IN THE SUPREME COURT OF THE STATE OF NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY Appellant, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, D/B/A MARQUEE NIGHTCLUB, Respondents.	Supreme Court No: 81344 District Court Case No: A758902

APPENDIX TO APPELLANT'S OPENING BRIEF
VOLUME XIII of XVI

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78	Transcript 2019-10-08	XIV	AA002753-AA002776
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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 XIII 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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Exhibit N

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ROOF DECK ENTERTAINMENT, LLC
d/b/a "Marquee Nightclub"

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 I through X, inclusive; ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-14-698824-C
Dept. No. XX

DEFENDANTS NEVADA PROPERTY 1, LLC d/b/a "THE COSMOPOLITAN OF LAS VEGAS," AND ROOF DECK ENTERTAINMENT, LLC d/b/a "MARQUEE NIGHTCLUB'S" TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141

COMES NOW, Defendants NEVADA PROPERTY 1, LLC d/b/a "The Cosmopolitan of Las Vegas," ("COSMOPOLITAN"), ROOF DECK ENTERTAINMENT, LLC d/b/a "Marquee Nightclub," ("MARQUEE") (hereby collectively known as "DEFENDANTS"), by and through their attorneys of record, Josh Cole Aicklen, Esq. David B. Avakian, Esq.,

LEWIS BRISBOIS

and Paul A. Shpirt, Esq., of the law firm of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and submit the following Trial Brief, pursuant to EDCR 7.27.

DATED this 15th day of March, 2017.

Respectfully Submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises out of an alleged physical altercation at the MARQUEE nightclub located in the COSMOPOLITAN between DAVID MORADI ("Plaintiff") and MARQUEE'S security officers. Plaintiff was a guest at MARQUEE during the early morning hours of April 8, 2012. At the end of the evening, Plaintiff was asked to produce his ID to compare his signature to that on his American Express Black card. He refused. MARQUEE security along with the club's general manager requested that Plaintiff step away from his table to discuss this matter. Plaintiff, instead, chose to try to leave. He was re-directed by the club security in the area where General Manager Ramon Mata was waiting for him to discuss his signature requirements.

Plaintiff was discussing this requirement for approximately 8-9 seconds, when he became belligerent and verbally abusive, and head-butted Mr. Mata. Consequently, MARQUEE staff restrained Plaintiff and escorted him to the outside area of the club.

II. LEGAL ARGUMENT

A. EDCR 7.27 Allows Filing of Civil Trial Briefs

EDCR 7.27 governs the ability of parties to file trial briefs with the Court in civil cases on any topic which affects the trial:

> Filing of civil trial memoranda. Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memoranda of points and authorities at any time prior to the close of trial. The original trial memoranda of points and authorities must be filed and a copy of the memoranda must be served upon opposing counsel at the time of or before submission of the memoranda to the court.

See, EDCR 7.27

Here, because NRS 41.141 directly affects Plaintiff's remedies, the Court should rule on this Trial Brief before the jury is brought in for *Voir Dire* and Plaintiff begins addressing the case.

///

B. The Express Terms of NRS 41.141 Provide that each Defendant Is *Severally Liable* to the Plaintiff only for that Portion of the Judgment Which Represents the Percentage of Negligence Attributable to that Defendant.

Under the traditional doctrine of joint and several liability, courts allowed plaintiffs to seek the entirety of their damages from a single tortfeasor. Humphries v. Eighth Judicial Dist. Court of State, 312 P.3d 484, 487 (Nev. 2013).

However, the Nevada Legislature supplanted the traditional, common-law functioning of joint and several liability by enacting NRS 41.141, which helps prevent plaintiffs, whether residents or visitors, in tort cases from obtaining "deep-pocket" judgments against Nevada hotels and casinos. Id.; Kawamura v. Boyd Gaming Corp., No. 2:13-CV-203 JCM (GWF), 2014 U.S. Dist. LEXIS 17727, at *14 (D. Nev. Feb. 12, 2014).

> (1) In any action to recover damages for injury to persons in which *comparative negligence is asserted as a defense*, the comparative negligence of the plaintiff does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.
>
> (4) *Where recovery is allowed against more than one defendant* in such an action, except as otherwise provided in NRS 41.141(5), *each defendant is severally liable* to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.

NRS 41.141(1) and (4) (emphasis added).

The Nevada Supreme Court has clarified that in a case alleging comparative negligence, an intentional tortfeasor's liability is joint and several, but a merely negligent co-tortfeasor's liability is only several, even if the injured party is not ultimately found to be comparatively negligent. Humphries v. Eighth Judicial Dist. Court of State, 312 P.3d 484, 486 (Nev. 2013) (citing to Café Moda, LLC v. Palma, 128 Nev. 78, 272 P.3d 137 (2012)). Clearly, several liability schemes are designed to protect individual defendants from liability exceeding the defendant's fault. Piroozi v. Eighth Judicial Dist. Court, 363 P.3d 1168, 1171 (Nev. 2015)

Here, Plaintiff has asserted multiple tort claims against DEFENDANTS, including both intentional and negligence torts. Undeniably, joint and several liability attaches to intentional torts. However, COSMOPOLITAN, being at most an alleged passive

tortfeasor, is ***only exposed to several liability*** as to Plaintiff's negligence claim. Because Plaintiff may recover against more than one defendant, NRS 41.141 provides several liability protection for COSMOPOLITAN. Thus, applying Humphries, in the event the jury finds that COSMOPOLITAN was negligent, the Court should hold COSMOPOLITAN severally liable ***only*** for the portion of the judgment which represents the percentage of negligence attributable directly to COSMOPOLITAN - nothing more.

III. CONCLUSION

Based upon the foregoing, DEFENDANTS respectfully request a judicial determination that DEFENDANTS are entitled to several liability under the express terms of NRS 41.141.

DATED this 15th day of March, 2017.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 15th day of March, 2017, I did cause a true copy of DEFENDANTS NEVADA PROPERTY 1, LLC d/b/a "THE COSMOPOLITAN OF LAS VEGAS," AND ROOF DECK ENTERTAINMENT, LLC d/b/a "MARQUEE NIGHTCLUB'S" TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141 placed in the United States Mail, with first class postage prepaid thereon, and addressed as follows:

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LEWIS BRISBOIS

Exhibit O

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DAVID MORADI, an individual,

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Defendants.

Case No. A-14-698824-C
Dept. No. XX

DEFENDANTS NEVADA PROPERTY 1, LLC D/B/A THE COSMOPOLITAN OF LAS VEGAS AND ROOF DECK ENTERTAINMENT, LLC D/B/A MARQUEE NIGHTCLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO THEIR TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141

DATE:
TIME:

DEFENDANTS NEVADA PROPERTY 1, LLC D/B/A THE COSMOPOLITAN OF LAS VEGAS AND ROOF DECK ENTERTAINMENT, LLC D/B/A MARQUEE NIGHTCLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO THEIR TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141

COME NOW, Defendants NEVADA PROPERTY 1, LLC d/b/a "The Cosmopolitan of Las Vegas," ROOF DECK ENTERTAINMENT, LLC d/b/a "Marquee Nightclub" (Hereby known as "Defendants"), by and through their attorneys of record, Josh Cole

Aicklen, Esq., David B. Avakian, Esq., and Paul A. Shpirt, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and hereby reply to Plaintiff's Opposition to their Trial Brief for Determination of Several Liability Under NRS 41.141.

This Reply is based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument allowed by the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

This case arises out of an alleged physical altercation at the MARQUEE nightclub between Plaintiff DAVID MORADI and MARQUEE's Security Officers. Plaintiff was a guest at the Marquee nightclub during the early morning hours of April 8, 2012. At the end of the evening, Plaintiff was asked to produce his ID to compare his signature to that on his American Express Black card. He refused. MARQUEE security along with the club's General manager requested that Plaintiff step away from his table to discuss this matter. Plaintiff, instead, chose to try to leave. He was re-directed by the club security in the area where the General Manager, Ramon Mata, was waiting for him to discuss his signature requirements.

Plaintiff was discussing this requirement for 8-9 seconds, when he became belligerent and verbally abusive, and head-butted Mr. Mata. The alleged altercation occurred shortly after Plaintiff physically assaulted MARQUEE's General Manager and was restrained and taken to the outside area of the club.

II. LEGAL ARGUMENT

A. Because COSMOPOLITAN Never Exercised Control over MARQUEE's Staff, COSMOPOLITAN Is not Vicariously Liable for any of Plaintiff's Alleged Intentional Torts.

"Respondeat superior liability attaches only when the employee is *under the control of the employer* and when the act is within the scope of employment." Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996). Therefore, an actionable claim on a theory of respondeat superior requires proof that (1) the actor at

issue was an employee, and (2) the action complained of occurred within the scope of the actor's employment. Id.

"The employer can be vicariously responsible only for the acts of his employees not someone else, and one way of establishing the employment relationship is to determine when the 'employee' is under the control of the 'employer.'" Id. "This element of control requires that the employer 'have control and direction not only of the employment to which the contract relates but also of all of its details and the method of performing the work. . . .'" Id.

Here, the Nightclub Management Agreement ("NMA") executed between COSMOPOLITAN and MARQUEE, provides that MARQUEE shall be responsible for "the recruiting, hiring, training, compensation, supervision, and discharge of the staff." Furthermore, the NMA states COSMOPOLITAN "***shall not have express or implied authority whatsoever to control*** any aspect of the employment relationship between [MARQUEE] and its employees..." NMA Section 3.1.1 (emphasis added).

In reviewing the subject NMA, this Court found that "Marquee staff were not employed by Cosmopolitan." See Order Denying Defendant Nevada Property 1, LLC's Motion for Summary Judgment, at 3:2-13. The Court additionally held that "Cosmopolitan could not have exercised control over [MARQUEE's security staff] and therefore been subject to *respondeat superior* liability." Id.

Thus, applying the NMA and this Court's holding, COSMOPOLITAN did not have any control or direction over MARQUEE's staff, including MARQUEE's security officers, at the time of the alleged incident. Accordingly, as COSMOPLITAN ***did not have any control*** over the subject security officers involved in the alleged tortious conduct, Plaintiff's allegation that COSMOPLITAN is vicariously liable is meritless.

In sum, Plaintiff cannot establish that COSMOPOLITAN engaged in any intentional tortious conduct, let alone wanton or willful conduct, because, without the necessary element of control, COSMOPLITAN is not vicariously liable for the intentional tortious acts Plaintiff alleged against MARQUEE.

B. Because COSMOPOLITAN Is not Subject to Vicarious Liability, COSMOPOLITAN Is at most Liable for a Negligence Claim and, Therefore, the Express Terms of NRS 41.141 Limit COSMOPOLITAN's Liability only to the Negligence Attributable to COSMOPOLITAN.

As addressed in Defendants' Trial Brief, under the traditional doctrine of joint and several liability, courts allowed plaintiffs to seek the entirety of their damages from a single tortfeasor. Humphries v. Eighth Judicial Dist. Court of State, 312 P.3d 484, 487 (Nev. 2013).

However, the Nevada Legislature supplanted the traditional, common-law functioning of joint and several liability by enacting NRS 41.141, which limits plaintiffs, whether residents or visitors, in tort cases from obtaining "deep-pocket" judgments against Nevada hotels and casinos. Id.; Kawamura v. Boyd Gaming Corp., No. 2:13-CV-203 JCM (GWF), 2014 U.S. Dist. LEXIS 17727, at *14 (D. Nev. Feb. 12, 2014).

> (1) In any action to recover damages for injury to persons in which *comparative negligence is asserted as a defense*, the comparative negligence of the plaintiff does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.
>
> (4) *Where recovery is allowed against more than one defendant* in such an action, except as otherwise provided in NRS 41.141(5), *each defendant is severally liable* to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.

