area and offered to transport the Plaintiff to a local hospital. Plaintiff declined transport.

Plaintiff was accompanied to Marquee by an Independent Host named Tony Marcum. When Mr. Marcum arrived on the scene, he convinced Plaintiff to provide his identification and the bill was properly closed out. Thereafter, Assistant Security Manager, Ricardo Wade and Security Officer, Hayes escorted Mr. Marcum and Mr. Moradi out of the venue.

5. <u>Surveillance Footage</u>

The surveillance footage in this case is a cause for concern. The Incident Report indicates the entire event took approximately 15-20 minutes. In contrast, only two minutes of video footage has been preserved. Specifically, there is 50 seconds of video inside Marquee (4:37:51-4:38:41) which shows Plaintiff and Mr. Mata talking to each other. The footage is from a significant distance and the interaction is difficult to make out. Still, it <u>does appear that Plaintiff attempts to head-butt Mata</u> as stated in the Incident Report. Next, there is over a minute of footage from the hallway between Marquee and the pool area (4:38:45-4:39:59). This video shows three Marquee security officers taking Plaintiff to the pool area. Of note, Mr. Melendez does appear to have Plaintiff in a choke-hold as his arm is clearly around his neck and not across Plaintiff's chest as Mr. Melendez claims. While the officers involved state the hold was actually to prevent Plaintiff from falling, it looks bad. Also, the video pretty clearly captures Plaintiff's head hitting the door as he is being ushered outside.

In addition to the existing video being problematic, the non-existing video is even worse. In this jurisdiction, the discovery commissioner expects retention of all camera angles for an hour before and an hour after the incident – even if these camera angles do not capture the event. Here, we do not even have the full video of the incident. In this case it was required that we retain all video of Plaintiff entering Marquee, his time at his table, his interactions with the staff, his full confrontation with Mr. Mata and the full physical altercation. It is cause for concern that there is no video of Plaintiff's detention at the pool area as this is likely where he sustained most of his injuries. Further, upon conducting a site inspection, this office learned that pool area cameras would have likely captured this event. However, since Marquee did not request the video from the Cosmopolitan, the video no longer exists.

The failure to retain the surveillance footage will become a significant issue in this case. Once Plaintiff's counsel becomes aware of this issue, Plaintiff will file a Motion for Spoliation which will likely be granted. This means the jury will be instructed that we failed to preserve evidence (or that we willfully destroyed evidence). Further, the jury will be told they are allowed to assume the video would have been harmful to the defense.

6. Witnesses

We have identified seven (7) employees who may have information related to this case. Each of them are listed below, along with a brief description of the information that they have personal knowledge of:

a. Ramon Mata – Marquee General Manager

We expect Mr. Mata to testify about Plaintiff's refusal to show identification and provide a correct signature for payment. He will also testify that Mr. Moradi told him to "fuck off" several times and attempted to leave without providing a proper signature. Mr. Mata will testify Plaintiff threatened to "kick [his] ass" and threatened to have Mr. Mata fired. He will further testify Plaintiff head-butted him.

b. Daniel Melendez – Marquee Front Door Manager

Mr. Melendez was deposed in this matter on September 23, 2015. He presented well. He was able to detail his training and Marquee policy clearly. He had good recall of the incident including his response to Mr. Mata's request for an officer to observe the confrontation. He testified convincingly that he observed Plaintiff head-butt Mr. Mata. The only problem with Mr. Melendez's testimony is that his description of his "hold" on Plaintiff is seemingly inconsistent with the video. Mr. Melendez claims his arm was over Plaintiff's shoulder with his hand reaching across Plaintiff's chest. In contrast, the video shows Mr. Melendez's arm wrapped around Plaintiff's neck.

c. **Glenn Hayes – (former) Marquee Security Officer**

We expect Mr. Hayes to testify he responded to Mr. Mata's radio call for officers to observe the bill dispute with Plaintiff. When he arrived, he noticed Plaintiff slapping a bill away from Mr. Mata's hand. He observed Plaintiff head-butt Mr. Mata.

Mr. Hayes no longer works for Marquee. He was terminated after the Cosmopolitan trespassed him from the property.

d. **David Long – (former) Security Director**

We expect Mr. Thompson to testify about the facts and circumstances of this incident. However, Mr. Long no longer works for Marquee. As a former employee, his testimony could prove critical.

e. **Ricardo Wade - Assistant Security Manager**

We expect Mr. Thompson to testify about his understanding of the events which gave rise to this litigation.

f. **Shanna Crane – (former) Marquee Cocktail Server**

We expect Ms. Crane to testify about her interactions with Plaintiff and whether she observed any part of Mr. Mata or security's interactions with Plaintiff. This office was recently successful in making contact with Ms. Crane and we fully expect her to cooperate going forward.

g. **Todd Abdalla – Security Director**

Mr. Abdalla was previously deposed and his continued deposition is schedule for December 8, 2015. Mr. Abdalla does not have any personal knowledge regarding this case but has provided clear, credible testimony on the policies and procedures of Marquee's security department. Unfortunately, Mr. Abdalla's testimony confirms that the officers did not follow security policies and procedures when they escorted Plaintiff to the pool area because the pool area is not a "Rally Point." Every designated "Rally Point" has surveillance coverage, but the pool area does not. Obviously, this looks bad given Plaintiff's allegation that security smashed his head into the concrete after he was placed on the ground.

A. Procedural Status

1. Pleadings and Discovery Dates

On August 19, 2014, we served a Demand for Security on Plaintiff's counsel. On September 16, 2014, Plaintiff posted his security for this case; we filed our Answer to the Complaint on September 26, 2014. Additionally, deadlines are as follows:

a.	**Initial Expert Disclosure:**	**January 4, 2015**
b.	**Rebuttal Expert Disclosure:**	**February 2, 2016**
c.	**Close of Discovery:**	**April 4, 2016**
d.	**Dispositive Motions:**	**May 2, 2016**
e.	**Calendar Call:**	**June 8, 2016**
f.	**Joint Pre-Trial Memorandum:**	**June 10, 2016**
g.	**Jury Trial (5 week stack):**	**June 27, 2016**

2. Presiding Judge

As mentioned above, this matter has been reassigned to Judge Eric Johnson. Judge Johnson is a former Assistant U.S. Attorney who served as chief of the Criminal Division for the District of Nevada. He has no civil practice or state court experience. While he is sufficiently intelligent and will likely be fair in his decision making, he simply has no experience in this area. Nevertheless, we do not recommend preempting him for fear of obtaining a judge with a clear plaintiff bias.

3. Plaintiff's Attorney

Plaintiff retained the office of Cohen & Padda, LLP. This firm markets itself as a personal injury firm. However, Paul S. Padda, Esq. spent most of his career as a federal prosecutor. Mr. Padda began his practice as a federal prosecutor in Washington, D.C. in 1995. He has been licensed in Nevada since 2007. Thus far, Mr. Padda has proved to be slow to respond to issues as they arise and has been unimpressive in his motion work and oral argument. He seems to have little to no knowledge of the Nevada Rules of Civil Procedure and the Eight Judicial District Court Rules.

However, Mr. Padda wisely associated in a California attorney named Rahul Ravipudi, Esq., a partner at the Panish Shea & Boyle firm in Los Angeles. The Panish Shea firm is highly regarded plaintiff firm in the Los Angeles area, with numerous multi-million dollar verdicts and a

$4.9 billion verdict against GM. Mr. Ravipudi is a successful trial attorney with several multi-million dollar verdicts to his name. In my interactions with him, he is both knowledgeable and well-prepared.

II. LITIGATION STRATEGY

The Litigation Strategy section is organized into three Parts. Part A identifies the scope of potential exposure. Part B discusses this office's liability assessment. Part C reports of our anticipated discovery and investigation plan to develop information related to the defense of this matter.

A. Potential Liability Exposure

As is stated above, Plaintiff has an estimated $300 million claim loss of future earnings/loss of earning capacity claim. While this is a staggering figure, this office's discovery efforts will attack the notion that Plaintiff has an ongoing brain injury and the claim that Plaintiff's business failed as a result to any alleged brain injury.

On July 14, 2015, Plaintiff presented for an Independent Psychological Examination with Dr. Mark Mills (Forensic Psychiatrist). Dr. Mills administered the Minnesota Multiphasic Personality Inventory and the Personality Assessment Inventory Test. The personality tests reveal aggressiveness in Plaintiff's personality and symptoms of anger proneness. Dr. Mills found little to no psychological injury to Plaintiff and no symptoms of post-traumatic stress disorder. Dr. Mills notes that Dr. Loong's opinions are unreliable and has requested that the Defendant retain a neuropsychological evaluation to determine whether any cognitive impairment exists.

In addition, Plaintiff presented for an Independent Medical Examination with Dr. Michael Hutchinson (Neuroradiology). Dr. Hutchinson concluded that Plaintiff's neurological examination revealed that Plaintiff was entirely normal. He reviewed MRI's of the spine and brain and found them both to be without any evidence of injury. Dr. Hutchinson opines that Plaintiff "may have suffered a mild post-concussion syndrome" which he would expect would resolve within a few weeks. He states there is no explanation for any extended period of time in which Plaintiff would have difficulty concentrating, dealing with anxiety or prolonged headaches. He even went so far as to say that post-traumatic headaches resolve within two to three weeks of most cases, and "when there is no litigation, no one has a headache after twelve months". He then goes on to state that Dr. Lewis, the radiologist reviewing Plaintiff's MRI results, are completely incorrect and "represent not so much an attempt to blind with science, as an attempt to blind with pseudoscience." Dr. Hutchinson is forceful in his opinions that Dr. Lewis has no business providing opinions on whether Plaintiff suffered any type of cognitive injury as a result of the subject incident.

The testimony of Dr. Hutchinson, and to a lesser extent the testimony of Dr. Mills, is helpful in establishing that Plaintiff does not have an objective brain injury. However, as previously discussed, it is imperative that this office retain Dr. Stephen A. Sands (Neuropsychologist). This office has already provided you with Dr. Sands' CV, Fee Schedule and other related documents. However, we are still waiting for a retainer check to be issued in order to formally retain Dr. Sands in this matter and get an examination scheduled. Dr. Sands is expected to conduct an Independent Psychological Examination where he will objectively determine whether Plaintiff is suffering from any cognitive impairment. As this is the ultimate damages issue in the case, his testimony, if favorable, can significantly diminish Plaintiff's enormous wage loss claim.

B. Liability Evaluation

Plaintiff asserted the following four causes of action in this matter: (1) assault and battery, (2) negligence, (3) intentional infliction of emotional distress and (4) false imprisonment. As this office has previously addressed the elements to prove each of the above causes of action, the relative merits, will not be discussed here. However, this section will address some of the key factual issues relating to whether Marquee will be found liable in this case.

As a preliminary matter, this office is confident we will be able to prove Plaintiff was being aggressive, uncooperative, and even went so far as to physically strike General Manager Ramon Mata through a head-butt. While it will be helpful to the defense to show that Plaintiff is unlikeable, this is unlikely to absolve Marquee of a liability finding. As has been addressed previously, Marquee security's actions likely exposed it to some finding of liability.

First, Marquee has a strict "hands off" policy as it relates to the touching of any of its guests. Despite this policy, the video shows an unidentified security officer forcefully spinning Plaintiff around by grabbing both of his shoulders in an attempt to make Plaintiff listen to Mr. Mata.

Next, after Plaintiff head-butts Mr. Mata, the security officers involved took him out of a back door toward the pool area, which is not an official "Rally Point". Failing to take a guest to a "Rally Point" is a violation of established Marquee security policies. This is problematic because the section of the pool area where Plaintiff was escorted has no surveillance coverage. Accordingly, we cannot disprove Plaintiff's claims that he was violently thrown to the ground and that his head was forcefully shoved into the concrete. Furthermore, the short amount of video which was preserved shows Officer Melendez with his arm firmly wrapped around Plaintiff's neck as he is being escorted to the pool area. This is a clear violation of established Marquee security policy.

Further, the video clearly shows Plaintiff's head hitting a steel door as he is being taken to the pool area.

Lastly, large portions of the surveillance video were not preserved. Specifically, no video of Plaintiff's time in the club was preserved; no video of Plaintiff's extensive interactions with Shanna Crane, the cocktail server, was preserved; and neither was the majority of Plaintiff's interaction with Ramon Mata. In light of the above, this office is of the opinion that it is more likely than not that a jury will find Marquee committed one or more of the claims alleged against it. Further, this office is of the opinion that it is more likely than not that the jury will also apportion some percentage of fault to Plaintiff for his injuries in light of his behavior.