NRS 41.141(1) and (4) (emphasis added).

The Nevada Supreme Court clarified that in a case alleging comparative negligence, an intentional tortfeasor's liability is joint and several, while a merely negligent co-tortfeasor's liability is only several, even if the injured party is not ultimately found to be comparatively negligent. Humphries v. Eighth Judicial Dist. Court of State, 312 P.3d 484, 486 (Nev. 2013) (citing to Café Moda, LLC v. Palma, 128 Nev. 78, 272 P.3d 137 (2012)). Clearly, several liability schemes are designed to protect individual defendants from liability exceeding the defendant's fault. Piroozi v. Eighth Judicial Dist. Court, 363 P.3d 1168, 1171 (Nev. 2015)

Here, Plaintiff asserted multiple tort claims against Defendants, including both intentional and negligence torts. Undeniably, joint and several liability attaches to

intentional torts. However, *since Plaintiff's vicarious liability claim fails*, COSMOPOLITAN is at most an alleged passive tortfeasor and, therefore, is *only exposed to several liability* as to Plaintiff's negligence claim. Because Plaintiff may recover against more than one defendant, NRS 41.141 provides several liability protection for COSMOPOLITAN. Thus, applying Humphries, in the event the jury finds that COSMOPOLITAN was negligent, the Court should hold COSMOPOLITAN severally liable *only* for the portion of the judgment which represents the percentage of negligence attributable directly to COSMOPOLITAN - nothing more.

III. CONCLUSION

Based upon the foregoing, DEFENDANTS respectfully request a judicial determination that DEFENDANTS are entitled to several liability under the express terms of NRS 41.141.

DATED this 23rd of March, 2017

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9 and NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 23rd day of March, 2017, a true copy of DEFENDANTS NEVADA PROPERTY 1, LLC D/B/A THE COSMOPOLITAN OF LAS VEGAS AND ROOF DECK ENTERTAINMENT, LLC D/B/A MARQUEE NIGHTCLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO THEIR TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141 was served electronically with the Court using the Wiznet Electronic Service system and addressed as follows:

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An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

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Exhibit P

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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' OPPOSITION TO PLAINTIFF'S TRIAL BRIEF REGARDING JURY INSTRUCTION CONCERNING DEFENDANT NEVADA PROPERTY 1, LLC'S NON-DELEGABLE DUTY**

Defendants Nevada Property 1, LLC, d/b/a "The Cosmopolitan of Las Vegas" (hereinafter "the Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a "Marquee Nightclub" (hereinafter "Marquee") (collectively, "Defendants") by and through their attorneys of record, hereby submit *DEFENDANTS' OPPOSITION TO PLAINTIFF'S TRIAL BRIEF REGARDING JURY INSTRUCTION CONCERNING DEFENDANT NEVADA PROPERTY 1, LLC'S NON-DELEGABLE DUTY.* This *Brief* is supported by the accompanying Memorandum of Points and Authorities, the papers and pleadings on file herein, and any oral argument the Court may allow.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff seeks to have this Court issue a single jury instruction on non-delegable duty before they have rested their case in chief. Defendants oppose this request because a request to settle jury instructions is premature, and the proposed instruction is not supported by the evidence, the orders of this court, or Nevada law.

"A party is entitled to have the jury instructed on all of his theories of the case that are supported by the evidence".[1] *Beattie v. Thomas*, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983)(citations omitted). "In addition to being supported by evidence, the requested instruction must be consistent with existing law". *Id.* ***"If ... there is no proof in the record to support the instruction, the trial court should not give it.*** *Id.* at 583-584 (emphasis added).

Because instructions must be supported by the evidence ("proof in the record"), it is premature to finally settle instructions until the close of the evidence. This is the custom and practice in this District. *See, e.g.* Effective Using Jury Instruction in a Civil Trial by Judge Mark Denton, ("My practice has been to initially confer with counsel, in chambers, with the court clerk present after the evidence is closed; there we identify the instructions that will likely be given and those that will be refused, and make a full record of the instructions and verdicts to be used, allowing for objections and formal proffers of instructions that are refused, during a formal conference in the courtroom").[2]

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[1] *See also J.A. Jones Constr. v. Lehrer McGovern Bovis*, 120 Nev. 277, 284-85, 89 P.3d 1009, 1014 (2004)("A party has the right to have the jury instructed on all theories of the party's case that are supported by the evidence if the instructions are correct statements of the law") and *Johnson v. Egtedar*, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996)("It is well established that a party is entitled to jury instructions on every theory of her case that is supported by the evidence").

[2] http://www.nvbar.org/wp-content/uploads/NevLawyer_June_2014_Effectively_Using_JI.pdf (last accessed on April 12, 2017).

Prior to the start of trial, Plaintiff provided proposed jury instructions to the defense. The parties met and conferred, and Defendants provided Plaintiff with an integrated set of instructions which contained the Defendants' objections to Plaintiff's proposed instructions and proposed additional and alternative instructions. A copy of this integrated set is attached as Exhibit "A". The new instruction now proposed by Plaintiff is not included in Plaintiff's proposed instructions, but the Defendants did propose a related (and much different) instruction based on NRS 651.015. We appreciate the reasons why the Plaintiff wants to have certainty on its new proposed instruction, but final settlement of any instruction is premature. Defendants object to the final settlement of any instruction prior to the close of the evidence. The issuance of an instruction at this stage of the trial, that is not supported by any evidence in the record before the jury, would be reversible error.

The proposed instruction should also be refused because it is inconsistent with the written orders of this Court. In denying summary judgment to Nevada Property 1, LLC, the Court found that "... Cosmopolitan does not hire, train, fire, or compensate employees of the Marquee". *See* Order filed on February 28, 2017 at page 3, attached for the Court's convenience as Exhibit "B". The Court also found that Section 3.1.1 of the NMA states that Cosmopolitan "shall not have express or implied authority whatsoever to control any aspect of the employment relationship between [Marquee and its employees ...". *Id.* Based on these facts and other recited findings, the "Court finds Marquee security staff were not employed by Cosmopolitan." The Court concluded that "[a]s a consequence, the Cosmopolitan could not have exercised control over these individuals and therefore been subject to respondeat superior liability." *Id.*

Notwithstanding this written order finding that Marquee security staff are not employees of Cosmopolitan, Plaintiff now proposes an instruction that finds the exact opposite; "that the security staff at Marquee are deemed to be employees of both defendants in this case".

///

Defendants recognize that the Court explained that Marquee security staff were "in the nature of employees" under the *Rockwell* decision in open court on March 24, 2017. This oral pronouncement from the bench was ineffective to modify the written order of this Court. Under Nevada law, "an order is not effective until the district court enters it." *Division of Child and Family Services, Dept. of Human Resources, State of Nevada v. Dist. Ct.*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004). "Entry involves the filing of a signed written order with the court clerk." *Id.* (citing NRAP 4(a)(3)). Prior to the court reducing "its decision to writing, sign[ing] it, and fil[ing] it with the clerk, the nature of the judicial decision is impermanent." *Id.* (citing *Canterino v. The Mirage Casino-Hotel*, 118 Nev. 191, 194, 42 P.3d 808, 810 (2002)). "The court remains free to reconsider the decision and issue a different written judgment." *Id.* (citing *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987)). Consequently, ***a "'[c]ourt's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order [is] ineffective for any purpose.'"*** *Id.* (quoting *Rust*, at 689, 747 P.2d at 1382)(emphasis added). As of today, the security staff at Marquee are not employees of the Cosmopolitan, and it would be error to approve an instruction directing the jury to find the opposite.

Moreover, the original findings of the Court were correct as a matter of fact and law. NRS 41.745 codifies the legal doctrine of *respondeat superior* liability. In Nevada, "*respondeat superior* liability attaches only when the employee is ***under the control*** of the employer."[3] *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) (quoting *Molino v. Asher*, 96 Nev. 814, 817, 618 P.2d 878, 879 (1980)) (emphasis added). Indeed, "[t]he employer can be vicariously responsible ***only for the acts of his employees*** not someone else." *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978) (emphasis added).

///

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

At trial, no evidence has yet been submitted to support Plaintiff's claim that he was assaulted by an ***employee under the control*** of the Cosmopolitan. *See, e.g., Complaint*, ¶¶ 23-26, docketed (4/4/14) (First Cause of Action: Assault and Battery). To the contrary, as quoted above, the Court has issued a written order expressly finding that Marquee security who allegedly assaulted Plaintiff are not under the control of the Cosmopolitan. This finding contrasts with the findings in *Rockwell*, where the court found there was evidence that "Sun Harbor actively supervised the security guards and controlled both the details and methods of performing the guards' work". *See Rockwell*, 925 P.2d at 1182.

Defendants also object to the first two sentences of the proposed instruction as incorrectly stating Nevada law. Defendants have extensively briefed these issues and will not repeat all of their arguments here. Defendants would point out, in addition to their prior arguments in support of summary judgment, that Plaintiffs are now asking for a finding that "The law imposes a non-delegable duty upon Cosmopolitan to provide responsible security and personnel on its property." This proposed instruction mischaracterizes the *Rockwell* decision. *Rockwell* found instead that "in the situation where a property owner hires security personnel to protect his or her premises and patrons, that property owner has a personal and nondelegable duty to provide responsible security personnel".[4]

In other words, *Rockwell* found that if an owner in possession and control of property *chooses* to hire security to protect its own property, it must hire responsible security. The evidence does not justify such a finding. The Cosmopolitan did not hire

[4] Moreover, the duty in *Rockwell* is based on theories of premises liability. It is part of a premises owner's duty to its business invitees to ensure that its premises are reasonably safe. For this reason, the non-delegable duty claimed in this case can only arise in the context of a claim for premises liability. *See Konar v. PFL Life Ins. Co.*, 840 A.2d 1115, 111 (R.I. 2004)("Based on the text of § 425 of the Restatement, it is clear that this section applies only to premises liability claims"). There is no corresponding non-delegable duty in the context of a negligence claim. Id. at 1121 ("Because § 425 of the Restatement does not affect the independent contractor rule as it pertains to a general negligence claim, our decision to adopt that section would have no bearing on plaintiff's appeal in this case"). In the instant case, the Plaintiff has not plead a case for premises liability and there is no applicable exception to the independent contractor rule.

security through a third party, which it then controlled and directed, like the owner in *Rockwell*. The Cosmopolitan leased the premises to another legal entity which then delegated and the entire nightclub operation and management to the Marquee. The patrons of the Marquee were not the business invitees of the Cosmopolitan. Indeed, the Marquee premises are separated from the premises controlled by the Cosmopolitan by "velvet ropes", which guests of the Cosmopolitan cannot pass without the consent of the Marquee.

Relief Requested

For these reasons, and the reasons set forth in connection with its summary judgment briefing, Cosmopolitan requests that the Court refuse the proposed instruction on non-delegable duty.

Dated this 12th day of April, 2017.

/s/ D. Lee Roberts, Jr.

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2017, a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S TRIAL BRIEF REGARDING JURY INSTRUCTION CONCERNING DEFENDANT NEVADA PROPERTY 1, LLC'S NON-DELEGABLE DUTY** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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NEVADA PROPERTY 1, LLC, dba
The Cosmopolitan of Las Vegas

Esther Ibarra

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

WEINBERG WHEELER HUDGINS GUNN & DIAL

Exhibit Q

TRAN

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CLERK OF THE COURT

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 CORPORATION I through X, inclusive,

Defendants.

CASE NO.: A-14-698824-C
DEPT. NO.: XX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JUDGE ERIC JOHNSON

DEPARTMENT XX

TUESDAY, APRIL 18, 2017

1:00 P.M.

Reported by: Amber M. McClane, NV CCR No. 914

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INDEX

EXHIBITS

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LAS VEGAS, NEVADA; TUESDAY, APRIL 18, 2017
1:00 P.M.
* * * * *
P R O C E E D I N G S
* * * * * * *

(The following proceedings were held outside the presence of the jury.)

THE COURT: Let's do the formalities here. Calling David Moradi v. Nevada Property 1, LLC, et al., Case No. A-698824.

Counsel, go ahead and note your appearances for the record.

MR. RAVIPUDI: Rahul Ravipudi for the plaintiff.

MR. SCHULTZ: Tom Schultz for the plaintiff.

MR. STUMPF: Matthew Stumpf for the plaintiff.

MR. DIAL: Dave Dial for the defendants.

MR. AICKLEN: Josh Aicklen for the defense.

MR. ROBERTS: Lee Roberts for the defendants.

THE COURT: Okay.

MR. STUMPF: And, Your Honor, we have Mr. Long in the courtroom right now. So I'm not sure what we're going to be discussing.

THE COURT: Well, I don't know what we're going to be discussing either. Do we need to ask

goes to The Cosmopolitan under your agreement?

A. In terms of the -- I'm not sure I understand the question.

Q. Do you pay The Cosmopolitan rent?

A. Yes.

Q. Okay.

A. Yes.

Q. And do you pay them just one kind of rent or more than one kind?

A. We pay them rent plus a percentage rent.

Q. Okay. What's a percentage rent?

A. It's a percentage over a certain -- it's a percentage of rent over a fixed amount, all based on sales.

Q. Is it your understanding that The Cosmopolitan owns the physical premises upon which the Marquee is located?

A. Yes.

Q. Is the rent -- percentage rent intended to compensate them for the use of that physical premises?

A. Yes.

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.

Q. Are there parts of the agreement that would seem to allow The Cosmopolitan to dictate standards with regard to your operations, including security?

MR. SCHULTZ: I think it goes beyond the scope. I'm happy that he opens the --

THE COURT: Hold on a second.

MR. ROBERTS: Well, I'm --

THE COURT: Hold on. It does go beyond, but if counsel isn't objecting, I'll --

MR. SCHULTZ: I'm just --

MR. ROBERTS: I'll withdraw.

THE COURT: It's up to you.

MR. ROBERTS: I'll withdraw. If they aren't going to go into it, I don't need to go into it.

THE COURT: All right.

Q. (By Mr. Roberts) Let me close by just allowing the jury to get a little bit more background.

You told the jury that you're one of the owners of the Marquee; is that correct?

A. Yes.

Q. Okay. And how many other owners are there?

A. Four.

Exhibit R

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
APR 26 2017

BY Linda Skinner
LINDA SKINNER, DEPUTY
3:48 pm

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI,

Plaintiff,

vs.

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

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

Defendants.

Case No.: A698824
Dept. No.: XX

SPECIAL VERDICT FOR PLAINTIFF

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

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

Yes ✓ No ____

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

Yes ✓ No ____

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

Yes ✓ No ____

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

Yes ✓ No ____

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

A-14-698824-C
SJV
Special Jury Verdict
4844051

4

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

Yes ✓ No ____

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

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

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

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

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

Yes ✓ No ____

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

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

Yes ____ No ✓

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

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

The Cosmopolitan and the Marquee	_____%
David Moradi	_____%
Total	100 %

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

Yes ✓ No _____

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

Yes ✓ No _____

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

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

Yes ✓ No_____

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

THIS IS OUR VERDICT.

Dated this 26 day of April, 2017.

FOREPERSON

Exhibit S

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

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

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

DATED: June 25, 2018

HEROLD & SAGER

By: _____

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

DATED: June 25, 2018

HEROLD & SAGER

By: _____ (11333) FOR

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I.

INTRODUCTION

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

II.

FACTUAL ALLEGATIONS RELEVANT TO THIS MOTION

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

A. Underlying Action

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

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

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

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

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

---

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

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

B. St. Paul's Claims Against Marquee

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

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

///

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

C. Nightclub Management Agreement

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

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

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

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

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

The NMA contains the following pertinent provisions:

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

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

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

12.2 [Marquee's] Insurance.

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

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

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

. . .

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

. . .

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

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

13. Indemnity

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

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

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

. . .

20. Third Party Beneficiary

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

...

28. Attorneys' Fees

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

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

(Emphasis added.)

III.

LEGAL STANDARDS

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

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

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

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

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

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

IV.

POINTS AND AUTHORITIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 229.

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

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

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

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

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

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

D. <u>Marquee Is Entitled to Recover Attorneys' Fees from St. Paul</u>

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

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

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V.

CONCLUSION

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

DATED: June 25, 2018

HEROLD & SAGER

By: (11333) FOR

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CERTIFICATE OF SERVICE

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

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Employee of HEROLD & SAGER

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

Exhibit T

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE
TUESDAY, OCTOBER 30, 2018

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

For the Plaintiff:	WILLIAM C. REEVES, ESQ. MARC J. DEREWETZKY, ESQ.
For Aspen Specialty Insurance Company:	RYAN A. LOOSVELT, ESQ.
For National Union Fire Insurance Company of Pittsburgh PA:	NICHOLAS B. SALERNO, ESQ. JENNIFER L. KELLER, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, October 30, 2018

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

THE COURT: And that is page 14. St. Paul Fire & Marine, Aspen Specialty Insurance Company, 758902. All of these and all of these. And notebooks, notebooks, notebooks. Everybody else, come on up. It's nice to see everybody. Let's see what we can get through here. And then I do have a question. I need to confirm with you guys, once you get all your appearances, because I think there's some confidentiality issues that we may have. So I want to make sure I don't violate whatever confidentiality agreement's out there.

MR. REEVES: Makes sense, Your Honor.

THE COURT: So if we can get appearances then? Case 758902. And start over here and work our way across the room.

MR. REEVES: All right. Wayne Reeves, on behalf of the Plaintiff.

MR. DEREWETZKY: Mark Derewetzky, on behalf of the Plaintiff as well.

THE COURT: Thank you.

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

THE COURT: Welcome.

MS. KELLER: -- and Roof Deck Entertainment.

THE COURT: Thank you.

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

also for National Union and Marquee.

THE COURT: Okay.

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

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

MR. LOOSVELT: Correct.

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

MR. REEVES: That --

THE COURT: So I just --

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

THE COURT: What do I have to avoid talking about?

MR. SALERNO: And the Nightclub Management Agreement is confidential.

THE COURT: Okay. Okay.

MR. REEVES: At least portions of it are.

MR. SALERNO: But there's --

MR. REEVES: We've made --

MR. SALERNO: -- nobody in court, so I think we're free to

talk about --

THE COURT: Right. Again --

MR. SALERNO: -- this, yeah.

THE COURT: But there'll be a record, and I just want to make sure I don't say something inadvertently that means we have to seal a transcript.

MR. SALERNO: Fair enough.

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

So I just want to make sure, so that Ms. Shell can indicate in her minutes, a disposition, if any, on specifically what's on.

So Defendant, Aspen Specialty Insurance Company's motion to dismiss Plaintiff St. Paul Fire and Marine Insurance Company's redacted first amendment complaint.

Defendant Roof Deck Entertainment LLC's motion to dismiss St. Paul Fire and Marine's first amendment complaint.

And National Union's motion to dismiss Plaintiff's complaint.

MR. REEVES: That's right, Your Honor. Three motions. We truncated National Union and refer to them as AIG. We truncated --

THE COURT: Yeah.

MR. REEVES: -- Roof Deck and refer to them as Marquee, so --

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

MR. REEVES: It's at your discretion.

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

MR. REEVES: And certainly, that's one way to do it. From where I sit, from Plaintiff's perspective, there's a clean division between insurance companies --

THE COURT: The ending?

MR. REEVES: -- versus an operator --

THE COURT: Yeah.

MR. REEVES: -- versus an insured. And so for purposes of how we had divided it internally --

THE COURT: Right. Okay. Certainly.

MR. REEVES: -- Mr. Derewetzky is going to handle the insurance issues. I'm here --

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

MR. REEVES: Agreed.

THE COURT: But it just seemed like arguing all of the motions at one time, and then arguing the oppositions -- and even if it's different counsel arguing, I have no problem with that. But it just seemed it would be easier to just argue the motions, argue the oppositions, and then you do the replies --

MR. SALERNO: Your Honor, I --

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

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

THE COURT: So you you're suggesting the two insurance motions be argued, and the Marquee motion be argued separate?

MR. SALERNO: At a minimum.

THE COURT: Okay.

MR. SALERNO: And there is --

THE COURT: Great. Okay. That's what we'll do then.

MR. SALERNO: I mean, there are notable differences.

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

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

the --

MR. SALERNO: I think it's your call. We've got a lot of briefing before this Court, so I'm --

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

MR. REEVES: No. They're distinct and separate --

THE COURT: Yeah. I didn't --

MR. REEVES: -- and separate tracks.

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

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

THE COURT: Yeah.

MR. SALERNO: -- of the various parties. At the time, if you recall, St. Paul was not acknowledging that the Nightclub Manager Agreement that we had attached to our papers, was the operative agreement. They seem to have acknowledged that now. So hopefully, we can get past what are the relationships and what is the agreement. Because those relationships are pretty fairly -- and in detail, set out in the Nightclub Management Agreement and the attached lease.

And we also then went through in detail in these renewed

papers, what those relationships are, to set that out for the Court. And be happy to answer any questions. But the crux of the argument is that the Nightclub Management Agreement includes subrogation waiver provision 1 that applies to all owner-insured policies, which St. Paul is an owner-insured policy, and I'll explain why. And that the cause of action that St Paul's attempting to subrogate to, for expressed indemnity under the Nightclub Management, only applies to claims that are not reimbursed by insurance, which we don't have here.

St. Paul is pursuing, under theory of subrogation, the claims that it paid under its policy. So those are insurance-funded claims that they expressed indemnity provision, by its expressed terms does not apply to. What St. Paul has now come forward and said, is that, well, wait a minute. My client, Cosmo, that I'm -- or, you know, my insured Cosmo who I'm subrogating to, they didn't agree to that subrogation waiver provision.

And so I'll address that first and separately, then the express indemnity aspect of that argument. That fails at several levels. First of all, the subrogation waiver provision applies to all owner policies which are defined as all owner-insured policies. And so the Nightclub Management Agreement defines what is an owner-insured policy at provision 12.3. And that includes -- I don't know if Your Honor tracked all that from our moving papers, because it's a little bit confusing. But when you look at provision 12.2.5, which is page 63 of the Nightclub Management Agreement --

THE COURT: Page 65?

MR. SALERNO: Page 63, Your Honor.

THE COURT: Sorry. It took me a little while to get that. It was very securely delivered in a sealed document envelope.

MR. SALERNO: Yes.

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

THE COURT: Yeah. It was sealed. So, yeah, I've got it.

MR. SALERNO: I have an extra copy --

THE COURT: I managed to --

MR. SALERNO: -- if you want to reference it.

THE COURT: -- get it out. No, I managed to get it out my sealed copy that's all in my sleeve, got sealed.

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

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

MR. SALERNO: Yeah. It was probably first, Your Honor. There was a stipulation to seal it.

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

THE COURT: Yeah. This is as of February 2018.

MR. REEVES: I see.

THE COURT: We've kept it --

MR. REEVES: Okay.

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

MR. SALERNO: Yes.

THE COURT: So, yeah.

MR. SALERNO: Okay.

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

MR. SALERNO: Very good.

THE COURT: I got it.