C. Discovery and Investigation Plan

Over the past eight months, this office has been working to obtain documents related to Plaintiff's financial damages claim. We have been stonewalled and ignored every step of the way. Recently, the Discovery Commissioner issued an Order requiring Plaintiff to provide the documentation we have requested in order to adequately investigation the lost wage claim. Given the extensive set-back and Plaintiff's failure to comply with discovery, this office will file a motion to extend discovery within the next week. We will advise you once continued discovery dates have been obtained. In the immediate future, this office will subpoena Anthion Management financial records from Morgan Stanley, whom we have been informed is in possession of those records. Once obtained, these records will be provided to our retained financial expert, Jay Rogers. It is expected this process will take somewhere between 30 – 60 days. As an aside, Mr. Rogers has significant experience in the financial field, but this office is somewhat concerned that Mr. Rogers has never had significant success in the hedge fund industry compared to Plaintiff. For this reason, we would like to explore the possibility of retaining Mr. Rogers strictly on a consultation basis and potentially retain a financial expert whose experience is more academic in nature. This would make it much more difficult for Plaintiff to call our financial expert's credentials into question.

Moving forward, Plaintiff has noticed four deposition for the next month. On December 4, 2015, Plaintiff has notice the deposition of David Long, former security director. David Long has yet to respond to this office's numerous attempts to contact him. Accordingly, this office has informed Plaintiff that it is his obligation to serve Mr. Long with his deposition notice as Marquee is unable to produce him. I will continue to reach out to Mr. Long with the hope of discussing the case with him and being able to prepare him for his deposition. However, there is no indication that he will be willing to do so. This is a significant concern as he has the potential to provide harmful testimony if he feels any animosity towards Marquee or, alternatively, if he simply goes into the deposition unprepared and provides contradictory testimony compared to other and current former Marquee employees. On December 8, 2015, Plaintiff noticed Mr. Abdalla's continued deposition as the 30(b)(6) witness for Marquee. Mr. Abdalla is expected to provide additional testimony regarding the policies and procedures for Marquee at the time of the subject incident. On December 9, 2015, Ramon Mata and Shanna Crane will be deposed. Mr. Mata and Ms. Crane will testify about their experience in dealing with the Plaintiff on the night of the subject incident.

Further, once we have been able to retain Dr. Sands, this office will begin working with Plaintiff's counsel to find a time for Dr. Sands to conduct his Independent Psychological Examination. If Plaintiff is not agreeable to the Independent Psychological Examination, this office will file a motion to compel Plaintiff to participate.

III. CONCLUSION

Although we will update you on any significant developments, please feel free to contact me, at your convenience with any questions or comments.

Sincerely,

MARTIN J. KRAVITZ, ESQ.
TYLER J. WATSON, ESQ.

MJK/TJW/JNT/ct

cc: Randy Conner Randy.Conner@cosmopolitanlasvegas.com
Kyle Hurley Kyle.Hurley@taogroup.com
John Ramirez John.Ramirez@taogroup.com

Exhibit F

From:	Tyler Watson
Sent time:	12/07/2015 10:31:02 AM
To:	edward.kotite@aspen-insurance.com; Green, Robin <Robin.Green@AIG.com>
Cc:	Janet_Roome@cohenins.com; John.Ramirez@taogroup.com
Subject:	RE: AIG #8798778786US; Claimant: David Moradi; Insured: The Restaurant Group
Attachments:	MORA 00008 - 00010 Marquee Incident Policies and Procedures.pdf MORA 00027 - 00030 Cosmopolitan Incident Report.pdf MORA 00048 - 00165 Aspen Policy Declarations.pdf

Robin, please see my responses below. Feel free to contact me with additional questions.

Good Afternoon,

I am the new AIG adjuster on the above referenced matter. Please send all future correspondence, updates and reports to my attention.

At this time, I am gathering information in order to further investigate and evaluate this claim.

Can you please provide me with the following information below:

1) More details of the Loss (How, When, Where, Why)?

   On April 8, 2012, Plaintiff was a guest at the Marquee Nightclub located inside the Cosmopolitan. The present lawsuit stems from a confrontation which occurred between Plaintiff and Marquee's security personnel when Mr. Moradi refused to present his credit card to his server for a second time in order to confirm his signature. The facts of this incident are disputed, but it is clear security, while escorting Plaintiff off the floor, push Plaintiff's head into a metal door frame. From the video, it does not appear intentional, but it does happen. Plaintiff alleges to have suffered significant injuries as a result of the incident. Plaintiff claims he "continues to suffer headaches, confusion, memory problems, difficulty concentrating, anxiety and emotional distress". Plaintiff alleges ongoing traumatic brain injury, memory loss, severe lack of concentration, feelings of violation and anxiety.

2) How is my named insured "The Restaurant Group" Involved in the Incident?

   Restaurant Group is the owner and operator of the Marquee nightclub.

3) Reports Filed by Police? OSHA? Any incident report? Report from a public health inspector?

   Attached hereto are Marquee Incident Report and the Cosmopolitan Incident Report. Bates MORA 00008 – 00010 and MORA 00027 – 00030.

4) Nature and Extent of the Injuries alleged

   As addressed above, Plaintiff claims he "continues to suffer headaches, confusion, memory problems, difficulty concentrating, anxiety and emotional distress". Plaintiff alleges ongoing traumatic brain injury, memory loss, severe lack of concentration, feelings of violation and anxiety.

5) Are punitive damages alleged? Yes.

6) Other Involved Parties? Reason or Participation?

   Plaintiff also named Nevada Property 1 (The Cosmopolitan) as a defendant, but it had no involvement in the incident and will likely be dismissed through summary judgment.

7) Have there been any Demand? Offers? No, but Plaintiff claimed he could prove $15-20 million of losses as early as 8/8/12

8) What are the damages alleged in this case for:

   Past/future medical costs: $35,817 alleged thus far.
   Past/future wage loss: Plaintiff alleges he can no longer work as a hedge fund manager as a result of his brain injury which has cost him in excess of $10 million per year for the rest of his working life. **<u>This is approximately a $300 million claim</u>**.

9) Please send me a complete copy of the primary policy. Attached hereto, Bates: MORA 00048 – 00165.

10) Have you issued any coverage position letters? If so, please send me a copy N/A

11) What is claimant's Date of birth/SS # for Medicare reporting? DOB: 01/01/1976; SSN: 543-29-9176

12) What is claimant's current condition? What was his course of treatment? Plaintiff has treated with numerous neurologists and neuropsychologists. These physicians have diagnosed him with TBI and amnesic disorder due to major neurocognitive disorder, ADD and organic personality disorder.

13) Upcoming scheduled trial, mediation, deposition dates?

Depositions currently scheduled: December 8, 2016, Continuation deposition of Todd Abdalla (Security PMK); December 9, 2015 Depositions of Ramon Mata and Shanna Crane (Security)
Jury Trial (5 week stack) June 27, 2016. These dates are likely to be moved back after a status check before the discovery commissioner on January 6, 2016.

Thank you,

Robin T. Green
AIG
Complex Director

Excess Casualty Claims | AIG Property Casualty

Mailing Address: P.O. Box 305904, Nashville, TN 37230-5904

Tel +1 212 458 1269 | Fax +1 866 576 2939

robin.green@aig.com | www.aig.com

Physical Address / Overnight Mail with AIG Claim Number to:
175 Water Street, 11th FL, New York, NY 10038

Exhibit G

Paul S. Padda, Esq. (NV Bar #10417)
Email: psp@paulpadda.com
PAUL PADDA LAW
4240 West Flamingo Road, Suite 220
Las Vegas, Nevada 89103
Tele: (702) 366-1888
Fax: (702) 366-1940

Rahul Ravipudi, Esq. (CA Bar #204519)
(Admitted *Pro Hac Vice*)
Email: ravipudi@psblaw.com
PANISH SHEA & BOYLE
11111 Santa Monica Blvd., Suite 700
Los Angeles, California 90025
Tele: (310) 477-1700
Fax: (310) 477-1699

Attorneys for the Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

DAVID MORADI, **Plaintiff,** **v.** **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 (20)**

PLAINTIFF'S OFFER OF JUDGMENT

Pursuant to Nevada Rule of Civil Procedure 68 and Nevada Revised Statute 17.115, Plaintiff David Moradi hereby offers to allow judgment to be entered in his favor against Defendant Roof Deck Entertainment, LLC in the amount of one million, five hundred thousand dollars ($1,500,000.00), inclusive of attorneys fees and costs, as full and complete satisfaction of any claims, damages, causes of action, lawsuits or losses Plaintiff claims to possess against Defendant, which arose out of the allegations set forth in Plaintiff's Complaint filed in this civil action.

The foregoing is offered in full and complete satisfaction of all claims which have been or could be asserted by Plaintiff herein and which arise out of or are related to the facts set forth in this civil action. This offer should not be construed as an admission of any kind. Pursuant to NRCP 68, this offer will be deemed rejected and withdrawn if not first accepted in writing within ten (10) days from the date of service.

PAUL PADDA LAW

Paul S. Padda, Esq.
4240 West Flamingo Road, Suite 220
Las Vegas, Nevada 89103
Tele: (702) 366-1888
Fax: (702) 366-1940

Counsel for Plaintiff

Dated: December 10, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 10, 2015, "PLAINTIFF'S OFFER OF JUDGMENT" was served through the Court's "Wiznet" electronic filing system to all counsel and parties of record in this matter.

Paul S. Padda

Exhibit H

28303.221

Law Offices

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

A Professional Corporation

Martin J. Kravitz
Gary E. Schnitzer
M. Bradley Johnson *
Gina M. Mushmeche ‡
Tyler J. Watson
Jordan P. Schnitzer **
Kristopher T. Zeppenfeld

8985 S. Eastern Avenue, Suite 200
Las Vegas, Nevada 89123

Telephone
(702) 362-6666

Facsimile
(702) 362-2203

¤ Christopher J. Halcrow
Wade J. Van Sickle
Matthew A. Walker

*Also Admitted in Texas
‡ Also Admitted in Louisiana and Mississippi
** Also Admitted in California
¤ Also Admitted in New York

ELECTRONICALLY SERVED
12/21/2015 11:12:14 AM

WRITER'S DIRECT DIAL: (702) 222-4183

EMAIL ADDRESS: tjwatson@ksjattorneys.com

December 18, 2015

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

Re: David Moradi v. Nevada Property 1, LLC
Case No.: A698824;

Dear Mr. Ravipudi:

I am in receipt of your Offer of Judgment. Please be advised it is our position that this offer is premature pursuant to *Beattie v. Thomas*, 99 Nev. 579 (1983). Specifically, the offer is unreasonable in its timing and amount. Your client has yet to produce evidence which would support a $1.5 million value on his claim. To date, he has merely disclosed medical specials totaling approximately $30,000.00. Plaintiff has provided no competent expert medical opinion or financial expert opinion which would establish he is entitled to any compensation for lost wages or loss of future earning capacity. As lost wages and/or loss of future earning capacity is the only possible, yet unsupported, basis for the offer, the offer is rejected.

While my client is certainly willing to engage in meaningful settlement discussions based upon evidence that has been produced, there is no current justification for the amount Plaintiff asserts. Therefore, we will vigorously oppose any attempts to utilize this Offer of Judgment in the future.

Sincerely,

TYLER J. WATSON, ESQ.

TJW/ct
cc: Paul Padda, Esq.

Exhibit I

PANISH
SHEA &
BOYLE
LLP

November 2, 2016

<u>VIA U.S. MAIL & E-MAIL</u>
CONFIDENTIAL SETTLEMENT COMMUNICATION

David Dial
D. Lee Roberts
Jeremy R. Alberts
Weinberg Wheeler Hudgins Gunn & Dial
6385 South Rainbow Boulevard, Suite 400
Las Vegas, NV 89118

Josh Aicklen
David Avakian
Paul Shpirt
Lewis Brisbois Bisgaard & Smith
6385 South Rainbow Boulevard, Suite 600
Las Vegas, NV 89118

Re: David Moradi v. Nevada Property 1, LLC, et al.
Case No. A-14-698824-C

Counsel:

This is a confidential settlement communication as contemplated under all applicable laws. Through discovery, we have been informed that the Defendants have two policies covering Mr. Moradi's claims: (1) $1 million Aspen; and (2) $25 million Chartis. I have been told that these are all of the policies covering Mr. Moradi's claims – i.e. that there is no additional coverage by way of another layer of insurance. Based upon these representations, Mr. Moradi is prepared to make yet another demand in this litigation within the insurance policy limits.