MR. SALERNO: Thank you, Your Honor.

So, page 63, provision 12.2.5. That provision talks about the insurance coverage maintained by the owner-insured parties. It says, all insurance coverages maintained by operators shall be primary to any insurance coverage maintained by any owner-insured parties. And then it refers and defines that term as the owner policies. So that is what defines the owner policies, as the owner-insured parties. The owner-insured parties is defined above, on that same page, on 12.2.3.

And you'll see that the owner-insured parties is defined to include the owner, which is Nevada Restaurant, one, a related affiliate, the project owner, which is Cosmo. And the landlord and the tenant under the lease, et cetera, parents, subsidiaries, affiliates. So the owner-insured parties under the express terms of the Nightclub Management Agreement is not just Nevada Restaurant, it's also, Cosmo, by the interaction of these two provisions.

So the insurance maintained by The Cosmo is an owner's policy under the terms of the Nightclub Agreement, to which the subrogation waiver provision applies. If there are any doubts, just by the definition of the parties and the relationships of them, the lease agreement, which is attached as Exhibit D to the Nightclub Management

Agreement, requires that The Cosmo, who is the landlord -- we lay this out in our papers -- at page 15 of Exhibit D, Your Honor, section 17.2, all right -- I know it's a little difficult to follow, my apology -- there's the insurance requirement between the landlord -- essentially between Cosmo and Nevada Restaurant.

And it says that tenant will carry and maintain all insurance required under section 12.1 of the RMA and will cause operator to carry and maintain all insurance required under section 12.2. So here, the tenant is required to carry the 12.1 provision, which is the Nevada Restaurant requirement. Then it goes on and says, landlord covenants and agrees that from and after the date of delivery of the premises from landlord to tenant, and during the term, landlord will carry and maintain all insurance required under paragraph 1H. So the landlord here, is Cosmo.

If you go to paragraph 1H of the lease agreement, which is on page 4 of the lease, it says, landlord insurance. And it says, all insurance required to be obtained by owner under section 12.1 of the RMA. So you've got multiple layers where that argument fails, because they're within the definition of owner-insured policies, and that's owner policies. And then when you go to the lease agreement, The Cosmo is required to maintain the insurance that Nevada Restaurant was required to maintain.

So this is clearly the policy that Nevada Restaurants was required to procure and maintain under the Nightclub Management Agreement. So despite attempting to split hairs between these various

provisions, their argument lacks merit. Plus, they're claiming, as an intended-third-party beneficiary -- and an intended-third-party beneficiary is subject to the same terms and conditions to the contracting parties. So it fails at multiple levels.

Then when you get to the claim itself, beyond the subrogation waiver provision, under the expressed indemnity provision, the expressed indemnity only applies to unreimbursed losses. And they again try to split that same hair there and say, but that's only as to policies which the owner is required to maintain.

And I've already explained why the St. Paul policy is a policy that the owner is required to maintain. So under the express terms of the agreement by which they're subrogating, subrogation rights have been waived, and the indemnity rights themselves expressly only apply to non-reimbursed losses, which we don't have here.

They next try to bring a cause of action for contribution against Marquee, by stepping into the shoes of their insured, Cosmo. There's several problems with that, Your Honor. Contribution; first of all, Your Honor, is not allowed in the State of Nevada when there is an expressed indemnity provision governing the parties' rights. And we cited to the provisions in 17.245 that say that. It's also in the case law, in Calloway and other cases cited, that when the parties have expressly contracted for indemnity rights, there is no equitable contribution right available. So that's under case law and statute.

The Uniform Contribution Act also provides that when a party has engaged in intentional conduct, they cannot pursue

contribution against another third party. And we clearly have a situation here, where the verdict found that Cosmo is jointly and severally liable for intentional conduct. St. Paul's tried to, again, split those hairs, and said, yeah, but it was for a non-delegable duty. It was for vicarious liability. There's no such exception. And there's no such support for that finding. The jury verdict clearly says they're jointly and severally liable for intentional conduct. And that's a binding finding.

THE COURT: Okay. And that was --

MR. SALERNO: In the underlying action.

THE COURT: The jury didn't decide that. The Court ruled that. And the jury verdict reflected that Court ruling?

MR. REEVES: I think it's --

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

THE COURT: I thought that was a --

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

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

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

MR. SALERNO: I'm not 100 percent --

THE COURT: Oh, yeah.

MR. SALERNO: -- but I don't think that's --

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

MR. SALERNO: -- relevant anyways. But that's my understanding of what occurred. There's a binding finding of intentional

conduct on the part of Cosmo, which prevents a right to contribution.

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

MR. SALERNO: Okay.

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

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

THE COURT: Okay.

MR. SALERNO: And I don't know why it would.

THE COURT: Okay.

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

MR. SALERNO: Thank you, Your Honor.

THE COURT: Okay. Thank you. And who's taking that one?

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

THE COURT: Okay.

MR. REEVES: Can you hear me from here --

THE COURT: Yes.

MR. REEVES: -- or do you want me to come --

THE COURT: Yeah. No problem.

MR. REEVES: All right. Our argument is quite simple. The Cosmopolitan is not a party to this agreement. Not a signatory. And so that's where everything flows from that. And that's the sleight of hand.

That's why Counsel had to walk you through all these different parts and provisions, and things like that, because if you go to page 1 -- and we provided the excerpt --

THE COURT: All right.

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

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

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

THE COURT: Yeah.

MR. REEVES: -- and where we're not dignifying the pleadings, we assume the truth of them. We assume the veracity of the allegations. It gets very cumbersome. You've got --

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

MR. REEVES: Well --

THE COURT: So we had them in their sealed form by stipulation of the parties, both of the entire agreements.

MR. REEVES: Agreed.

THE COURT: Okay.

MR. REEVES: Agreed.

THE COURT: So we got it.

MR. REEVES: And so you'll see on the face page of the agreement, it'll identify the parties. You won't see Cosmopolitan there. And that is the driver of everything, because if Cosmopolitan is not a party to this agreement, then why are we talking about obligations that it owes. It may be beneficiary of things, under this agreement, and the indemnity provision, in particular. But as to duties and obligations that it brings, it owes, it's not present.

And so that's why Counsel is walking you through all these different provisions, because he's trying to cobble together a scenario where Cosmopolitan, who is a silent party to all this, relative to the trial, certainly non-delegable duty. Certainly heard that. And certainly, the Court reached that issue.

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

MR. REEVES: Yes, Your Honor.

THE COURT: -- for example, affidavits; they're all signed by Tao (phonetic), but whoever is the representative --

MR. REEVES: It's a managing member.

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

MR. REEVES: Yes.

THE COURT: That's why they're in here, and why we're seeing affidavits signed by some executive, a Tao.

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

THE COURT: Okay.

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

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

MR. REEVES: Correct.

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

MR. REEVES: Roof Deck, being Marquee.

THE COURT: -- is Marquee.

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

THE COURT: Yeah. Roof Deck is Marquee and also, ultimately, Tao.

MR. REEVES: Correct.

THE COURT: That's how we get there.

MR. REEVES: Marquee, Roof Deck, and Tao, we can almost collapse them all together. Cosmopolitan being completely separate.

THE COURT: Okay.

MR. REEVES: And so that's the thrust of everything. We're not distancing ourself from the agreement. We found it odd that we're dealing with it, in terms of introduction of it, vis-a-vis, a pre-answer motion. And so for purposes of what we're doing here, respectfully, pre-answer motion, this is a motion for summary judgment, when we're going -- poring through agreement. Set that issue to the side. If we're going to introduce the agreement and we're going to consider it, core issue; Cosmopolitan is not a party to it. It is a signatory at the end where it says, we will be bound as to a few provisions. And that's on --

THE COURT: Yeah.

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

THE COURT: Right.

MR. REEVES: -- 89.

THE COURT: 89?

MR. REEVES: 89.

THE COURT: Is 89 -- I think it's page 90 -- Bates-stamped down in the lower --

MR. REEVES: See, I don't have a Bates-stamped copy.

THE COURT: -- right-hand --

MR. REEVES: So there, in --

THE COURT: -- corner.

MR. REEVES: -- and of itself, creates a [indiscernible] and

that's why I wanted to ask you --

THE COURT: Right. It's 89.

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

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

MR. REEVES: Page 89 of the agreement.

THE COURT: Yeah. It's the project owner in that paragraph.

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

THE COURT: Okay.

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

Contribution, well, if we're not a party to the agreement, then we get contribution. So either we're in, relative to enforcing the expressed indemnity, or we don't get to enforce the expressed indemnity and then we get contribution. It's kind of an either/or scenario. We pled in the alternative, which you do when you're at the pleading stage, so --

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

trying -- at least that's what I understand, but --

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

THE COURT: It seemed like he --

MR. REEVES: So either I get the indemnity --

THE COURT: -- was arguing the opposite.

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

THE COURT: Exactly. Yeah.

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

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

THE COURT: Right.

MR. REEVES: Running the operation.

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

MR. REEVES: Who actually what, Your Honor?

THE COURT: Who actually made the finding, and what did they actually find --

MR. REEVES: There was no ---

THE COURT: -- with respect to

MR. REEVES: -- findings between them.

THE COURT: Yeah. Between the --

MR. REEVES: And that's what we're trying to do.

THE COURT: Yeah.

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

THE COURT: So that's, then, my next question.

MR. REEVES: Yes, Your Honor.

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

MR. REEVES: No. It's --

THE COURT: I mean, is there really --

MR. REEVES: -- certainly factual.

THE COURT: -- any discovery --

MR. REEVES: It was never tested.

THE COURT: -- to be done?

MR. REEVES: It was never tested in the underlying case.

THE COURT: Yeah.

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

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

MR. REEVES: The enforceability --

THE COURT: The contribution, it seems like, would be the stature.

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

THE COURT: Okay.

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

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

legal finding, expressed indemnity --

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

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

MR. REEVES: yes. Your Honor.

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: Thank you.

MR. REEVES: -- to answer your question.

THE COURT: Thank you.

MR. SALERNO: Thank you, Your Honor.

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

MR. SALERNO: Sure. Your Honor, Counsel attempts to compilate several legal concepts. So I'll try to make these clear. When they say they're not a party to the contract and then they say they signed it, I think that's somewhat tongue-in-cheek. At page 89 of the Nightclub Management Agreement, they are the project owner. The project owner is defined throughout this agreement, and so 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.

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

This is not a motion for summary judgment. It's a motion to dismiss. We've cited the legal authority of why it's appropriate when a

complaint fails to include, for the second time, the actual operative agreement that they're basing their subrogation right on. We can come forward with that agreement, and that's what we've done. And Your Honor can and should decide these types of legal issues up front, to avoid the waste of resources that it would cost to develop discovery on simply irrelevant issues. And that's why we're bringing it forward now.

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

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

So if you look at the *Calloway* decision, it says that, and in the other cases we cited, and you look at the Uniform Contribution Act, it

says that. When they've contracted for how to allocate, it's the contract that applies. You don't get the contribution claim when that fails because of the manner in which it was allocated. That's what we have here.

Here, the parties expressly agreed that they would allocate it in a certain way, and the key to that is that it had to not be reimbursed by insurance. And otherwise, everybody walks away. And so whether you think they're a party to the agreement because of the way the insurance was set up and the way it references a project owner, and there's owner-insured policies, is really not important. Because they're claiming they're coming forward as a beneficiary. Well, as a beneficiary, they don't obtain greater rights. They're still stepping into the contract to obtain the rights bargained for between the contracting parties. So they don't obtain greater rights than the contracting parties because they're coming in as a third party beneficiary. That's black letter law in Nevada.