Mr. Moradi will accept the insurance policy limits of $26 million in exchange for the following: (1) a mutual release of any and all claims against all parties; (2) Mr. Moradi will dismiss his lawsuit with prejudice; (3) each party is to be responsible for their own attorneys' fees and costs; (4) Mr. Moradi will be responsible for resolving any medical liens. The purpose of this demand is to give one more opportunity resolve this disputed matter within the policy limits of your clients. With hundreds of millions at issue – not including the real punitive damage claims – I am sure your clients will be wanting to know of this opportunity to eliminate any personal exposure and will demanding the insurance companies to resolve this matter immediately. Should the demand not be accepted, it would appear that the insurance companies will be gambling in bad faith on the verdict at the expense of its insureds.

Please be advised and make sure to inform your clients that this will be the last demand made within the insurance policy limits. Should Mr. Moradi choose to make another settlement offer in this case, it will be for a number that will properly compensate him for his harms and losses which is greatly in excess of the policy limits.

This settlement offer will expire on the close of business in fourteen days, November 16, 2016, if it is not accepted in a writing transmitted to my office.

If you have any questions, please do not hesitate to call me. Thank you.

Very Truly Yours,

Rahul Ravipudi

RR

cc: All Counsel (Via E-Mail)

Exhibit J

From: Crystal Calloway <ccalloway@McGriff.com>
Sent time: 02/13/2017 10:20:11 AM
To: BSIclaims; First Report
Cc: Kerri Crosby <KCrosby@McGriff.com>; ClaimFileComAtl <Claimfilecomatl@McGriff.com>
Subject: E9A5329 xe96 [UNREGISTERED] FNOL of Lawsuit: Cosmopolitan/Nevada Property 1 (Insured) David Moradi (Clmt) DOL 4/8/12 062428-000037-01 [S]

Good Afternoon:

Insured: Cosmopolitan/Nevada Property 1
Policy Number: QK06503290

DOL: 4/8/12

When the lawsuit was served to the insured in 2014, it was immediately tendered to the Marquee's carrier, Aspen and they accepted service per the attached Reservations of Rights letter. They agreed to provide a defense for the Cosmopolitan and have continued to do so. Recently their attorneys have made the Cosmopolitan aware they believe this case could have an exposure of $1-3 BILLION dollars and thus, the request to NOTICE same to the Primary and Excess carriers now. The insured questions this value but wants the carriers involved given the recent comments. The Marquee's carrier has coverage up to $25M.

Please accept this as a first notice of loss. Please setup a new claim, acknowledge and process accordingly. If there are attachments to this email, please forward to the handling department/adjuster. Please provide a claim number and handling adjuster/ contact information. If this is a lawsuit, please contact the undersigned as well as the assigned Claims Account Executive:

Kerri G. Crosby - Vice President/ Commercial Claims Manager
Phone - 404-497-7576
kcrosby@mcgriff.com

Thanks,

Crystal P. Calloway | Claims Account Manager

McGRIFF, SEIBELS & WILLIAMS, INC. | 5605 Glenridge Drive, Suite 500 | Atlanta, GA 30342

T: 404.847.1637 | Email: ccalloway@mcgriff.com

Exhibit K

PANISH
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ELECTRONICALLY SERVED
03/09/2017 05:05:32 PM

March 9, 2017

VIA E-SERVICE

David Dial
D. Lee Roberts
Jeremy R. Alberts
Weinberg Wheeler Hudgins Gunn & Dial
6385 South Rainbow Boulevard, Suite 400
Las Vegas, NV 89118

Josh Aicklen
David Avakian
Paul Shpirt
Lewis Brisbois Bisgaard & Smith
6385 South Rainbow Boulevard, Suite 600
Las Vegas, NV 89118

Re: David Moradi v. Nevada Property 1, LLC, et al.
Case No. A-14-698824-C

Counsel:

Now that we are past all of the Motions in Limine and trial is about to commence, I am writing this Confidential settlement communication in an effort to give the Defendants, and their insureds, an opportunity to resolve this case prior to verdict.

Mr. Moradi hereby agrees to resolve his negligence cause of action in exchange for the first two layers of insurance totaling $26 million. Further, in accepting this settlement amount, Plaintiff will agree to: (1) an immediate dismissal of all other causes of action including the punitive damage claims; (2) execute a standard mutual release, which will include the release of any and all known or unknown claims between the parties, and which release would include a confidentiality provision; (3) will dismiss his lawsuit in its entirety with prejudice after payment of the settlement monies, which will occur within 45 days of this letter; (4) each party is to be responsible for their own attorneys' fees and costs; and (5) Mr. Moradi will be responsible for resolving any and all liens against Mr. Moradi.

This settlement offer will expire at 5 p.m. on March 17, 2017, and can be accepted by any forms of written communication.

From our perspective, the irrefutable evidence confirms that there was a negligent excessive use of force. This was authorized by and in the presence of a managing agent of the Defendants. By definition, assaulting, battering, and false imprisoning someone is oppressive, despicable and malicious, for which the Marquee will be responsible for punitive damages. It is undisputed amongst the parties that Mr. Moradi was injured. Indeed, all Defense experts confirm Mr. Moradi was injured. The issue is the nature and extent of the injury.

11111 Santa Monica Boulevard, Suite 700 • Los Angeles, California 90025 • 310.477.1700 phone • 310.477.1699 fax • www.psblaw.com

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All of Mr. Moradi's treating doctors and the credible experts have confirmed that he suffered a traumatic brain injury. The positive findings on multiple MRIs, functional MRI, and multiple neuropsychological testing all corroborate the opinions that Mr. Moradi's brain injury was a complicated moderate traumatic brain injury. The impact of the brain injury to Mr. Moradi resulted in a significant impairment in executive functioning and mental processes – functioning that is integral to being a hedge fund manager and running the type of fund Mr. Moradi ran. The evidence has borne out that Anthion failed as a result of the brain injury. The undisputed facts – Mr. Roger's repeatedly confirmed in three different days of deposition – that Mr. Moradi's brain injury diagnosis has created a permanent barrier for re-entry into the industry as a hedge fund manager and whether he could serve in a lesser capacity – e.g. an analyst – is speculative at best. Mr. Rogers agrees unequivocally that a ***conservative*** evaluation of Mr. Moradi's earning capacity pre-injury was $11 million per year with a retirement age of 67. The probability is that, but for the brain injury, Mr. Moradi's earnings and earning capacity would be much greater with a later retirement age. Be that as it may, the economic damages in this case by agreement of the experts is in excess of $150 million.

Here, with the actions of the managing agents and the willful destruction of video evidence, it is very likely that the jury will make a finding of oppression, despicable conduct and/or malice. This will obviously be the subject of another motion and sanction hearing, but it is clear the financial records are being withheld because they only bolster Plaintiffs' position and highlight the significant punitive exposure.

With the risk of a nine-figure verdict and punitive damages exposure, this demand is a fair and reasonable offer. I am sure that your clients greatly desire the limitations of their personal exposure among other things. Should the demand not be accepted, it would appear that the responsible insurers will be gambling in bad faith on the verdict at the expense of its insureds.

If you have any questions, please do not hesitate to call me. Thank you.

Very Truly Yours,

Rahul Ravipudi

RR
cc: All Counsel (Via E-service)

Exhibit L

AIG

AIG Claims, Inc.
P.O. Box 305904
Nashville, TN 37230-5904
www.aig.com

Robin T. Green
COMPLEX DIRECTOR
T (212) 458-1269
F (866) 576-2939
Robin.Green@aig.com

March 21, 2017

VIA CERTIFIED MAIL

Randy Conner
Director, Risk & Safety Management
The Cosmopolitan of Las Vegas
3708 Las Vegas Blvd. South
Las Vegas, NV 89109

Re: ***David Moradi v. Nevada Property 1, LLC d/b/a "The Cosmopolitan of Las Vegas", et al.***
District Court, Clark County, Nevada Case No. A-14-698824-C

Insured:	The Restaurant Group, et al.
Insurer:	National Union Fire Ins. Co. of Pittsburgh, PA
Policy No.:	BE25414413 (10/6/11-10/6/12)
AIG Claim No.:	8798778786US

Dear Mr. Conner:

AIG Claims, Inc. is the claims administrator for AIG member company National Union Fire Insurance Company of Pittsburgh, PA ("National Union") which issued Umbrella Prime Commercial Umbrella Liability Policy with CrisisResponse policy number BE25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al.

The purpose of this letter is to advise you of our position regarding insurance coverage as it relates to the action captioned *David Moradi v. Nevada Property 1, LLC d/b/a "The Cosmopolitan of Las Vegas", et al.*, filed in the District Court of the State of Nevada in and for the County of Clark, Case no. A-14-698824-C ("the Moradi Action"). For the reasons discussed more fully below, and based on the information in our possession, National Union has no present duty to defend or indemnify Nevada Property 1, LLC in the Moradi Action because the National Union policy has not attached given the scheduled underlying insurance and/or any other insurance has not exhausted. Nevertheless, National Union is continuing to investigate this matter and is exercising its right to defend Nevada Property 1, LLC in this matter pursuant to a reservation of rights. National Union has retained D. Lee Roberts of the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial, who can be reached at 6385 South Rainbow Blvd., Suite 400, Las Vegas, NV 89118; 702-938-3809, to assist in the defense of Nevada Property 1, LLC.

AIG

In considering your request for coverage, we have reviewed the National Union policy, as well as the allegations asserted. No other policies were considered. If you assert a right to coverage under another policy issued by any other member company of AIG, please submit notice pursuant to the notice provisions contained in that policy.

Based on the information we have received to date, the following sets forth a summary of the allegations and other pertinent information. Our summary in no way implies that National Union believes the allegations asserted in the above-referenced matter are true or deserve merit.

This matter arises out of an altercation involving David Moradi, a patron of the Marquee Nightclub located in The Cosmopolitan hotel in Las Vegas, Nevada, and employees of the nightclub and/or hotel that occurred on or about April 8, 2012, resulting in alleged injury to Mr. Moradi.

On April 4, 2014, Plaintiff David Moradi filed a complaint against Defendants Nevada Property 1, LLC dba The Cosmopolitan of Las Vegas and Roof Deck Entertainment, LLC dba Marquee Nightclub alleging causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment.

Plaintiff alleges that Defendant Nevada Property 1, LLC ("NP1") owns and operates The Cosmopolitan of Las Vegas ("Cosmopolitan"). Plaintiff further alleges that Defendant Roof Deck Entertainment, LLC ("Roof Deck") owns and operates the Marquee Nightclub ("Marquee"). Plaintiff alleges upon information and belief that the Cosmopolitan has an ownership/financial interest in the Marquee.

On or about April 8, 2012, Plaintiff alleges he went to Marquee to socialize with friends and was seated at table 53, a special table generally reserved for VIP guests. After being seated at the table, Plaintiff alleges he gave his American Express Centurion Card and identification to the cocktail waitress and then socialized with friends at table 53 for approximately three hours, ordering expensive champagne. Plaintiff alleges that the cocktail waitress was presumably impressed with the quality of champagne he ordered as she requested to be allowed to drink some to which Plaintiff acceded. Plaintiff alleges the waitress proceeded to drink several glasses of the champagne while continuing to serve his table.

After a few hours, Plaintiff alleges that he requested the bill so he could leave and return to his room at the Wynn hotel. Plaintiff alleges the waitress brought the bill, which was approximately $10,000, and that, after he signed the bill, the waitress returned his Amex card and identification to him. As he was about to leave, Plaintiff alleges he ordered an additional three drinks from the waitress for his friends at the table and gave the waitress three hundred dollars in cash to pay for the drinks, including an additional gratuity on top of what he paid with his Amex card. After the waitress returned to the table with the drinks for his friends, Plaintiff alleges the waitress's demeanor suddenly changed when he told her that he was leaving the nightclub. Plaintiff alleges the waitress became hostile and belligerent and demanded that Plaintiff give her is Amex card and identification again even though he had paid the bill in full and paid for the additional drinks in cash. Plaintiff alleges he asked the waitress why she needed his Amex card and identification again given he had paid the bill to which the waitress allegedly threatened that she would bring security to the table if Plaintiff did not comply with her demand. Plaintiff allegedly became concerned that the waitress was attempting to perpetrate a fraud on him and alleges that he informed her that he was going to leave.

Shortly thereafter, Plaintiff alleges two members of Marquee's security detail and a manager came to the table and demanded that Plaintiff provide them with his Amex card and identification. Plaintiff alleges that he explained he paid the bill in full and that they had no reason to demand his Amex card and identification a second time. He alleges the Marquee security or management never explained why they were requesting the Amex card and identification. When Plaintiff said he was leaving and began walking away from the table, he alleges the Marquee security members and manager followed him and when he tried to turn right to exit, the Marquee security members and manager physically stopped him and told him to turn left. Plaintiff alleges that he wanted to turn right but the Marquee security and manager continued to demand that he turn left. Plaintiff alleges the Marquee security forcefully grabbed him, shook him, and forcibly pushed him to the left against his will.

Plaintiff alleges he was forced out of an unknown exit of the Marquee into a room between the nightclub and pool which he believed to be a security room. Once in the room, Plaintiff alleges the Marquee security members threw him into a wall, head first, causing injuries to his head. After that, Plaintiff alleges the Marquee security members and manager picked him up and dragged him into the pool area against his will. He alleges the Marquee security members and manager shoved him to the ground causing his head to forcefully hit the concrete surface and the security members and manager repeatedly hit and smashed his head into the concrete and held his head and right eye against the concrete with a high degree of pressure. While still holding his head against the concrete, Plaintiff alleges the Marquee security staff and manager repeatedly asked him if he was going to cooperate and give them his identification. Plaintiff alleges he agreed in order to end the violent attack.

Plaintiff alleges he was highly disoriented when he was finally allowed to get up off the ground. He alleges that he explained to the security members and manager that he had paid his bill and did not deserve this treatment but the security members and manager kept asking for his identification. Plaintiff alleges that an unknown Marquee or Cosmopolitan employee came up to him with a flashlight and, upon seeing visible injuries to his head, asked him if he wanted to go to a hospital. Plaintiff alleges he was still highly disoriented and expressed his desire to leave fearing that he could be attacked again if he stayed. He alleges the Marquee security staff and manager continued to hold him against his will for another 15 to 20 minutes before he was finally escorted out of the property.

Upon returning to the Wynn, Plaintiff alleges the VIP host for the hotel became alarmed when he saw Plaintiff's condition and arranged for one of the Wynn's drivers to take Plaintiff to the Desert Springs hospital. At the hospital, Plaintiff alleges he underwent a CT scan and was diagnosed with a concussion. Plaintiff further alleges he suffered numerous injuries, including but not limited to, right eye and head swelling, right black eye, concussion, sore arms, sore knees, sore neck, difficulty walking, headaches, difficulty concentrating, confusion, disorientation, and anxiety. A few days later, Plaintiff alleges he sought treatment from a Las Vegas Neurosurgeon who diagnosed him with a traumatic brain injury. Plaintiff alleges that, he continues to suffer headaches, confusion, memory problems, difficulty concentrating, anxiety and emotional distress.

In the first cause of action for Assault and Battery, Plaintiff alleges he was willfully, maliciously, and without just cause or provocation assaulted and battered by security guards/employees and/or agents of the Marquee Nightclub whose conduct was allegedly ratified, encouraged and countenanced by Cosmopolitan's employees/agents. Specifically, Plaintiff alleges he was grabbed, shaken, shoved against a wall where he hit his head, forced to the ground where his head, face, and eye were smashed into the concrete numerous times, and he was held forcefully against the ground. As a result of these acts, Plaintiff was allegedly diagnosed with a traumatic brain injury. As a direct and proximate result of the assault and battery, Plaintiff alleges physical, emotional, and financial injuries, including pain and suffering and the cost incurred for medical treatment for his physical injuries. In addition to compensatory and special damages, Plaintiff seeks to recover punitive damages in an amount deemed appropriate to punish Defendants for their malicious, wrongful and egregious conduct.

In the second cause of action for Negligence, Plaintiff alleges Defendants had a duty to maintain their premises in a reasonably safe condition for the general

AIG

public, including the duty to ensure that cocktail waitresses do not become inebriated and instigate false disputes with patrons, that security personnel act in a reasonable manner in the performance of their duties and that security personnel receive proper training in carrying out those duties. Plaintiff alleges Defendants breached their duty to him and the attack and injuries resulting therefrom were caused solely and proximately by the negligence of Defendants without any contributory negligence on the part of Plaintiff. Plaintiff further alleges Defendants' negligence consisted of gross misconduct and/or negligence by personnel acting on behalf of Defendants resulting in significant injuries to Plaintiff. Plaintiff alleges the gross misconduct and/or negligence of Defendants' personnel constituted a dangerous condition and that Defendants had, or should have had, actual knowledge and notice of said dangerous condition.

As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff alleges that he suffered physical injuries including, but not limited to, traumatic brain injury, head pain, neck pain, arm pain, knee pain, headaches, bruising, swelling, confusion and anxiety, which have caused him to suffer extreme physical pain and suffering and severe emotional distress resulting in damages in excess of $10,000. Plaintiff further alleges that he has engaged the services of physicians and medical treatment providers incurring damages in a sum currently unascertainable but well in excess of $10,000, which will continue to accrue as future medical treatments are necessary. Plaintiff also allegedly suffered lost wages/income and future lost wages/income. He also alleges entitlement to an award of attorneys' fees and costs of suit. Additionally, Plaintiff alleges the acts, conduct and behavior of Defendants were performed knowingly and intentionally, oppressively and maliciously and seeks punitive damages from each Defendant.

In the third cause of action for Intentional Infliction of Emotional Distress, Plaintiff alleges the acts, conduct and behavior of Defendants 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, and physical pain and anxiety. As a direct and proximate result of the acts alleged in the complaint, Plaintiff alleges he engaged the services of physicians and medical treatment providers and other persons to care and treat him, as well as present and future lost wages/income. Plaintiff also seeks punitive damages in a sum in excess of $10,000.

In the fourth cause of action for False Imprisonment, Plaintiff alleges that he was lawfully on the property owned by Defendants and during this time he was physically abused by Marquee personnel and/or employees of Cosmopolitan who refused to allow Plaintiff to leave but, on the contrary, without any probable or reasonable cause therefore, unlawfully detained Plaintiff by forcing him into a room and pool area, then refusing to let him go. Plaintiff alleges he was subjected to great indignities, humiliation and disgrace in being assaulted, imprisoned, restrained against his will, battered, and detained. As a result of said conduct, Plaintiff alleges that third parties were thereby made aware that Plaintiff was being intentionally restrained. As a direct and proximate result of Defendants' actions, Plaintiff alleges injury in an amount in excess of $10,000. In addition, Plaintiff alleges Defendants' actions were done willfully, with malice and oppression and with conscious disregard for Plaintiff's rights entitling him to recover punitive damages in an amount deemed appropriate to punish Defendants for their wrongful and egregious conduct.

In his prayer for relief, Plaintiff requests compensatory and pecuniary damages in an amount in excess of $10,000, punitive damages in an amount in excess of $10,000, prejudgment interest as allowed by statute, attorneys' fees and costs of suit, and such other and further relief as the Court may deem just and proper.

As discussed above, National Union issued Umbrella Prime Commercial Umbrella Liability Policy With CrisisResponse policy number BE 25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. ("National Union Policy"). The National Union Policy provides for limits of $25,000,000 each occurrence, $25,000,000 products-completed operations aggregate and $25,000,000 general aggregate. The policy also contains a $10,000 each occurrence self-insured retention.

Attached to this letter as Exhibit A are the relevant policy provisions of the National Union Policy and attached to this letter as Exhibit B are the relevant policy provisions of the Aspen Specialty Insurance Company ("Aspen") policy which have been incorporated into the National Union Policy (except as otherwise provided by the National Union Policy). Kindly refer to the policies for the complete terms and conditions. National Union reserves the right to rely upon the terms and provisions of the National Union Policy and Aspen policy that are not attached to this letter in support of its coverage position.

As a preliminary matter, please note that the National Union Policy only provides coverage for those entities named as an insured and/or who otherwise qualify as an insured. The National Union Policy was issued to named insured, The Restaurant Group, et al. NP1 is not specifically named as an insured under the National Union Policy. Coverage is only available to NP1 to the extent it qualifies as an insured under the National Union Policy.

Please note Section VII. Definitions, Paragraph R., as amended by the Broad Form Named Insured Amendatory Endorsement (Endorsement No. 15), provides as follows:

Named Insured means:

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

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

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

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

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

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

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

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

In addition, pursuant to Section VII. Definitions, Paragraph M. Insured provides, in part, as follows:

M. Insured means:

1. the Named Insured;

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. . .

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

Notwithstanding any of the above:

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

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

The Schedule of Underlying Insurance to the National Union Policy identifies a commercial general liability policy issued by Aspen, effective October 6, 2011 to October 6, 2012, with limits of $1,000,000 each occurrence, $2,000,000 general aggregate, $2,000,000 per location aggregate, and $2,000,000 products/completed operations aggregate ("Aspen Policy"). The Aspen Policy contains an Additional Named Insured Endorsement which amends the Named Insured to include Roof Deck.

In addition, we note the Aspen Policy contains an Additional Insured – Managers or Lessors of Premises endorsement which amends Section II - Who Is An Insured to include as an insured "the person or organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions: . . . 1. Any 'occurrence' which takes place after you cease to be a tenant in that premises. 2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule." The Schedule to the endorsement identifies the premises leased "as required by written contract signed by both parties prior to a loss." The Aspen Policy defines the term "you" as the Named Insured in the Declarations, and any other person or organization qualifying as a Named Insured under the policy. As noted above, Roof Deck appears to have been added as a Named Insured to the Aspen Policy pursuant to endorsement.

We understand Roof Deck entered into a Nightclub Management Agreement ("Agreement"), effective April 21, 2010, with Nevada Restaurant Venture 1, LLC, to manage and operate the nightclub venues on the premises identified in the Agreement. NP1 is identified as the owner of the real property identified in the Agreement. Section 12.2.3 of the Agreement provides that NP1 shall be named as an additional insured on Roof Deck's policies, with the exception of workers compensation and employment practices liability insurance. To the extent NP1 does not qualify as an insured under the National Union Policy pursuant to any of the above provisions, there would be no coverage available to NP1 under the National Union Policy. National Union reserves all rights in that regard.

Please be advised that the National Union Policy is excess over all scheduled underlying insurance and other insurance. As discussed in detail below, the National Union Policy requires that all of the applicable limits of insurance of the underlying policies listed in the Schedule of Underlying Insurance to the National Union Policy and all of the applicable limits of insurance of any other insurance available to Roof Deck be exhausted before any defense or indemnity obligation attaches under the National Union Policy. To the extent there are multiple occurrences with regard to this matter, the applicable aggregate limits of each of the underlying and other insurance policies must each be exhausted before the National Union Policy would attach. National Union reserves all rights in that regard.

Please note that, pursuant to Section I. Insuring Agreement – Commercial Umbrella Liability, the National Union Policy only provides coverage for "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages . . .. The amount we will pay for damages is limited as described in Section IV. Limits of Insurance." Pursuant to Section VII. Definitions, Retained Limit means "the total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance providing coverage to the Insured; or the Self-Insured Retention applicable to each Occurrence that results in damages not covered by Scheduled Underlying Insurance nor any applicable Other Insurance providing coverage to the Insured." Scheduled Underlying Insurance means "the policy or policies of insurance and limits of insurance shown in the Schedule of Underlying Insurance forming a part of this policy; and automatically any renewal or replacement of any policy in Paragraph 1. above, provided that such renewal or replacement provides equivalent coverage to and affords limits of insurance equal to or greater than the policy being renewed or replaced. Scheduled Underlying Insurance does not include a policy of insurance specifically purchased to be excess of this policy affording coverage that this policy also affords." Section VII. Definitions defines Other Insurance as "a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy. However, Other Insurance does not include Scheduled Underlying Insurance, the Self-Insured Retention or any policy of insurance specifically purchased to be excess of this policy affording coverage that this policy also affords."

As noted above, the Schedule of Underlying Insurance to the National Union Policy identifies the Aspen Policy. The Schedule of Underlying Insurance also provides that defense costs are in addition to the Aspen policy limit and do not erode the policy limits or aggregates. Any renewal of same would also constitute Scheduled Underlying Insurance. Further, pursuant to Section VII. Definitions, Self-Insured Retention means "the amount that is shown in Item 5. of the Declarations." Item 5. of the Declarations lists the Self-Insured Retention amount as $10,000 each occurrence.

In addition, pursuant to Section IV. Limits of Insurance, paragraph F., the National Union Policy applies only in excess of the Retained Limit. If, however, a policy shown in the Schedule of Underlying Insurance has a limit of insurance: (1) greater than the amount shown in such schedule, the National Union Policy will apply in excess of the greater amount of valid and collectible insurance; or (2) less than the amount shown in such schedule, the National Union Policy will apply in excess of the amount shown in the Schedule of Underlying Insurance. Section IV. Limits of Insurance, paragraph G. provides that, if the total applicable limits of Scheduled Underlying Insurance are reduced or exhausted by the payment of Loss to which the National Union Policy applies and the total applicable limits of applicable Other Insurance are reduced or exhausted, National Union will, in the event of reduction, pay excess of the remaining total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance and, in the event of exhaustion, continue in force as underlying insurance.