So, Your Honor, it's just not an either-or thing. And it's appropriate for motion-to-dismiss matters, because this should've been pled in the complaint. And because it wasn't, it's before Your Honor now. So we would ask that we take the time to sort out these important legal distinctions that had to be addressed as a threshold matter before they can move forward. And try to -- what they're saying relitigate the underlying case? They want to call everybody and relitigate contribution and indemnity when those rights have been waived?

THE COURT: Okay. So your position would be that this is purely legal, whether we call this a motion to dismiss or a motion for

summary judgment?

MR. SALERNO: Yeah.

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

MR. SALERNO: Well, no. It's not --

THE COURT: -- to do discovery?

MR. SALERNO: -- that you're not bound, they're claiming beneficiary status then. So they obtain no greater rights. They are claiming entitlement to express indemnity, because they're referenced in the indemnity provision. So they're bound by what that indemnity provides for. And they don't also get contribution when that indemnity doesn't provide for it, because that's what they contracted for. And these are pure legal issues.

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

THE COURT: Thanks.

MR. REEVES: Briefly respond, Your Honor?

THE COURT: No. I mean -- no.

MR. SALERNO: Thank you, Your Honor.

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

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

THE COURT: Okay.

MS. KELLER: So what Plaintiff is asking the Court to do here is create judge-made law in Nevada, since the Nevada Supreme Court has not recognized equitable subrogation between insurers. And even the jurisdictions that do, like California, have never recognized a right to equitable subrogation as between excess carriers in different towers. In other words, excess carriers standing on the same footing. The Plaintiff knows this, and so it's now asserting that its coverage is excess to that which we've provided. Because it wants to say, if our coverage is excess, then we have the same right to go after you, that, say, in California, an excess would have to go after a primary.

But it's not. It's not. They are both excess in different towers. And the Marquee tower, Aspen was primary, National Union is excess. The Cosmopolitan tower, Zurich is primary, St. Paul is excess. And all the Court has to do is look at the fact that Cosmo was a named insured under the St. Paul policy, and Marquee was the named insured under National Union.

There's no court anywhere, that's held that those excess

carriers can go after one another for subrogation. There just isn't. So what the Court is being asked to do is make two big leaps. One, to establish the principle that the Nevada Supreme Court has not, and they can only find one case to cite to the Court, an unpublished opinion -- not of the 9th Circuit, but of a district court here in Nevada -- which seemed to recognize the right of equitable contribution, but not between excess carriers.

In that case, as the Court can see, in California -- and in fact the district court here cited a California case on it, the Fireman's Fund case -- it was an excess carrier asking for equitable subrogation from a primary. And you can see why that is, the primary essentially can hold excess carriers hostage, but not the other way around when it comes to settlement, so -- but that's been the rule. That's been the rule nationwide. They can't cite you one case standing for the proposition that they're asking the Court to do now.

And even the one case they cite, while it seems to support the right of equitable subrogation at least, if an excess is going after a primary it puts the kibosh on their other claim for contractual subrogation -- for conventional subrogation. The Court says, no, that's not recognized. And they don't like that part, so they say, well, the Court should ignore that part. So based on an unpublished decision of a district court citing California law, they're asking this Court to blaze this new path. It seems to me that in a case like this where they're asking for two bodies of judgment law, it shouldn't be the trail court doing it.

Since they haven't stated a claim that is currently cognizable

under Nevada Law, I think this Court should grant our motion. And then, if the Nevada Supreme Court wants to establish that new right of equitable subrogation between insurers, it can do so. And it could also consider, at the same time, whether it will become the only court in the land to allow equitable subrogation between excess carriers in separate towers with coextensive responsibilities. It should not be for this Court to do it. Plaintiff simply has not gotten there. And it is consistently asking this Court to make these leaps. Now, this is, of course, purely a question of law. If the --

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

MS. KELLER: They have --

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

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

THE COURT: Okay.

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

should, at minimum, be required to give this Court a copy of its proxy, which it keeps hiding.

And the reason that it hasn't produced it -- I think the inference is clear, that if it does produce it, that'll be the end of the case. Because it will clearly show that it is excess to Zurich in the Cosmopolitan tower, not standing above National Union in the Marquee tower. And we've diagrammed that on page 10 of our motion to dismiss. It isn't refuted. And in a statement, a legal conclusion in the complaint doesn't bind this Court. If it were a factual assertion, it would. But it's a legal conclusion, whether somebody is excess to another carrier, and the Court decides that by looking at the policies. That's how the Court always decides that.

THE COURT: Well, how do I --

MS. KELLER: So I think --

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

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

THE COURT: Right. But my --

MS. KELLER: Because it's a legal issue.

THE COURT: -- question is, don't -- I mean, how can I do this on a motion to dismiss? Don't I have to say, put them to test your

theory, that, you know, you're -- produce sure policy and show us where it is clear that you're not excess in The Cosmo tower?

MS. KELLER: Then I think a simple way to do that would be, just continue this motion to dismiss, order the Plaintiffs to provide a copy of the policy so the Court can make that determination. Because otherwise, what happens is, all this litigation is kicked up for God knows how long, when it should be probably aborted at this stage. And if not aborted, it should be deferred to the Nevada Supreme Court to decide.

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

MS. KELLER: That's true.

THE COURT: So --

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

THE COURT: But --

MS. KELLER: But there isn't any real reason to do that when

this really is a pure question of law.

THE COURT: Okay. All right. Thank you.

Now, yeah, ask.

MR. LOOSVELT: A lot it applies to Aspen as well, that Aspen's a primary. But in addition to these not being recognized as causes of action in Nevada State Court here, it is purely questionable. And that's what Your Honor keeps saying as to what Aspen's policy limits are. And that's really what a lot of the claims are based on. So setting aside that these aren't recognized in Nevada, you'd be making judge-made law.

THE COURT: Okay.

MR. LOOSVELT: Outside of that, it's all based on largely whether or not Aspen refused settlements within policy limits. And the law's pretty clear on how each occurrence, when it applies in the CGL coverage, that that's the limit. There's been one occurrence here. St. Paul has not argued that there's been two occurrences. They just argue that there's two injuries. There's a bodily injury and then there's a false advertising, because of the false imprisonment claim falls under there. That's not how policies are construed, and that's not the purpose of this policy. Each occurrence, the limit is $1 million, regardless of the amount of injuries and those things that fall under that CGL coverage.

And we think the law is pretty clear. And we do believe that is a purely legal question. And based on that, in addition to the other things that the claims do fail, it's Aspen because it's largely what they're all based on, if not --

THE COURT: So we've got the issue on, was Aspen really exposed to one million or two million? It may be a purely legal question in the end. But the issue about, were there opportunities to settle this thing within policy limits?

MR. LOOSVELT: Well, that's --

THE COURT: Do we have to do discovery on, were there opportunities to settle, before we decide, was it one or two?

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

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

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

THE COURT: Right.

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

THE COURT: There -- one.

MR. LOOSVELT: -- policy limits. And that's the issue here. And this is what magically appeared in the amended complaint that was absent in the first complaint. They were talking about the $26 million -- the 1 million primary and the 25 million excess that was made. And then we filed a motion that Your Honor ordered amendment. And then they saw it. Wait, we've got to come up with something else. And

that's when this whole theory of aggregate limits apply.

But that is a legal question. That is not a factual one. It's a legal determination Your Honor can and should make. Because the law is pretty clear that the $1-million-occurrence limit applies. And if that is true, as we believe the case law shows, then there is no failure to settle within policy limits, because there is no fact, alleged or otherwise, that there was a settlement offer within that $1 million. And that's why this aggregate-limit theory has appeared in the second round. And, you know -- so --

THE COURT: And so need -- again, motion to dismiss stage where the question is, is there anything they could possibly go out there and discover on any legal theory --

MR. LOOSVELT: Well --

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

MR. LOOSVELT: But --

THE COURT: But --

MR. LOOSVELT: So --

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

MR. LOOSVELT: $1 million --

THE COURT: -- your client, no.

MR. LOOSVELT: -- is the policy limit is illegal question.

THE COURT: Uh-huh.

MR. LOOSVELT: There is no fact alleged that there is a

settlement offer within that $1 million. So that can be determined, yes.

THE COURT: Okay. Okay. Thank you.

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

THE COURT: Sure.

MS. KELLER: -- to clarify --

THE COURT: And then -- well --

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

THE COURT: Okay. Okay, thanks. Thanks. Thanks for confirming. Now Mr. Derewetzky.

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

THE COURT: Yes.

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

THE COURT: But don't we have to first determine whether or

not your client's bound by this agreement? Because Mr. Salerno was already -- I mean -- the argument is that they're not bound. That they expressly, in their acceptance provisions, said nothing in paragraph 12.

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

THE COURT: Back here on the signature page, it's Cosmo --

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

THE COURT: Okay.

MR. DEREWETZKY: -- this is a provision that deals with insurance that's going to benefit Marquee.

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

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

THE COURT: Okay. But --

MR. REEVES: -- coverage is primary --

THE COURT: Okay, yeah.

MR. REEVES: -- Marquee.

THE COURT: So that's what I'm trying to ---

MR. REEVES: Yes.

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

Your point being, it doesn't matter if we were not signatories to the insurance section; the operator was. And the operator, being Marquee, says, right in there, any other insurance is going to be excess. We're up front. We're number one. Anything else, we don't care. That's between them and their insurance carrier whether they're excess or not. That's between us. It's been, our insurance carriers and their insurance carriers we agreed will be excess. It doesn't matter.

MR. DEREWETZKY: Will be excess?

THE COURT: Correct. Exactly.

MR. DEREWETZKY: Yes.

THE COURT: A bit important. That Marquee specifically says, we don't care what -- that's between Cosmo and its insurance carriers, who's excessive and who's primary. We don't care. That doesn't matter to us. Always, as between us and them, we're going to be primary. They're going to be excess.

MR. DEREWETZKY: Yes. And --

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

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

THE COURT: Yeah.

MR. DEREWETZKY: -- the threshold issue --

THE COURT: Yeah.

MR. DEREWETZKY: -- of whether there can be a claim for subrogation under these circumstances. Assuming that we prevail on the argument that we're excess, Counsel has acknowledged that there are cases where excess carriers subrogate against primary carriers. And that would be our situation here. There isn't a specific case by the Nevada Supreme Court under those facts.

But we lay out in our briefing, at length, the history of subrogation in the State of Nevada, starting with a case in 1915, called *Laffranchini v. Clark*, at 39 Nevada 48, which says, subrogation is simply a means by which equity works out justice between man and man. It is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties; and the courts incline rather to extend than restrict the principle, and the doctrine has been steadily growing and expanding in importance. This is 1915, Your Honor.

And the court went on to say, subrogation applies to a great variety of cases, and is broad enough to include every instance in which one party pays a debt for which another party is primarily liable. Our argument here, Your Honor, is that we are paying it. We have paid a

debt for which National Union is primarily liable. And for which -- well, and for which National Union is primarily liable. This has been the law in the State of Nevada for over 100 years. And if there's any question about that, you know, cases that were decided in 2010 hold the same.

The court has expressly stated the district courts have full discretion to fashion and grant equitable remedies. You have the authority to do this, even if no other court in Nevada has ever done it. But there have been equitable subrogation cases in Nevada for years. We cite, in our brief -- and I have to mention this because Counsel raised the issue of the Maxwell decision. As Counsel noted, there are recent federal trial court decisions which have enforced the right of equitable subrogation in the insurance context, in this situation; excess vs. primary, and those are the *Colony* cases. There are two of them. I refer to them as "Colony 1" and "Colony 2". In one of the decisions, the court rejected the claim of contractual subrogation based on *Maxwell*.

And let me go back to the *Canfora* case. The *Canfora* case was a contractual subrogation case, in the context of medical benefits, where insurer for the employer compensated the injured insured. Who then went and sued the tortfeasor, got a big recovery. And the insurer wanted to get the amount back of their medical lien.

The beneficiary cited Maxwell for the proposition that you don't have the right to contractual indemnity. And here's what the Nevada Supreme Court said about Maxwell in the *Canfora* case, we have previously prohibited an insurer from asserting a subrogation lien against medical payments of its insured as a matter of public policy. In

Maxwell v. Allstate Insurance, 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.

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

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

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

THE COURT: So then what? What is there to discover? Because aren't you essentially saying, purely legal issue. Go ahead and decide it today. We don't need to do anything. It's purely legal. Give everybody the contracts that are here. I guess, technically outside the scope of the initial pleading. So I'm just trying to figure out; what's left? What are we going to do under a Buzz Stew analysis? What are we

going to do?

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

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

MR. DEREWETZKY: I'm --

THE COURT: How would a jury understand?

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

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

MR. DEREWETZKY: Yes. But I do know that there are allegations in the complaint, and there's argument in the papers, about superior equities. And at least in the very recently decided, again, federal district court opinion, Fidelity and Deposit Company of Maryland vs. Travelers Casualty, which is at 2018 Westlaw 4550397, the court said it could not make a determination on summary judgment as to who has the superior equities because it involves questions of fact and questions of disputed fact.

So at the very minimum, if the cause of action for equitable

contribution survives, the case must go forward to determine, at a minimum, who had the superior equities.

THE COURT: Okay. Got it. Thank you.

MS. KELLER: Your Honor, the --

THE COURT: Yes?

MS. KELLER: The argument that somehow the lease agreement could control who is excess, fails. It's a matter of black letter law that in actions between insurers, regarding priority of coverage issues such as here, courts have found the provisions of an insurance policy control, over the terms in an insured's contract. And that's -- we cited the *Travelers Casualty Surety Company vs. American Equity Insurance Company*, 93 Cal. App. 4th 1142. And we cited a couple of other cases for that proposition. You simply can't take an insurance policy and convert it into a different kind of policy via a lease agreement with someone else. You can't do it. And so that fails.

So we're back to, Plaintiff pled that they insure Cosmo as the named insured, and that they have an excess policy. And they pled that National Union insures Marquee as its named insured, excess policy. So you have two towers, and you have two excess carriers going after each other. The idea that we've had equitable subrogation in Nevada for years, not between insurance companies ever. It's always a third party tortfeasor and the insurance company.

So it's a completely different situation. It really would open up, I think, the courts, to endless food fights between excess carriers. Everybody in every tower going after every other carrier, saying, well,

you're the reason it didn't settle. No, you are. And if somebody is going to do that, again, it should be the Nevada Supreme Court.

And one reason is, the same reason that whenever you have judge-made law, you want it to be done by the highest court, because they can get briefing from everyone. Including, many amici curiae can come in and say, we've researched this extensively and here's what we've found. They're in a position to really seriously consider the pros and cons from everybody who might have an interest in it, because it would be making new policy. It's a policy decision.

And in this case, for the Court to grant our motion to dismiss and defer that to the Nevada Supreme Court, would make sense for another reason. There's no one here who's going to be injured in the interim. These are two insurance carriers fighting it out. There's not a paraplegic person who's going without medical care. We're not in a situation where witnesses could die or memories fade. This is a situation that is a legal issue only.

And so that's another reason why I think the fact that Plaintiff has not been able to state a claim under current Nevada law, means that we should prevail.

THE COURT: Thank you.

Aspen?

MR. LOOSVELT: There was no opposition that the one-million limit applies. And that's notable, because that's -- even if we were going to recognize these new causes of action, that's failed to all the claims. So the initial complaint stated equitable subrogation, and

then the amended complaint just did away with equitable. It sounds like that's what the focus is, or maybe there being -- alleging an alternative. It's hard to tell. But under either, they fail because of the purely legal question Your Honor cold make, based on the facts and what the settlement offers were. And they were not within the policy limits.

Even where Your Honor is going to recognize an equitable subrogation claim, just looking at some of the elements, they're just lacking here. And this is, it's an equitable thing. It's to do equity and, you know, do fairness to people. And this is rights emanating from the insured. And one of the prominent elements is that the insured suffered a loss. And they're trying to subrogate it to that loss. But the insured here didn't suffer a loss. The insured was fully indemnified in the post-verdict settlement. Based on all the limits, by the way, which included the one with another policy limit.

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

MR. LOOSVELT: So there's --

THE COURT: But don't they stand in the shoes of Cosmo? I mean --

MR. LOOSVELT: So they --

THE COURT: -- they did that to protect their insured.

MR. LOOSVELT: There's a different element that kind of addresses that, up under that, and that element is, the insured had an existing signable cause of action against the defendant, that they could

have asserted had they not been compensated. So that's a completely separate element. One of the other elements is whether or not the insured itself actually suffered a loss. So after everything is done here and they've been paid, where is their loss? There is none. They're not out-of-pocket on --

THE COURT: I think Counsel's standing up because I don't think he addressed the Aspen issues. So hang on.

MR. LOOSVELT: Sure.

THE COURT: You'll get the last word. And we'll let Counsel address the Aspen issues, because I --

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

THE COURT: -- think you -- yeah.

MR. DEREWETZKY: I got all excited and sat down.

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

MR. DEREWETZKY: Yes.

THE COURT: We --

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

THE COURT: Yeah.

MR. DEREWETZKY: -- and the history and the evolution of subrogation, it's this fact that allows the insurance company to go and

pursue the tortfeasor to get recovery. The insurance company's out of pocket. They get the rights from the insured to pursue the tortfeasor to get reimbursed. If there was actually a requirement that the insured had to be out of pocket, we'd never have a subrogation claim because the insured's company wouldn't have paid. And I think that puts to rest that particular argument.

But let me address the policy limits issue in the Aspen policy, because I think this is actually pretty clear. What Aspen is trying to argue is that they have an endorsement amending the common policy conditions, that says, if this policy contains two or more coverage parts providing coverage for the same occurrence, accident, cause of loss, loss, or offense, the maximum limit of insurance, under all coverage parts, shall not exceed the highest limit of insurance under any one coverage part. I think we have to assume that the insurance company knew what it was doing when it drafted its policy and use the term coverage part as opposed to some other term.

THE COURT: So the mere fact --

MR. DEREWETZKY: We think --

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

question of whether or not they did in fact have an offer to settle they could've settled for within their policy limits.

MR. DEREWETZKY: That's correct, Your Honor. But what I think is controlling is, and the issue is whether there's a $1 million limit or a $2 million limit.

And we get down to this question of, what's a coverage part? There are several coverage parts in the Aspen policy. There's a general liability coverage part. There's a liquor liability coverage part. And there are other coverage parts referred to within the policy. In the general liability coverage part, there are two distinct coverages. There is bodily injury and property damage coverage, and there's personal and advertising injury coverage. Under bodily injury coverage, you have to have an occurrence for there to be coverage, an occurrence defined as an accident.

THE COURT: Okay. So I understand this. And so -- but how do we need discovery on that?

MR. DEREWETZKY: I'm sorry?

THE COURT: Why would be need discovery on that? I mean, is -- again, is that just something the Court can say, I think you're wrong. It's $2 million because he had both his injury -- because that was a big part of this thing, was his damages, the financial loss due to his reputation of his inability to run his hedge fund, allegedly. So the Court could just say, I think that's 2 million and you've already said there was an offer for 1.75. Therefore, as a matter of law, you blew it.

MR. DEREWETZKY: Yes. But I think it's important for us --

THE COURT: So --

MR. DEREWETZKY: -- to argue the legal question.

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

MR. DEREWETZKY: Well --

THE COURT: Is there anything out there?

MR. DEREWETZKY: -- I think it's --

THE COURT: Or it's just a legal issue?

MR. DEREWETZKY: -- a legal question, Your Honor.

THE COURT: Okay.

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

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

MR. REEVES: If he's going to concede a $1.5 million offer and you find $2 million, then the answer would be yes. You have what you need.

THE COURT: Okay.

MR. REEVES: They failed to settle the case --

THE COURT: Okay.

MR. REEVES: -- I mean, to your point, or relative to that concession.

THE COURT: Okay.

MR. REEVES: It's an allegation. And if we're going to say in

open court that that concession is binding, then --

THE COURT: Okay. Thanks.

MR. LOOSVELT: I agree it is a legal question as to what the limit is. And so he just talked about an endorsement for different coverage parts, all right? But when we look at the CGL coverage part, there's A, B. You have a section of bodily injury and you have a section of this personal and advertising injury. All these CGL coverage parts are subject to the each occurrence limit of $1 million. It doesn't matter the amount of injuries that result under that. And that's what the case law shows and says.

So what you have here is a legal question of what applies. Is it the one million or is it the two million? Anything under the CGL, we have an each-occurrence limit of $1 million. It doesn't matter, like in the *Bisch* case, when the Nevada Supreme Court recognized that it was this causal approach to when an occurrence applies, that it was this horrible thing where this little girl was being backed over, back and forth, back and forth. It wasn't multiple injuries that determined multiple occurrences. It was one causal common event. And that's this incident that happened at Moro [phonetic] Peak.

Whether that resulted in him being falsely imprisoned and being beat up by the security guard -- if that's kind of what the allegations parse out -- but it's that one common cause, is that one occurrence, and it's that $1 million policy limit that applies to the CGL coverage of which the bodily injury and the personal and false advertising.

THE COURT: Okay. All right. Great. Thanks. Fine.

MR. DEREWETZKY: Your Honor, I didn't get a chance to actually finish my argument, because it has to do with this question that he just raised, where they argue about occurrences and there are two different types of coverage under the CGL coverage part; one that doesn't require an occurrence, one that requires an offense. And the offense in this case is false imprisonment. We have an offense of false imprisonment for which there's a $1 million limit, and we have an accident that caused bodily injury, for which there's $1 million limit, hence, $2 million.

THE COURT: Okay.

MS. KELLER: Sorry.

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

Same thing with Aspen. Again, for motion-to -dismiss stage, I see those -- Mr. Salerno's correct. The two insurance issues, although very different -- very different -- are distinct from the Marquee issue. So the question on the insurance policies is, what do we need? If not granting a motion to dismiss, what are we proceeding on? Granting?

Denying? Are we making a determination in their favor in the case that they win at this point in time? The Marquee issue is, to me, it's very different. And that's why I asked, you know, why are we having one set of Counsel argue this? Because I appreciate Counsel saying, but these are not inconsistent. Really? Really?

MR. REEVES: One observation, Your Honor --

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

MR. REEVES: Okay.

THE COURT: I'll let you know.

MR. REEVES: May I make one observation?

THE COURT: Sure. And they can have their closing --

MR. REEVES: Well, we didn't --

THE COURT: -- word, too.

MR. REEVES: -- file a motion, so when, you know --

THE COURT: All right.

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

THE COURT: Right. And that's why --

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

THE COURT: That's why I'm saying, are we essentially saying, then, at this stage, if we're all agreeing, it's a purely legal issue?

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

THE COURT: Yeah.