Further, Section IV. Limits of Insurance, paragraph H. provides that expenses incurred to defend any Suit or to investigate any claim will be in addition to the applicable Limits of Insurance of the National Union Policy. Provided, however, that if such expenses reduce the applicable limits of Scheduled Underlying Insurance, then such expenses will reduce the applicable Limits of Insurance of this policy. Finally, Section IV. Limits of Insurance, paragraph M. provides that National Union will not make any payment under the National Union Policy unless and until the total applicable limits of Scheduled Underlying Insurance have been exhausted by the payment of Loss to which the National Union Policy

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applies and any applicable Other Insurance have been exhausted by the payment of Loss, or the total applicable Self-Insured Retention has been satisfied by the payment of Loss to which the Policy applies. Pursuant to Section VII. Definitions, Loss means "those sums actually paid as judgments or settlements, provided, however, that if expenses incurred to defend a Suit or to investigate a claim reduce the applicable limits of Scheduled Underlying Insurance, then Loss shall include such expenses."

We understand that all applicable Scheduled Underlying Insurance, including the Aspen Policy and any renewals, and all Other Insurance, as defined by the National Union Policy, has not exhausted by payment of claims or loss to which the National Union Policy applies and therefore coverage under the National Union Policy has not yet attached.

Please also be advised that, pursuant to Section III. Defense Provisions, paragraph A., National Union has the right and duty to defend any Suit against the Insured seeking damages for covered Bodily Injury or Personal Injury and Advertising Injury only after the total applicable limits of Scheduled Underlying Insurance have been exhausted by payment of Loss to which the National Union Policy applies and the total applicable limits of Other Insurance have been exhausted; or the damages sought because of Bodily Injury or Personal Injury and Advertising Injury would not be covered by Scheduled Underlying Insurance or any applicable Other Insurance, even if the total applicable limits of either the Scheduled Underlying Insurance or any applicable Other Insurance had not been exhausted by the payment of Loss. National Union has no duty to defend the Insured against any Suit seeking damages with respect to which the National Union Policy does not apply. Notwithstanding the above, also pursuant to Section III. Defense Provisions, paragraph D., National Union has the right, but not the duty, to participate in the defense of any Suit and the investigation of any claim to which the National Union Policy may apply. Please be advised that, although National Union has no present duty to defend NP1 because the National Union Policy has not attached given the Scheduled Underlying Insurance and applicable Other Insurance have not exhausted, National Union is exercising its right to participate in the defense of NP1 in this matter subject to a reservation of rights, and has retained the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial to defend NP1.

Please be advised that if the National Union Policy were to attach in this matter, coverage may be limited and/or precluded and/or excluded pursuant to the terms, conditions, exclusions, limitations and/or endorsements to the National Union Policy and/or the Aspen Policy as discussed in detail below.

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The National Union Policy only provides coverage for "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 . . . or Personal Injury and Advertising Injury to which this insurance applies or because of Bodily Injury . . . to which this insurance applies assumed by the Insured under an Insured Contract." With regard to bodily injury coverage, the bodily injury must be caused by an Occurrence and the bodily injury must occur during the policy period. As respects bodily injury, the National Union Policy defines Occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one Occurrence."

In his claims for assault and battery, intentional infliction of emotional distress, and false imprisonment, Plaintiff alleges intentional, willful and malicious conduct by Defendants. Accordingly, to the extent that any of the claims asserted in this matter (a) do not constitute damages because of bodily injury; (b) do not constitute bodily injury (as defined by the National Union Policy); (c) involve bodily injury which did not take place during the policy period; and/or (d) involve bodily injury which was not caused by an occurrence (as defined by the National Union Policy), coverage for such claims would be precluded. Coverage may also be precluded to the extent that, prior to the policy period, any insured or employee of an insured knew that bodily injury had occurred in whole or in part.

With regard to personal injury and advertising injury coverage, the personal injury and advertising injury must be caused by an Occurrence arising out of your business, but only if the Occurrence was committed during the policy period. The National Union Policy defines Personal Injury and Advertising Injury as "injury arising out of your business, including consequential Bodily Injury, arising out of one or more of the following offenses: 1. false arrest, detention or imprisonment; . . .". As respects Personal Injury and Advertising Injury, the National Union Policy defines Occurrence as "an offense arising out of your business that causes Personal Injury and Advertising Injury. All damages that arise from the same, related or repeated injurious material or act will be deemed to arise out of one Occurrence, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants."

As noted above, Plaintiff has asserted a claim for false imprisonment against Defendants alleging he was physically abused by Marquee personnel and/or employees of The Cosmopolitan who refused to allow him to leave and unlawfully detained him. Accordingly, to the extent that any of the claims asserted in this matter (a) do not constitute damages because of personal injury and advertising injury; (b) do not constitute personal injury and advertising injury (as defined by the National Union Policy); (c) involve personal injury and advertising injury, if any, which did not arise out of your business; (d) involve personal injury and advertising injury, if any, which was not caused by an occurrence (as defined by the National Union Policy); and/or (e) involve personal injury and advertising injury, if any, caused by an occurrence which was not committed during the policy period, coverage for such claims would be precluded.

The National Union Policy contains a Commercial General Liability Limitation Endorsement (Endorsement No. 10) which excludes coverage for commercial general liability. However, if insurance for commercial general liability is provided by a policy listed in Scheduled Underlying Insurance, this exclusion will not apply and coverage under the National Union Policy will follow the terms, definitions, conditions and exclusions of Scheduled Underlying Insurance, subject to the policy period, limits of insurance, premium and all other terms, definitions, conditions and exclusions of the National Union Policy. Provided, however, that coverage provided by the National Union Policy will be no broader than the coverage provided by Scheduled Underlying Insurance. As noted above, the Schedule of Underlying Insurance identifies the Aspen Policy. Accordingly, coverage under the National Union Policy will follow the terms, definitions, conditions and exclusions of the Aspen Policy, subject to the policy period, limits of insurance, premium and all other terms, definitions, conditions and exclusions of the National Union Policy. Further, the coverage provided by the National Union Policy will be no broader than the coverage provided by the Aspen Policy.

The Aspen Policy contains a Limitation of Coverage to Designated Premises or Project which provides that the policy applies only to bodily injury or personal and advertising injury and medical expenses arising out of the ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or the project shown in the Schedule. The Schedule to the endorsement identifies various premises, including "Marquee Las Vegas – 3708 Las Vegas Blvd South, Las Vegas, NV 89109 (inside The Cosmopolitan of Las Vegas)". To the extent the premises identified in Plaintiff's complaint is not the premise shown in the Schedule to the Limitation of Coverage to Designated Premises or Project endorsement, coverage would be precluded.

Please be advised that Exclusion K. to the National Union Policy and Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion a. to the Aspen Policy exclude coverage for bodily injury expected or intended from the standpoint of the Insured. However, the exclusion does not apply to bodily injury resulting from the use of reasonable force to protect persons or property. Here, Plaintiff has asserted a claim against NP1 for assault and battery alleging he was willfully, maliciously, and without just cause or provocation assaulted and battered by security guards, employees and/or agents of the Marquee Nightclub and that such conduct was ratified, encouraged and countenanced by Cosmopolitan's employees/agents. Plaintiff also asserts a claim for intentional infliction of emotional distress alleging Defendants' acts, conduct and behavior were performed intentionally and recklessly, and Defendants' actions were extreme and outrageous causing Plaintiff to suffer severe emotional distress. Additionally, in his claim for false imprisonment, Plaintiff alleges that he was physically abused by Marquee personnel and/or employees of Cosmopolitan who refused to allow him to leave and unlawfully detained him by forcing him into a room and pool area and refused to let him go. To the extent the alleged damages in this matter were expected or intended from the standpoint of the Insured, coverage for the same would be excluded.

Exclusion C. to the National Union Policy and Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion b. to the Aspen Policy are substantially the same and exclude coverage for any liability for which the Insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. However, such exclusion does not apply to liability for damages that the Insured would have in the absence of a contract or agreement or assumed in an Insured Contract as defined in the National Union Policy and more fully described in Exclusion C., provided the Bodily Injury occurs subsequent to the execution of the Insured Contract. Solely for the purposes of liability assumed in an Insured Contract, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" and included in the Limits of Insurance of the National Union Policy, provided liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. Accordingly, to the extent there are any claims in this matter for liability for which NP1 is obligated to pay damages by reason of the assumption of liability in a contract or agreement, coverage would be excluded, except to the extent NP1 would have liability for damages in the absence of the contract or agreement or liability for damages was assumed by NP1 in a contract or agreement that is an insured contract as defined by the National Union Policy and/or Aspen Policy. National Union reserves all rights in this regard.

The Aspen Policy also contains a Contractual Liability – Amendments endorsement which excludes coverage for any claim for damages resulting from the sole negligence of the indemnitee arising out of any liability assumed under any "insured contract" as defined by the Aspen Policy. Accordingly, to the extent any claim for damages results from the sole negligence of an indemnitee arising out of any liability assumed under any insured contract, no coverage would be available for such claim.

Exclusion M. in the National Union Policy (as deleted and replaced by Endorsement No. 17 to the National Union Policy) provides in pertinent part as follows:

> This insurance does not apply to Bodily Injury or Property Damage for which any Insured may be held liable by reason of:
>
> 1. causing or contributing to the intoxication of any person;
>
> 2. the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> 3. any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.
>
> However, if insurance for such Bodily Injury or Property Damage is provided by a policy listed in the Scheduled Underlying Insurance:
>
> 1. This exclusion shall not apply; and
>
> 2. Coverage under this policy for such Bodily Injury or Property Damage will follow the terms, definitions, conditions and exclusions of Scheduled Underlying Insurance, subject to the Policy Period, Limits of Insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by Scheduled Underlying Insurance.

To the extent any Insured under the National Union Policy may be held liable for the damages by reason of causing or contributing to the intoxication of any person; the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages, coverage for such claims may be limited and/or excluded and/or precluded pursuant to Exclusion M. unless coverage for such claims is provided by a policy listed in the Scheduled Underlying Insurance and, in such case, coverage under the Policy for such claims will follow the terms, definitions, conditions and exclusions of the Scheduled Underlying Insurance with the exceptions discussed above and as set forth in greater detail in Exclusion M. National Union reserves all rights in this regard.

Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion o. to the Aspen Policy excludes coverage for bodily injury arising out of "personal and advertising injury". The Aspen Policy defines "personal and advertising injury" as "injury, including consequential 'bodily injury', arising out of one or more of the following offenses: . . . false arrest, detention or imprisonment . . .". Plaintiff asserts a claim for false imprisonment against NP1. Therefore, to the extent any bodily injury arose out of "personal and advertising injury" as defined by the Aspen Policy, coverage for the same would be excluded.

Please be advised that Exclusion U.1. of the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion a. of the Aspen Policy exclude coverage for personal injury and advertising injury caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict personal injury and advertising injury. In his claim for false imprisonment, Plaintiff alleges he was physically abused by Marquee personnel and/or employees of The Cosmopolitan who refused to allow him to leave and unlawfully detained him without any probable or reasonable cause by forcing him into a room and pool area, then refusing to let him leave. Plaintiff alleges Defendants' actions were done willfully, with malice and oppression and with conscious disregard for Plaintiff's rights. Accordingly, to the extent alleged personal injury was caused by or at the direction of the insured with knowledge that the act would violate the rights of Plaintiff and would inflict personal injury, coverage for the same would be excluded.

Exclusion U.4. in the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion d. in the Aspen Policy exclude coverage for personal injury and advertising injury arising out of a criminal act committed by or at the direction of the insured. As noted above, Plaintiff asserts claims for assault and battery and false imprisonment. Accordingly, to the extent any personal injury arose out of a criminal act committed by or at the direction of the insured, coverage for the same would be excluded.

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Exclusion U.5. in the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion e. in the Aspen Policy exclude coverage for personal injury and advertising injury for which the insured has assumed liability in a contract or agreement. However, the exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement. Accordingly, to the extent there are any claims in this matter for liability for personal injury and advertising injury for which NP1 is obligated to pay damages by reason of the assumption of liability in a contract or agreement, that NP1 would not have in the absence of the contract or agreement, no coverage would be available for such claims.

The National Union Policy contains a Professional Liability Exclusion Endorsement which excludes coverage for any liability arising out of any act, error, omission, malpractice or mistake of a professional nature committed by the Insured or any person for whom the Insured is legally responsible. This exclusion applies even if the claims against any Insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that Insured. Therefore, to the extent that any claimed damages arise out of any act, error, omission, malpractice or mistake of a professional nature committed by the Insured or any person for whom the Insured is legally responsible, coverage for same would be excluded, even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured.