MR. REEVES: So, understood.
THE COURT: And so --
MR. REEVES: Thank you, Your Honor.
THE COURT: There is no motion for a summary judgment pending on any of this.
MR. REEVES: Understood. I'm --
THE COURT: It's all a motion to dismiss --
MR. REEVES: -- just pointing out a procedural irregularity --
THE COURT: It's --
MR. REEVES: -- that we're --
MR. SALERNO: Your Honor --
THE COURT: Yeah.
MR. SALERNO: -- briefly? I'm not sure if Your Honor wants to entertain supplemental briefing, if you feel like you need St. Paul's policy, we'd be happy to do that.
THE COURT: I'll let you know.
MR. SALERNO: Okay.
THE COURT: If I think that that's going to be a critical factor --
MR. SALERNO: Yes.
THE COURT: -- such that it would be --
MR. SALERNO: Yeah.
THE COURT: -- deciding thing and there wouldn't be any other facts.
MR. SALERNO: To the extent Your Honor is prepared to rule,

I would like to have the record reflect that we did object to the sur reply --

THE COURT: Okay.

MR. SALERNO: -- and requested to strike that --

THE COURT: Uh-huh.

MR. SALERNO: So for the record, we would ask for your ruling on that as well.

MR. DEREWETZKY: And we objected to the two-month-late-filed reply brief of Aspen and ask that it be stricken.

THE COURT: Okay.

MR. LOOSVELT: And we oppose that, and counter move for approval of the reply, so --

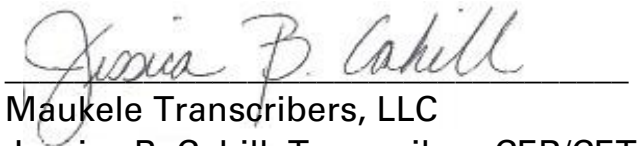
THE COURT: Okay. All right. Thank you. So as I said, I will look at that and determine if, in fact, there is anything additional needed, or if, really, at this point in time with what we've got, we're done. Because I kind of think it's one or the other. So thank you very much.

IN UNISON: Thank you, Your Honor.

THE COURT: Thank you very much for time, everybody.

[Proceedings concluded at 12:34 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

Exhibit U

ODM
Ramiro Morales [SBN 7101]
William C. Reeves [SBN 8235]
Marc. J. Derewetzky [SBN 6619]
MORALES FIERRO & REEVES
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Attorneys for Plaintiff St. Paul
Fire and Marine Insurance Company

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE AND MARINE INS. CO., Plaintiff, vs. ASPEN SPECIALTY INS. CO, et al., Defendants.	Case No.: A758902 Dept.: XXVI ORDER RE: DEFENDANTS' MOTIONS TO DISMISS DATE: October 3, 2018 TIME: 9:30 a.m.

The Court, having considered the Motions to Dismiss filed separately by Defendants Aspen Specialty Ins. Co. ("Aspen"), Roof Deck Entertainment, LLC ("Roof Deck") and National Union Fire Ins. Co. of Pittsburgh, PA ("AIG") as to the First Amended Complaint ("FAC") filed by Plaintiff St. Paul Fire and Marine Insurance Company ("Travelers"), denied each of the motions for the reasons set forth in this Court's Minute Order, a copy of which is attached hereto as Exhibit A.

By virtue of this Order, Aspen, AIG and Roof Deck shall each file Answers to the FAC within ten (10) days of the issuance of this Order.

IT IS SO ORDERED.

Dated: June 26, 2019

DISTRICT COURT JUDGE

///

///

SUBMITTED BY:

MORALES FIERRO & REEVES

By 

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

Exhibit A

A-17-758902-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Insurance Tort | **COURT MINUTES** | February 28, 2019

A-17-758902-C St. Paul Fire & Marine Insurance Company, Plaintiff(s)
vs.
Aspen Specialty Insurance Company, Defendant(s)

February 28, 2019 **3:00 PM** **Minute Order**

HEARD BY: Sturman, Gloria **COURTROOM:** RJC Courtroom 10D

COURT CLERK: Lorna Shell

PARTIES PRESENT: None

JOURNAL ENTRIES

- DEFENDANT ASPEN SPECIALTY INS. CO.'S MOTION TO DISMISS PLAINTIFF ST PAUL FIRE AND MARINE INS. CO.'S REDACTED FIRST AMENDED COMPLAINT ..... DEFENDANT ROOF DECK ENTERTAINMENT LLC'S MOTION TO DISMISS PLAINTIFF ST PAUL FIRE & MARINE INS. CO.'S FIRST AMENDED COMPLAINT ..... AND NATIONAL UNION'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant Aspen Specialty Ins. Co.'s Motion to Dismiss Plaintiff St Paul Fire and Marine Ins. Co.'s Redacted First Amended Complaint; Defendant Roof Deck Entertainment LLC's Motion to Dismiss Plaintiff St Paul Fire & Marine Ins. Co.'s First Amended Complaint; and National Union's Motion to Dismiss Plaintiff's Complaint came on for hearing on October 30, 2018. Having reviewed the transcript filed December 26, 2018 and taken the matter under advisement, the COURT HEREBY FINDS as follows:

With respect to the Roof Deck Motion to Dismiss, the Court raised the question of whether the standard of review for a Motion to Dismiss would change with the amendment of the Nevada Rules of Civil Procedure. COURT FINDS it is now clear from the Advisory Committee notes to NRCP 12 that no change is anticipated Rule 12(b)(5) mirrors FRCP 12(b)(6). Incorporating the text of the federal rule does not signal intent to change existing Nevada pleading standards. COURT FURTHER FINDS Roof Deck's Motion introduces matters outside the scope of the initial pleadings and the issues related to the operating agreement in question are such that, under Nevada s rigorous pleading standards, it is not appropriate for disposition at the pleading stage. Nevada law provides

A-17-758902-C

that a complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief. Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). COURT THEREFORE ORDERED, Roof Deck's Motion to Dismiss DENIED.

Similarly, both the National Union and Aspen Specialty Ins. Co. Motions require the Court to go beyond the pleadings and ask this Court to analyze insurance policies without testing through discovery whether those policies are complete and that there are no missing amendments, exhibits, riders, or endorsements. Notably the declarations in support of the admissibility of the respective policies are brief, stating only that the exhibit is a true and correct copy with only premium information redacted, with no explanation of how the declarant determined the completeness of the policy. Further, both National Union and Aspen argue that the indemnity action must fail as a matter of law, but it seems that at least one piece of evidence necessary to evaluate these legal issues is missing from the record before the Court, i.e. the St Paul policy.

Nevada has not adopted the federal standard found in Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Both National Union and Aspen Specialty have provided evidence outside the initial pleadings, but argue that the issue before the court is purely a matter of legal interpretation and appropriate for disposition at the pleading stage. Based on the record before the Court at this time, there appears to be no material questions of fact and the only issues remaining are purely questions of law. COURT THEREFORE ORDERED, Motions to Dismiss filed respectively by National Union and Aspen Specialty DENIED WITHOUT PREJUDICE to raise these issues in a Motion for Summary Judgment.

Counsel for Plaintiff is DIRECTED to provide an Order for signature by the Court within 30 days.

CLERK'S NOTE: A copy of this minute order was e-mailed, mailed, or faxed as follows: Nicholas Salerno, Esq. (nsalerno@heroldsagerlaw.com), Ryan Loosvelt, Esq. (rloosvelt@messner.com), and William Reeves, Esq. (702-699-9455)

Exhibit V

William Reeves

From: William Reeves <wreeves@mfrlegal.com>
Sent: Wednesday, September 25, 2019 10:51 AM
To: Nicholas Salerno
Cc: Andy Herold; Kathleen Harrison; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

To be clear:

• Original inquiry was made on Calendar Day 7 (or, as you state below, 1 business day before 10 calendar days are scheduled to elapse)

• Follow up was made on Calendar Day 10 (Business Day 6) with a call later that day between us in which no mention was made of your view as to the deadline

• On Calendar Day 11 (Business Day 7), you substantively responding to our inquiry while contending the Opp is now untimely

Interesting timing. Under your logic, no extension is needed since we are already too late. Meanwhile, per the Court's website, the rules remain unchanged.

We will raise with the Court.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Wednesday, September 25, 2019 9:45 AM
To: William Reeves
Cc: Andy Herold; Kathleen Harrison; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

Bill –

This exchange seems unproductive. You requested an extension the business day before your oppositions were due and apparently did not appreciate the rule changes. We were not able to address your request with our client until the deadline had passed. You have offered no understandable reason why additional time would be needed to brief the same legal issues for a third time with the court. Nonetheless, we have offered you a proposal that provides some additional time for the briefing under a reservation of rights. Please advise how you wish to proceed.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Wednesday, September 25, 2019 9:40 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: Andy Herold <aherold@heroldsagerlaw.com>; Kathleen Harrison <kharrison@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

The exchange set forth below speaks for itself. Not sure what sentences you are referring to. At this point, feel free to clarify and/or expound upon where you believe I have erred.

William C. Reeves
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2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Wednesday, September 25, 2019 9:33 AM
To: William Reeves
Cc: Andy Herold; Kathleen Harrison; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

Bill –

Apparently, you see some benefit to casting unfounded accusations. We tried to explain how this developed from our end on the phone yesterday and you would only make similar unfounded accusations without allowing us to even complete a sentence. This is your error. Please clarify if you are rejecting the proposal.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Wednesday, September 25, 2019 7:38 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: Andy Herold <aherold@heroldsagerlaw.com>; Kathleen Harrison <kharrison@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

Odd proposal since we requested the extension on calendar Day 7. Given this, it appears AIG strategically stalled in an effort to manufacture its timeliness argument. Unfortunate and disappointing gamesmanship.

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From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 3:40 PM
To: wreeves@mfrlegal.com
Cc: Andy Herold; Kathleen Harrison; Jeremy Stamelman
Subject: FW: Moradi

The proposal is as follows:

- St. Paul to file its opposition to National Union's and Marquee's motions for summary judgment by October 4.
- National Union and Marquee reserve their rights to contend St. Paul missed its deadline to file oppositions to their motions for summary judgment.
- National Union and Marquee to file their replies by October 18.
- Parties agree to move the October 23 discovery motion hearing date until after the new MSJ hearing date.
- Discovery stay in place through new MSJ hearing and new discovery motion hearing.

If acceptable, please provide proposed stipulations for the Judge and for the Discovery Commissioner to accomplish the above.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 12:23 PM
To: 'Nicholas Salerno' <nsalerno@heroldsagerlaw.com>
Cc: 'Andy Herold' <aherold@heroldsagerlaw.com>; 'Kathleen Harrison' <kharrison@heroldsagerlaw.com>; Jeremy Stamelman <jstamelman@kelleranderle.com>
Subject: RE: Moradi

Go ahead and make a proposal and we will convey it to our client.

William C. Reeves
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(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 12:19 PM
To: wreeves@mfrlegal.com
Cc: Andy Herold; Kathleen Harrison; Jeremy Stamelman
Subject: Moradi

Bill –

As we tried to explain during the call today, EDCR 1.14 has been suspended by the Eighth District pursuant to the attached Administrative Order, effective March 12, 2019. As such, the exclusion of weekends and holidays for deadlines of less than 11 days no longer applies nor does the mail rule. The deadline for the oppositions has passed and we do not have client authority to extend an already passed deadline. However, we believe our clients would be agreeable to an extended briefing period that is not as lengthy as proposed with the proviso that (i) my clients reserve all rights relating to the missed opposition deadline and (ii) the hearing on the motion to phase discovery is moved commensurately to a time after the MSJ hearing.

Please let us know if there is any interest in an approach of this nature.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 11:10 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Andy Herold <aherold@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

I do not understand the purpose of the call. Per below, you refused any extension. Has there been a change in position?

Local Rules obtained via the Clark County website today are attached. Let me know what I am missing.

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From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 10:50 AM

To: William Reeves
Cc: 'Jeremy Stamelman'; Andy Herold; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

We will give you a call at 11:00 PM.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 10:25 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Andy Herold <aherold@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

No idea what confusion or options you are referencing. I am around.