The Aspen Policy contains an Exclusion – Designated Professional Services endorsement which provides that, with respect to any professional services shown in the Schedule, this insurance does not apply to bodily injury or personal and advertising injury due to the rendering of or failure to render any professional service. The Description of Professional Services identified in the Schedule to the endorsement identifies "all professional services". Therefore, to the extent any of the claimed damages are due to the rendering of or failure to render any professional service, coverage would be excluded.

Further, please be advised that to the extent any of the damages alleged in this matter are preventative in nature or constitute economic loss, there may be no coverage for such damages under the National Union Policy. In addition, it appears that Plaintiff is seeking punitive damages. Please be advised that such damages may not be covered by the National Union Policy because they are not caused by an occurrence as defined by the National Union Policy and applicable law, and/or pursuant to the Expected or Intended Injury Exclusion (Exclusion K. to the National Union Policy and Exclusion a. to the Aspen Policy), and/or public policy and/or applicable law.

Finally, it appears that the claims do not involve, and NP1 is not seeking coverage for damages for property damage under the National Union Policy and, accordingly, this correspondence only addresses issues pertinent to coverage for bodily injury and personal injury and advertising injury under the National Union Policy. If our understanding in that regard is inaccurate, please let us know and we will supplement this correspondence with regard to property damage coverage.

Please be advised that all actions to date have been, and any further action taken by National Union with respect to this matter shall be, under a full and complete reservation of rights, including, but not limited to, paying reasonable and necessary fees and costs subject to any deductible, self-insured retention, or other funding arrangement required under the National Union Policy and/or set forth herein and/or pursuant to applicable law, the right to decline coverage, the right to join in and/or withdraw from the defense of this matter, the right to seek reimbursement and/or apportionment of any and all defense fees and costs paid and/or indemnity payments made, if any, if appropriate pursuant to the language of any and all applicable policies, applicable exclusions and endorsements, as well as applicable law, the right to dispute any and all fees and costs incurred to the extent such fees and costs are not reasonable and necessary in terms of amount and need, the right to seek reimbursement for any attorneys' fees and costs incurred with regard to claims and/or causes of action and/or damages which are not covered in any coverage action or otherwise if appropriate pursuant to the language of the National Union Policy, applicable exclusions and endorsements, and applicable law, the right to disclaim coverage in its entirety, the right to seek a judicial determination of its rights and duties, the right to investigate this matter further, and the right to add to, delete from and/or modify the position at a later date.

National Union's coverage position is based on the information presently available to us. This letter is not, and should not be construed as, a waiver of any terms, conditions, exclusions or other provisions of the National Union Policy, or any other policies of insurance issued by National Union or any of its affiliates. National Union expressly reserves all of its rights under the National Union Policy, including the right to assert additional defenses to any claims for coverage, if subsequent information indicates that such action is warranted.

Should you have any additional information that you feel would either cause us to review our position or would assist us in our investigation or determination, we ask that you advise us as soon as possible. Also, if NP1 is served with any additional demands or amended complaints or pleadings, please forward them to us immediately, so that we can review our coverage position. Please continue to keep us advised of the status, claims, defenses and all pertinent events with respect to this matter. If NP1 wishes to have its own personal counsel become involved in this matter, at its own expense, please feel free to do so, and we will cooperate fully with such counsel.

If NP1 has any other insurance policies which may respond to this claim, you should notify that carrier immediately.

Thank you for your cooperation in this matter. If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,
/s/ Robin T. Green
Robin T. Green
AIG Claims, Inc.

Enclosures: Exhibit A and Exhibit B

Exhibit M

AIG

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March 21, 2017

VIA CERTIFIED MAIL & EMAIL
John.Ramirez@taogroup.com
John R. Ramirez
Tao Group Risk & Safety Manager
Roof Deck Entertainment, LLC
The Restaurant Group, et al.
1350 Avenue of the Americas
Suite 710
New York, NY 10019

Re: ***David Moradi v. Nevada Property 1, LLC d/b/a "The Cosmopolitan of Las Vegas", et al.***
District Court, Clark County, Nevada Case No. A-14-698824-C

Insured:	The Restaurant Group, et al.
Insurer:	National Union Fire Ins. Co. of Pittsburgh, PA
Policy No.:	BE25414413 (10/6/11-10/6/12)
AIG Claim No.:	8798778786US

Dear Mr. Ramirez:

AIG Claims, Inc. is the authorized claims administrator for AIG member company National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). National Union issued Umbrella Prime Commercial Umbrella Liability Policy with CrisisResponse policy number BE25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. I am the adjuster handling this claim on behalf of National Union and all correspondence, information, and documentation should be directed to my attention.

The purpose of this letter is to advise you of our position regarding insurance coverage as it relates to the action captioned *David Moradi v. Nevada Property 1, LLC d/b/a "The Cosmopolitan of Las Vegas", et al.*, filed in the District Court of the State of Nevada in and for the County of Clark, Case no. A-14-698824-C ("the Moradi Action"). For the reasons discussed more fully below, and based on the information in our possession, National Union has no present duty to defend or indemnify Roof Deck Entertainment, LLC ("Roof Deck") in the Moradi Action because the National Union policy has not attached given the scheduled underlying insurance and/or any other insurance has not exhausted. Nevertheless, National Union is continuing to investigate this matter and is exercising its right to defend Roof Deck in this matter pursuant to a reservation of rights. National Union has retained D. Lee Roberts of the law firm of

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Weinberg, Wheeler, Hudgins, Gunn & Dial, who can be reached at 6385 South Rainbow Blvd., Suite 400, Las Vegas, NV 89118; 702-938-3809, to defend Roof Deck.

We would like you to know that we appreciate and value you as a customer and are committed to working closely with you with regard to this matter. In considering your request for coverage, we have reviewed the National Union policy, as well as the allegations asserted. No other policies were considered. If you assert a right to coverage under another policy issued by any other member company of AIG, please submit notice pursuant to the notice provisions contained in that policy.

Based on the information we have received to date, the following sets forth a summary of the allegations and other pertinent information. Our summary in no way implies that National Union believes the allegations asserted in the above-referenced matter are true or deserve merit.

This matter arises out of an altercation involving David Moradi, a patron of the Marquee Nightclub located in The Cosmopolitan hotel in Las Vegas, Nevada, and employees of the nightclub and/or hotel that occurred on or about April 8, 2012, resulting in alleged injury to Mr. Moradi.

On April 4, 2014, Plaintiff David Moradi filed a complaint against Defendants Nevada Property 1, LLC dba The Cosmopolitan of Las Vegas and Roof Deck alleging causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment.

Plaintiff alleges that Defendant Nevada Property 1, LLC ("NP1") owns and operates The Cosmopolitan of Las Vegas ("Cosmopolitan"). Plaintiff further alleges that Defendant Roof Deck owns and operates the Marquee Nightclub ("Marquee"). Plaintiff alleges upon information and belief that the Cosmopolitan has an ownership/financial interest in the Marquee.

On or about April 8, 2012, Plaintiff alleges he went to Marquee to socialize with friends and was seated at table 53, a special table generally reserved for VIP guests. After being seated at the table, Plaintiff alleges he gave his American Express Centurion Card and identification to the cocktail waitress and then socialized with friends at table 53 for approximately three hours, ordering expensive champagne. Plaintiff alleges that the cocktail waitress was presumably impressed with the quality of champagne he ordered as she requested to be allowed to drink some to which Plaintiff acceded. Plaintiff alleges the waitress proceeded to drink several glasses of the champagne while continuing to serve his table. After a few hours, Plaintiff alleges that he requested the bill so he could leave and return to his room at the Wynn hotel. Plaintiff alleges the waitress brought the bill, which was approximately $10,000, and that, after he signed the bill, the waitress returned his Amex card and identification to him. As he was about to leave, Plaintiff alleges he ordered an additional three drinks from the waitress for his friends at the table and gave the waitress three hundred dollars in cash to pay for the drinks, including an additional gratuity on top of what he paid with his Amex card. After the waitress returned to the table with the drinks for his friends, Plaintiff alleges the waitress's demeanor suddenly changed when he said that he was leaving the nightclub. Plaintiff alleges the waitress became hostile and belligerent and demanded that Plaintiff give her his Amex card and identification again even though he had paid the bill in full and paid for the additional drinks in cash. Plaintiff alleges he asked the waitress why she needed his Amex card and identification again given he had paid the bill to which the waitress allegedly threatened that she would bring security to the table if Plaintiff did not comply with her demand. Plaintiff allegedly became concerned that the waitress was attempting to perpetrate a fraud on him and alleges that he informed her that he was going to leave.

Shortly thereafter, Plaintiff alleges two members of Marquee's security detail and a manager came to the table and demanded that Plaintiff provide them with his Amex card and identification. Plaintiff alleges that he explained he paid the bill in full and that they had no reason to demand his Amex card and identification a second time. He alleges the Marquee security or management never explained why they were requesting the Amex card and identification. When Plaintiff said he was leaving and began walking away from the table, he alleges the Marquee security members and manager followed him and when he tried to turn right to exit, the Marquee security members and manager physically stopped him and told him to turn left. Plaintiff alleges that he wanted to turn right but the Marquee security and manager continued to demand that he turn left. Plaintiff alleges the Marquee security forcefully grabbed him, shook him, and forcibly pushed him to the left against his will.

Plaintiff alleges he was forced out of an unknown exit of the Marquee into a room between the nightclub and pool which he believed to be a security room. Once in the room, Plaintiff alleges the Marquee security members threw him into a wall, head first, causing injuries to his head. After that, Plaintiff alleges the Marquee security members and manager picked him up and dragged him into the pool area against his will. He alleges the Marquee security members and manager shoved him to the ground causing his head to forcefully hit the concrete surface and the security members and manager repeatedly hit and smashed his head into the concrete and held his head and right eye against the concrete with a high degree of pressure. While still holding his head against the concrete,

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Plaintiff alleges the Marquee security staff and manager repeatedly asked him if he was going to cooperate and give them his identification. Plaintiff alleges he agreed in order to end the violent attack.

Plaintiff alleges he was highly disoriented when he was finally allowed to get up off the ground. He alleges that he explained to the security members and manager that he had paid his bill and did not deserve this treatment but the security members and manager kept asking for his identification. Plaintiff alleges that an unknown Marquee or Cosmopolitan employee came up to him with a flashlight and, upon seeing visible injuries to his head, asked him if he wanted to go to a hospital. Plaintiff alleges he was still highly disoriented and expressed his desire to leave fearing that he could be attacked again if he stayed. He alleges the Marquee security staff and manager continued to hold him against his will for another 15 to 20 minutes before he was finally escorted out of the property.

Upon returning to the Wynn, Plaintiff alleges the VIP host for the hotel became alarmed when he saw Plaintiff's condition and arranged for one of the Wynn's drivers to take Plaintiff to the Desert Springs hospital. At the hospital, Plaintiff alleges he underwent a CT scan and was diagnosed with a concussion. Plaintiff further alleges he suffered numerous injuries, including but not limited to, right eye and head swelling, right black eye, concussion, sore arms, sore knees, sore neck, difficulty walking, headaches, difficulty concentrating, confusion, disorientation, and anxiety. A few days later, Plaintiff alleges he sought treatment from a Las Vegas Neurosurgeon who diagnosed him with a traumatic brain injury. Plaintiff alleges that, he continues to suffer headaches, confusion, memory problems, difficulty concentrating, anxiety and emotional distress.

In the first cause of action for Assault and Battery, Plaintiff alleges he was willfully, maliciously, and without just cause or provocation assaulted and battered by security guards/employees and/or agents of the Marquee Nightclub whose conduct was allegedly ratified, encouraged and countenanced by Cosmopolitan's employees/agents. Specifically, Plaintiff alleges he was grabbed, shaken, shoved against a wall where he hit his head, forced to the ground where his head, face, and eye were smashed into the concrete numerous times, and he was held forcefully against the ground. As a result of these acts, Plaintiff was allegedly diagnosed with a traumatic brain injury. As a direct and proximate result of the assault and battery, Plaintiff alleges physical, emotional, and financial injuries, including pain and suffering and the cost incurred for medical treatment for his physical injuries. In addition to compensatory and special damages, Plaintiff seeks to recover punitive damages in an amount deemed appropriate to punish Defendants for their malicious, wrongful and egregious conduct.

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In the second cause of action for Negligence, Plaintiff alleges Defendants had a duty to maintain their premises in a reasonably safe condition for the general public, including the duty to ensure that cocktail waitresses do not become inebriated and instigate false disputes with patrons, that security personnel act in a reasonable manner in the performance of their duties and that security personnel receive proper training in carrying out those duties. Plaintiff alleges Defendants breached their duty to him and the attack and injuries resulting therefrom were caused solely and proximately by the negligence of Defendants without any contributory negligence on the part of Plaintiff. Plaintiff further alleges Defendants' negligence consisted of gross misconduct and/or negligence by personnel acting on behalf of Defendants resulting in significant injuries to Plaintiff. Plaintiff alleges the gross misconduct and/or negligence of Defendants' personnel constituted a dangerous condition and that Defendants had, or should have had, actual knowledge and notice of said dangerous condition.

As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff alleges that he suffered physical injuries including, but not limited to, traumatic brain injury, head pain, neck pain, arm pain, knee pain, headaches, bruising, swelling, confusion and anxiety, which have caused him to suffer extreme physical pain and suffering and severe emotional distress resulting in damages in excess of $10,000. Plaintiff further alleges that he has engaged the services of physicians and medical treatment providers incurring damages in a sum currently unascertainable but well in excess of $10,000, which will continue to accrue as future medical treatments are necessary. Plaintiff also allegedly suffered lost wages/income and future lost wages/income. He also alleges entitlement to an award of attorneys' fees and costs of suit. Additionally, Plaintiff alleges the acts, conduct and behavior of Defendants were performed knowingly and intentionally, oppressively and maliciously and seeks punitive damages from each Defendant.

In the third cause of action for Intentional Infliction of Emotional Distress, Plaintiff alleges the acts, conduct and behavior of Defendants 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, and physical pain and anxiety. As a direct and proximate result of the acts alleged in the complaint, Plaintiff alleges he engaged the services of physicians and medical treatment providers and other persons to care and treat him, as well as present and future lost wages/income. Plaintiff also seeks punitive damages in a sum in excess of $10,000.

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In the fourth cause of action for False Imprisonment, Plaintiff alleges that he was lawfully on the property owned by Defendants and during this time he was physically abused by Marquee personnel and/or employees of Cosmopolitan who refused to allow Plaintiff to leave but, on the contrary, without any probable or reasonable cause therefore, unlawfully detained Plaintiff by forcing him into a room and pool area, then refusing to let him go. Plaintiff alleges he was subjected to great indignities, humiliation and disgrace in being assaulted, imprisoned, restrained against his will, battered, and detained. As a result of said conduct, Plaintiff alleges that third parties were thereby made aware that Plaintiff was being intentionally restrained. As a direct and proximate result of Defendants' actions, Plaintiff alleges injury in an amount in excess of $10,000. In addition, Plaintiff alleges Defendants' actions were done willfully, with malice and oppression and with conscious disregard for Plaintiff's rights entitling him to recover punitive damages in an amount deemed appropriate to punish Defendants for their wrongful and egregious conduct.

In his prayer for relief, Plaintiff requests compensatory and pecuniary damages in an amount in excess of $10,000, punitive damages in an amount in excess of $10,000, prejudgment interest as allowed by statute, attorneys' fees and costs of suit, and such other and further relief as the Court may deem just and proper.

As discussed above, National Union issued Umbrella Prime Commercial Umbrella Liability Policy With CrisisResponse policy number BE 25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. ("National Union Policy"). The National Union Policy provides for limits of $25,000,000 each occurrence, $25,000,000 products-completed operations aggregate and $25,000,000 general aggregate. The policy also contains a $10,000 each occurrence self-insured retention.

Attached to this letter as Exhibit A are the relevant policy provisions of the National Union Policy and attached to this letter as Exhibit B are the relevant policy provisions of the Aspen Specialty Insurance Company ("Aspen") policy which have been incorporated into the National Union Policy (except as otherwise provided by the National Union Policy). Kindly refer to the policies for the complete terms and conditions. National Union reserves the right to rely upon the terms and provisions of the National Union Policy and Aspen policy that are not attached to this letter in support of its coverage position.

As a preliminary matter, please note that the National Union Policy only provides coverage for those entities named as an insured and/or who otherwise qualify as an insured. The National Union Policy was issued to named insured, The Restaurant Group, et al. Roof Deck is not specifically named as an insured

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under the National Union Policy. Coverage is only available to Roof Deck to the extent it qualifies as an insured under the National Union Policy.

Please note Section VII. Definitions, Paragraph R., as amended by the Broad Form Named Insured Amendatory Endorsement (Endorsement No. 15), provides as follows:

> Named Insured means:
>
> The person or organization first named as the Named Insured on the Declarations Page of this policy (the "First Named Insured"). Named Insured also includes:
>
> 1. any other person or organization named as a Named Insured on the Declarations Page;
>
> 2. any subsidiary or acquired company or corporation (including subsidiaries thereof) and any other legal entities (including joint ventures, limited liability companies and partnerships) in which:
>
>   a. any Insured named as the Named Insured on the Declarations Page has more than 50% ownership in; or
>
>   b. any Named Insured or its subsidiaries have entered into a contract or agreement to place insurance for each such entity; or
>
>   c. any Named Insured or its subsidiaries exercise management or financial control.
>
> The insurance afforded under this endorsement shall not be subject to any requirement of Section VII. Paragraph M. that the partnership, joint venture, or limited liability company be shown as a Named Insured in Item 1. of the Declarations.
>
> Notwithstanding any of the above, no person or organization is an Insured under this policy who is not an Insured under applicable Scheduled Underlying Insurance.

In addition, pursuant to Section VII. Definitions, Paragraph M. Insured provides, in part, as follows:

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M. Insured means:

1. the Named Insured;

...

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

Notwithstanding any of the above:

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

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

The Schedule of Underlying Insurance to the National Union Policy identifies a commercial general liability policy issued by Aspen, effective October 6, 2011 to October 6, 2012, with limits of $1,000,000 each occurrence, $2,000,000 general aggregate, $2,000,000 per location aggregate, and $2,000,000 products/completed operations aggregate ("Aspen Policy"). The Aspen Policy contains an Additional Named Insured Endorsement which amends the Named Insured to include Roof Deck. To the extent Roof Deck does not qualify as an insured under the National Union Policy pursuant to any of the above provisions, there would be no coverage available to Roof Deck under the National Union Policy. National Union reserves all rights in that regard.

Please be advised that the National Union Policy is excess over all scheduled underlying insurance and other insurance. As discussed in detail below, the National Union Policy requires that all of the applicable limits of insurance of the underlying policies listed in the Schedule of Underlying Insurance to the National Union Policy and all of the applicable limits of insurance of any other insurance available to Roof Deck be exhausted before any defense or indemnity

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obligation attaches under the National Union Policy. To the extent there are multiple occurrences with regard to this matter, the applicable aggregate limits of each of the underlying and other insurance policies must each be exhausted before the National Union Policy would attach. National Union reserves all rights in that regard.

Please note that, pursuant to Section I. Insuring Agreement – Commercial Umbrella Liability, the National Union Policy only provides coverage for "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages . . .. The amount we will pay for damages is limited as described in Section IV. Limits of Insurance." Pursuant to Section VII. Definitions, Retained Limit means "the total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance providing coverage to the Insured; or the Self-Insured Retention applicable to each Occurrence that results in damages not covered by Scheduled Underlying Insurance nor any applicable Other Insurance providing coverage to the Insured." Scheduled Underlying Insurance means "the policy or policies of insurance and limits of insurance shown in the Schedule of Underlying Insurance forming a part of this policy; and automatically any renewal or replacement of any policy in Paragraph 1. above, provided that such renewal or replacement provides equivalent coverage to and affords limits of insurance equal to or greater than the policy being renewed or replaced. Scheduled Underlying Insurance does not include a policy of insurance specifically purchased to be excess of this policy affording coverage that this policy also affords." Section VII. Definitions defines Other Insurance as "a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy. However, Other Insurance does not include Scheduled Underlying Insurance, the Self-Insured Retention or any policy of insurance specifically purchased to be excess of this policy affording coverage that this policy also affords."

As noted above, the Schedule of Underlying Insurance to the National Union Policy identifies the Aspen Policy. The Schedule of Underlying Insurance also provides that defense costs are in addition to the Aspen policy limit and do not erode the policy limits or aggregates. Any renewal of same would also constitute Scheduled Underlying Insurance. Further, pursuant to Section VII. Definitions, Self-Insured Retention means "the amount that is shown in Item 5. of the Declarations." Item 5. of the Declarations lists the Self-Insured Retention amount as $10,000 each occurrence.

In addition, pursuant to Section IV. Limits of Insurance, paragraph F., the National Union Policy applies only in excess of the Retained Limit. If, however, a policy shown in the Schedule of Underlying Insurance has a limit of insurance: (1) greater than the amount shown in such schedule, the National Union Policy

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will apply in excess of the greater amount of valid and collectible insurance; or (2) less than the amount shown in such schedule, the National Union Policy will apply in excess of the amount shown in the Schedule of Underlying Insurance. Section IV. Limits of Insurance, paragraph G. provides that, if the total applicable limits of Scheduled Underlying Insurance are reduced or exhausted by the payment of Loss to which the National Union Policy applies and the total applicable limits of applicable Other Insurance are reduced or exhausted, National Union will, in the event of reduction, pay excess of the remaining total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance and, in the event of exhaustion, continue in force as underlying insurance.

Further, Section IV. Limits of Insurance, paragraph H. provides that expenses incurred to defend any Suit or to investigate any claim will be in addition to the applicable Limits of Insurance of the National Union Policy. Provided, however, that if such expenses reduce the applicable limits of Scheduled Underlying Insurance, then such expenses will reduce the applicable Limits of Insurance of this policy. Finally, Section IV. Limits of Insurance, paragraph M. provides that National Union will not make any payment under the National Union Policy unless and until the total applicable limits of Scheduled Underlying Insurance have been exhausted by the payment of Loss to which the National Union Policy applies and any applicable Other Insurance have been exhausted by the payment of Loss, or the total applicable Self-Insured Retention has been satisfied by the payment of Loss to which the Policy applies. Pursuant to Section VII. Definitions, Loss means "those sums actually paid as judgments or settlements, provided, however, that if expenses incurred to defend a Suit or to investigate a claim reduce the applicable limits of Scheduled Underlying Insurance, then Loss shall include such expenses."

We understand that all applicable Scheduled Underlying Insurance, including the Aspen Policy and any renewals, and all Other Insurance, as defined by the National Union Policy, has not exhausted by payment of claims or loss to which the National Union Policy applies and therefore coverage under the National Union Policy has not yet attached.

Please also be advised that, pursuant to Section III. Defense Provisions, paragraph A., National Union has the right and duty to defend any Suit against the Insured seeking damages for covered Bodily Injury or Personal Injury and Advertising Injury only after the total applicable limits of Scheduled Underlying Insurance have been exhausted by payment of Loss to which the National Union Policy applies and the total applicable limits of Other Insurance have been exhausted; or the damages sought because of Bodily Injury or Personal Injury and Advertising Injury would not be covered by Scheduled Underlying

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Insurance or any applicable Other Insurance, even if the total applicable limits of either the Scheduled Underlying Insurance or any applicable Other Insurance had not been exhausted by the payment of Loss. National Union has no duty to defend the Insured against any Suit seeking damages with respect to which the National Union Policy does not apply. Notwithstanding the above, also pursuant to Section III. Defense Provisions, paragraph D., National Union has the right, but not the duty, to participate in the defense of any Suit and the investigation of any claim to which the National Union Policy may apply. Please be advised that, although National Union has no present duty to defend Roof Deck because the National Union Policy has not attached given the Scheduled Underlying Insurance and applicable Other Insurance have not exhausted, National Union is exercising its right to participate in the defense of Roof Deck in this matter subject to a reservation of rights, and has retained the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial to defend Roof Deck.

Please be advised that if the National Union Policy were to attach in this matter, coverage may be limited and/or precluded and/or excluded pursuant to the terms, conditions, exclusions, limitations and/or endorsements to the National Union Policy and/or the Aspen Policy as discussed in detail below.

The National Union Policy only provides coverage for "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 . . . or Personal Injury and Advertising Injury to which this insurance applies or because of Bodily Injury . . . to which this insurance applies assumed by the Insured under an Insured Contract." With regard to bodily injury coverage, the bodily injury must be caused by an Occurrence and the bodily injury must occur during the policy period. As respects bodily injury, the National Union Policy defines Occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one Occurrence."

In his claims for assault and battery, intentional infliction of emotional distress, and false imprisonment, Plaintiff alleges intentional, willful and malicious conduct by Defendants. Accordingly, to the extent that any of the claims asserted in this matter (a) do not constitute damages because of bodily injury; (b) do not constitute bodily injury (as defined by the National Union Policy); (c) involve bodily injury which did not take place during the policy period; and/or (d) involve bodily injury which was not caused by an occurrence (as defined by the National Union Policy), coverage for such claims would be precluded. Coverage may also be precluded to the extent that, prior to the policy period, any insured or employee of an insured knew that bodily injury had occurred in whole or in part.

With regard to personal injury and advertising injury coverage, the personal injury and advertising injury must be caused by an Occurrence arising out of your business, but only if the Occurrence was committed during the policy period. The National Union Policy defines Personal Injury and Advertising Injury as "injury arising out of your business, including consequential Bodily Injury, arising out of one or more of the following offenses: 1. false arrest, detention or imprisonment; . . .". As respects Personal Injury and Advertising Injury, the National Union Policy defines Occurrence as "an offense arising out of your business that causes Personal Injury and Advertising Injury. All damages that arise from the same, related or repeated injurious material or act will be deemed to arise out of one Occurrence, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants."

As noted above, Plaintiff has asserted a claim for false imprisonment against Defendants alleging he was physically abused by Marquee personnel and/or employees of The Cosmopolitan who refused to allow him to leave and unlawfully detained him. Accordingly, to the extent that any of the claims asserted in this matter (a) do not constitute damages because of personal injury and advertising injury; (b) do not constitute personal injury and advertising injury (as defined by the National Union Policy); (c) involve personal injury and advertising injury, if any, which did not arise out of your business; (d) involve personal injury and advertising injury, if any, which was not caused by an occurrence (as defined by the National Union Policy); and/or (e) involve personal injury and advertising injury, if any, caused by an occurrence which was not committed during the policy period, coverage for such claims would be precluded.

The National Union Policy contains a Commercial General Liability Limitation Endorsement (Endorsement No. 10) which excludes coverage for commercial general liability. However, if insurance for commercial general liability is provided by a policy listed in Scheduled Underlying Insurance, this exclusion will not apply and coverage under the National Union Policy will follow the terms, definitions, conditions and exclusions of Scheduled Underlying Insurance, subject to the policy period, limits of insurance, premium and all other terms, definitions, conditions and exclusions of the National Union Policy. Provided, however, that coverage provided by the National Union Policy will be no broader than the coverage provided by Scheduled Underlying Insurance. As noted above, the Schedule of Underlying Insurance identifies the Aspen Policy. Accordingly, coverage under the National Union Policy will follow the terms,

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definitions, conditions and exclusions of the Aspen Policy, subject to the policy period, limits of insurance, premium and all other terms, definitions, conditions and exclusions of the National Union Policy. Further, the coverage provided by the National Union Policy will be no broader than the coverage provided by the Aspen Policy.

The Aspen Policy contains a Limitation of Coverage to Designated Premises or Project which provides that the policy applies only to bodily injury or personal and advertising injury and medical expenses arising out of the ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or the project shown in the Schedule. The Schedule to the endorsement identifies various premises, including "Marquee Las Vegas – 3708 Las Vegas Blvd South, Las Vegas, NV 89109 (inside The Cosmopolitan of Las Vegas)". To the extent the premises identified in Plaintiff's complaint is not the premise shown in the Schedule to the Limitation of Coverage to Designated Premises or Project endorsement, coverage would be precluded.

Please be advised that Exclusion K. to the National Union Policy and Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion a. to the Aspen Policy exclude coverage for bodily injury expected or intended from the standpoint of the Insured. However, the exclusion does not apply to bodily injury resulting from the use of reasonable force to protect persons or property. Here, Plaintiff has asserted a claim against Roof Deck for assault and battery alleging he was willfully, maliciously, and without just cause or provocation assaulted and battered by security guards, employees and/or agents of the Marquee Nightclub. Plaintiff also asserts a claim for intentional infliction of emotional distress alleging Defendants' acts, conduct and behavior were performed intentionally and recklessly, and Defendants' actions were extreme and outrageous causing Plaintiff to suffer severe emotional distress. Additionally, in his claim for false imprisonment, Plaintiff alleges that he was physically abused by Marquee personnel and/or employees of Cosmopolitan who refused to allow him to leave and unlawfully detained him by forcing him into a room and pool area and refused to let him go. To the extent the alleged damages in this matter were expected or intended from the standpoint of the Insured, coverage for the same would be excluded.

Exclusion C. to the National Union Policy and Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion b. to the Aspen Policy are substantially the same and exclude coverage for any liability for which the Insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. However, such exclusion does not apply to liability for damages that the Insured would have in the absence of a contract or

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agreement or assumed in an Insured Contract as defined in the National Union Policy and more fully described in Exclusion C., provided the Bodily Injury occurs subsequent to the execution of the Insured Contract. Solely for the purposes of liability assumed in an Insured Contract, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" and included in the Limits of Insurance of the National Union Policy, provided liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. Accordingly, to the extent there are any claims in this matter for liability for which Roof Deck is obligated to pay damages by reason of the assumption of liability in a contract or agreement, coverage would be excluded, except to the extent Roof Deck would have liability for damages in the absence of the contract or agreement or liability for damages was assumed by Roof Deck in a contract or agreement that is an insured contract as defined by the National Union Policy and/or Aspen Policy. National Union reserves all rights in this regard.

The Aspen Policy also contains a Contractual Liability – Amendments endorsement which excludes coverage for any claim for damages resulting from the sole negligence of the indemnitee arising out of any liability assumed under any "insured contract" as defined by the Aspen Policy. Accordingly, to the extent any claim for damages results from the sole negligence of an indemnitee arising out of any liability assumed under any insured contract, no coverage would be available for such claim.

Exclusion M. in the National Union Policy (as deleted and replaced by Endorsement No. 17 to the National Union Policy) provides in pertinent part as follows:

> This insurance does not apply to Bodily Injury or Property Damage for which any Insured may be held liable by reason of:
>
> 1. causing or contributing to the intoxication of any person;
>
> 2. the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> 3. any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

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

1. This exclusion shall not apply; and

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

To the extent any Insured under the National Union Policy may be held liable for the damages by reason of causing or contributing to the intoxication of any person; the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages, coverage for such claims may be limited and/or excluded and/or precluded pursuant to Exclusion M. unless coverage for such claims is provided by a policy listed in the Scheduled Underlying Insurance and, in such case, coverage under the Policy for such claims will follow the terms, definitions, conditions and exclusions of the Scheduled Underlying Insurance with the exceptions discussed above and as set forth in greater detail in Exclusion M. National Union reserves all rights in this regard.

Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion o. to the Aspen Policy excludes coverage for bodily injury arising out of "personal and advertising injury". The Aspen Policy defines "personal and advertising injury" as "injury, including consequential 'bodily injury', arising out of one or more of the following offenses: . . . false arrest, detention or imprisonment . . .". Plaintiff asserts a claim for false imprisonment against Roof Deck. Therefore, to the extent any bodily injury arose out of "personal and advertising injury" as defined by the Aspen Policy, coverage for the same would be excluded.

Please be advised that Exclusion U.1. of the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion a. of the Aspen Policy exclude coverage for personal injury and advertising injury caused by or at the direction of the insured with the knowledge that the act

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would violate the rights of another and would inflict personal injury and advertising injury. In his claim for false imprisonment, Plaintiff alleges he was physically abused by Marquee personnel and/or employees of The Cosmopolitan who refused to allow him to leave and unlawfully detained him without any probable or reasonable cause by forcing him into a room and pool area, then refusing to let him leave. Plaintiff alleges Defendants' actions were done willfully, with malice and oppression and with conscious disregard for Plaintiff's rights. Accordingly, to the extent alleged personal injury was caused by or at the direction of the insured with knowledge that the act would violate the rights of Plaintiff and would inflict personal injury, coverage for the same would be excluded.

Exclusion U.4. in the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion d. in the Aspen Policy exclude coverage for personal injury and advertising injury arising out of a criminal act committed by or at the direction of the insured. As noted above, Plaintiff asserts claims for assault and battery and false imprisonment. Accordingly, to the extent any personal injury arose out of a criminal act committed by or at the direction of the insured, coverage for the same would be excluded.

Exclusion U.5. in the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion e. in the Aspen Policy exclude coverage for personal injury and advertising injury for which the insured has assumed liability in a contract or agreement. However, the exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement. Accordingly, to the extent there are any claims in this matter for liability for personal injury and advertising injury for which Roof Deck is obligated to pay damages by reason of the assumption of liability in a contract or agreement, that Roof Deck would not have in the absence of the contract or agreement, no coverage would be available for such claims.

The National Union Policy contains a Professional Liability Exclusion Endorsement which excludes coverage for any liability arising out of any act, error, omission, malpractice or mistake of a professional nature committed by the Insured or any person for whom the Insured is legally responsible. This exclusion applies even if the claims against any Insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that Insured. Therefore, to the extent that any claimed damages arise out of any act, error, omission, malpractice or mistake of a professional nature committed by the Insured or any person for whom the Insured is legally responsible, coverage for same would be excluded, even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured.

The Aspen Policy contains an Exclusion – Designated Professional Services endorsement which provides that, with respect to any professional services shown in the Schedule, this insurance does not apply to bodily injury or personal and advertising injury due to the rendering of or failure to render any professional service. The Description of Professional Services identified in the Schedule to the endorsement identifies "all professional services". Therefore, to the extent any of the claimed damages are due to the rendering of or failure to render any professional service, coverage would be excluded.

Further, please be advised that to the extent any of the damages alleged in this matter are preventative in nature or constitute economic loss, there may be no coverage for such damages under the National Union Policy. In addition, it appears that Plaintiff is seeking punitive damages. Please be advised that such damages may not be covered by the National Union Policy because they are not caused by an occurrence as defined by the National Union Policy and applicable law, and/or pursuant to the Expected or Intended Injury Exclusion (Exclusion K. to the National Union Policy and Exclusion a. to the Aspen Policy), and/or public policy and/or applicable law.

Finally, it appears that the claims do not involve, and Roof Deck is not seeking coverage for damages for property damage under the National Union Policy and, accordingly, this correspondence only addresses issues pertinent to coverage for bodily injury and personal injury and advertising injury under the National Union Policy. If our understanding in that regard is inaccurate, please let us know and we will supplement this correspondence with regard to property damage coverage.

Please be advised that all actions to date have been, and any further action taken by National Union with respect to this matter shall be, under a full and complete reservation of rights, including, but not limited to, paying reasonable and necessary fees and costs subject to any deductible, self-insured retention, or other funding arrangement required under the National Union Policy and/or set forth herein and/or pursuant to applicable law, the right to decline coverage, the right to join in and/or withdraw from the defense of this matter, the right to seek reimbursement and/or apportionment of any and all defense fees and costs paid and/or indemnity payments made, if any, if appropriate pursuant to the language of any and all applicable policies, applicable exclusions and endorsements, as well as applicable law, the right to dispute any and all fees and costs incurred to the extent such fees and costs are not reasonable and necessary in terms of amount and need, the right to seek reimbursement for any attorneys' fees and

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costs incurred with regard to claims and/or causes of action and/or damages which are not covered in any coverage action or otherwise if appropriate pursuant to the language of the National Union Policy, applicable exclusions and endorsements, and applicable law, the right to disclaim coverage in its entirety, the right to seek a judicial determination of its rights and duties, the right to investigate this matter further, and the right to add to, delete from and/or modify the position at a later date.

National Union's coverage position is based on the information presently available to us. This letter is not, and should not be construed as, a waiver of any terms, conditions, exclusions or other provisions of the National Union Policy, or any other policies of insurance issued by National Union or any of its affiliates. National Union expressly reserves all of its rights under the National Union Policy, including the right to assert additional defenses to any claims for coverage, if subsequent information indicates that such action is warranted.

Should you have any additional information that you feel would either cause us to review our position or would assist us in our investigation or determination, we ask that you advise us as soon as possible. Also, if Roof Deck is served with any additional demands or amended complaints or pleadings, please forward them to us immediately, so that we can review our coverage position. Please continue to keep us advised of the status, claims, defenses and all pertinent events with respect to this matter. If Roof Deck wishes to have its own personal counsel become involved in this matter, at its own expense, please feel free to do so, and we will cooperate fully with such counsel.

If Roof Deck has any other insurance policies which may respond to this claim, you should notify that carrier immediately.

Thank you for your cooperation in this matter.

Very truly yours,
/s/Robin T. Green
Robin T. Green
Complex Director
AIG Claims, Inc.

Enclosures: Exhibit A and Exhibit B

Cc: janet_roome@cohenins.com
Janet Roome
Elias B. Cohen & Associates