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From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 10:18 AM
To: William Reeves
Cc: 'Jeremy Stamelman'; Andy Herold; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

Bill –

Your response indicates some confusion as to where we are coming from. Are you available for a call at 11:00 AM to clarify and discuss options?

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 10:07 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Andy Herold <aherold@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

Your response below is disappointing and reflects a lack of professional courtesy.

As you know, LR 1.14 provides that weekends are excluded from time calculations. The recent changes in the NRCP do not trump these rules, a fact highlighted by your comment below that our Oppositions to your 40+ page dispositive motions are due in 10 calendar days, which is ludicrous.

As stated during your call, the additional time requested is, in part, to permit for us to coordinate with our clients in opposing the motions. I assume the same was true when your office previously requested extensions which we agreed to afford as a matter of professional courtesy.

Given your position outlined below, I see no reason for a further call. If you believe otherwise, I am reachable per below.

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From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 9:15 AM
To: William Reeves
Cc: 'Jeremy Stamelman'; Andy Herold; Jeremy Stamelman
Subject: RE: Moradi

Bill –

NU's and Marquee's motions for summary judgment are premised on the same legal arguments that were briefed in the two rounds of their motions to dismiss so it is unclear why St. Paul needs the additional weeks when those legal issues have already been briefed at length. When we spoke yesterday, you did not offer a particular reason for the extension request and our clients do not understand what St. Paul's good cause would be for the amount of time requested.

In addition, we have reviewed the rules and are confused by St. Paul's request because the deadline for St. Paul to file its oppositions is now past: 10 days from the filing and service of the motions for summary judgment. We cannot agree to an extension of a past deadline.

Please let us know if you would like to set a call today to discuss St. Paul's basis for an extended briefing period.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 7:25 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>
Subject: RE: Moradi

Let me know on the extension.

Note that we plan to involve the Court via Emergency Motion if needed.

Thanks.

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From: William Reeves [mailto:wreeves@mfrlegal.com]
Sent: Monday, September 23, 2019 11:32 AM
To: Nicholas Salerno
Cc: 'Jeremy Stamelman'
Subject: RE: Moradi

Works. Talk to you then.

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From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Monday, September 23, 2019 11:28 AM
To: William Reeves
Cc: 'Jeremy Stamelman'
Subject: RE: Moradi

How about 1:30 PM?

From: William Reeves <wreeves@mfrlegal.com>
Sent: Monday, September 23, 2019 10:49 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>
Subject: RE: Moradi

Yes.

William C. Reeves
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From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Monday, September 23, 2019 10:46 AM
To: William Reeves
Cc: Jeremy Stamelman
Subject: RE: Moradi

Are you available to discuss this afternoon?

From: William Reeves <wreeves@mfrlegal.com>
Sent: Monday, September 23, 2019 10:03 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Subject: RE: Moradi

Let me know. Thanks.

William C. Reeves
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From: William Reeves [mailto:wreeves@mfrlegal.com]
Sent: Friday, September 20, 2019 9:19 AM
To: Nicholas Salerno
Subject: Moradi

Do you want to set a briefing schedule for the AIG and Marquee motions? Opps due in 30 days and replies due 21 days thereafter?

William C. Reeves
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**********PLEASE NOTE **********

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	CASE NO.: A-17-758902-C **ST. PAUL'S REPLY SUPPORTING ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY, AND OPPOSITION TO ASPEN'S COUNTERMOTION FOR SUMMARY JUDGMENT** Date: Time: 9:00 a.m. Dept.: XXVI

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INTRODUCTION

The underlying action triggered two coverages within Aspen's CGL Coverage Part: 1) Coverage A - Bodily Injury and Property Damage Liability, which covers bodily injury caused by an accident, *i.e.*, negligence; and 2) Coverage B - Personal and Advertising Injury, which covers injuries resulting from a variety of offenses including false imprisonment. Because the underlying action alleged and the $161 million special verdict found liability based on bodily injury from negligence as well as for false imprisonment, both coverages apply. Coverage A is subject to a $1 million per occurrence limit, limiting Aspen's indemnity obligation under Coverage A for damages resulting from one occurrence to $1 million. Coverage B is subject to a personal and advertising injury limit of $1 million, limiting Aspen's indemnity obligation under Coverage B for injury sustained by any one person to $1 million. Aspen's indemnity obligation under the sum of both coverage parts together is in turn limited by the general aggregate limit of $2 million. Therefore, because both coverages were triggered by the underlying suit, Aspen had $2 million available to settle this case and indemnify its insured.

Aspen disputes this plain language, arguing that: 1) the per occurrence limit applies to both Coverage A and Coverage B; 2) its Coverage Part endorsement limits not just coverage under the Coverage Parts of the policy, but also coverages within a Coverage Part; and 3) its policy is ambiguous, and should be resolved against its insured to limit coverage. All of these arguments fail to withstand even basic scrutiny. The policy plainly states the per occurrence limit of $1 million applies only to Coverage A, not Coverage B, and that the $1 million personal and advertising limit applies to Coverage B, with both coverages together subject to the general aggregate of $2 million. In fact, Coverage B does *not require an occurrence or use that term because many of the covered offenses are not occurrences*, so to subject it to a per occurrence limit would render Coverage B illusory. Aspen's position is therefore necessarily wrong.

Aspen does not even attempt to address this actual policy language. Rather, it cites irrelevant cases that only involved damages under Coverage A, and which therefore only involved the per occurrence limit, for the proposition that the per occurrence applies to Coverage B as well. Of course, these cases do nothing of the kind, since they did not involve Coverage B. In contrast,

St. Paul cites not only clear policy language but also cases nationally that hold there is no reason a policy cannot provide multiple coverages for damages within a single action.

Further, St. Paul explained in detail in its moving papers why the Coverage Part endorsement does not apply to coverages within a Coverage Part under its plain language, and summarizes that discussion again below. Aspen also does not attempt to address St. Paul's textual argument of this endorsement, thereby effectively conceding St. Paul's reading is correct. Instead, it pivots into an ambiguity argument, arguing that its policy is ambiguous. This is not the law in Nevada. The policy is not ambiguous. It says there are two limits. Therefore, there are two limits. Even if it were ambiguous, it would be construed in favor of the insured, in whose shoes St. Paul stands. Therefore, this Court should grant St. Paul's motion that Aspen had two limits of $1 million each or a total of $2 million available in the underlying case.

In its attempt to avoid the plain language of its policy, and, ultimately, the consequences of its acts, Aspen argues it cannot be held to account for its actions because subrogation does not exist in Nevada and because St. Paul protected Cosmo from Aspen's bad faith Aspen is off the hook.[1] Because Aspen's discussion of subrogation is so fundamentally misguided, and because even before Aspen's misleading opposition brief this Court had questions regarding the operation of subrogation generally, St. Paul feels compelled to again provide a comprehensive primer on the law of subrogation below.

Put simply, subrogation is when one party stands in the shoes of another because it paid for that other party's injuries, thereby transferring to it via equity or contract the rights that injured party originally had to seek redress from the third party who injured it. Fundamental to this definition is that the originally injured party had its injuries paid for by the subrogating party. Thus, the fact that the injured party had its injuries paid for does not obviate a right of subrogation

[1] St. Paul agrees with Aspen's footnote no 2, wherein it infers St. Paul intended on this motion for the Court to rule only the number of available limits and the propriety of subrogation in Nevada. That was in fact St. Paul's intent. Thus this Court does not have to rule on whether St. Paul ultimately succeeds in its subrogation claim, whether it has evidence to support the elements of that claim, and it does not need to render final judgment against Aspen. Rather, all the Court need decide now is whether St. Paul can assert a claim for subrogation if it can prove the elements it says it can under Nevada law.

as Aspen would have this Court believe; rather, it is what creates that right. Aspen's position has been referred to as "circular" and "illogical" repeatedly by the courts, because otherwise subrogation would not exist at all.

Further, contractual subrogation is when one party has the right to subrogate to the rights of another per a contract between them, rather than merely through equity. This contract is between the subrogating party and the injured party, not between the subrogating party and the tortfeasor who caused those injuries. Aspen's position that St. Paul needs a contract with Aspen to sue it in contractual subrogation is therefore misguided. If St. Paul did have a direct contract with Aspen, a suit on on that contract would simply be a breach of contract action, not contractual subrogation. The reason it is called contractual "subrogation" is that St. Paul does not have such a contract, but rather subrogates to Cosmo's contract with Aspen. That is the whole point. St. Paul can sue under contractual subrogation because its policy includes a subrogation clause, which is undisputed, and which are enforced in Nevada. Therefore, again, Aspen's arguments fail.

All the cases Aspen cites either do not say what it claims they do, or are demonstrably incorrect themselves. If the Court were to hold to the contrary, that there is no right of subrogation in Nevada under these circumstances, than inevitably insurers will play chicken with each other in the settlement of cases, hoping that the other blinks first, pays the claim, and thereby gets stuck with the bill. Not only would this operate as a windfall to unscrupulous insurers like Aspen who commit bad faith while increasing premiums, but it would also greatly increase the risk of judgments in excess of policy limits that will directly injure insureds. Accordingly, this Court should grant St. Paul's motion for partial summary judgment, holding Aspen had two limits or a total of $2 million available to settle the underlying case, and that subrogation in the circumstances St. Paul alleges is available in Nevada.

LEGAL ARGUMENT

I. Aspen Had $2 Million in Applicable Limits.

A. Aspen's $1 Million Per Occurrence Limit Applied.

Aspen does not dispute that its $1 million per occurrence limit applied to the underlying action. As St. Paul explained in its moving papers, that limit applies whenever Coverage A -

Bodily Injury and Property Damage Liability of the CGL Coverage Part is triggered. Coverage A covers sums the insured becomes legally obligated to pay as damages because of bodily injury or property damage, if that injury or damage occurs during the policy period, and if it is caused by an occurrence, defined as an accident. Here, it is undisputed that this loss triggered Coverage A because of Moradi's bodily injury in the form of a beating and traumatic brain injury, and because negligence was alleged in the underlying complaint and found in the special verdict.

Aspen's indemnity obligation under Coverage A is limited by the per occurrence limit, which provides:

> 5. Subject to Paragraph 2 or 3 above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
>
> a. ***Damages under Coverage A;*** and
> b. Medical expenses under Coverage C
>
> because of all bodily injury and property damage arising out of any one occurrence.

This is not a complicated clause. It limits the amount of indemnity available under Coverage A and Coverage C (which is not relevant here) arising out of one occurrence to the amount of the per occurrence limit. *It does not state that the each occurrence limit applies to Coverage B.* Therefore, the each occurrence limit does not apply to Coverage B, but rather only Coverage A. The declarations of Aspen's policy state that the per occurrence limit is $1 million. Therefore, Aspen's $1 million per occurrence limit was triggered by the underlying claim.

B. Aspen's $1 Million Personal and Advertising Injury Limit Applied.

Coverage A is not the only coverage within the CGL Coverage Part that was applicable to the damages at issue. Coverage B - Personal and Advertising Injury was also applicable. Coverage B covers sums the insured becomes legally obligated to pay as damages because of personal and advertising injury. Personal and advertising injury is in turn defined to include a number of offenses, including false imprisonment. Because here the underlying suit alleged, among other things, false imprisonment, and the special verdict awarded damages based in part on a finding of false imprisonment, Aspen's personal and adverting injury limit under Coverage B was also triggered.

Aspen's indemnity obligation under Coverage B is limited by its personal and advertising injury limit, which provides:

> 4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay ***under Coverage B*** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

This is also not a complicated provision. It limits Aspen's indemnity obligation under Coverage B to the amount of the personal and advertising limit for all personal and advertising injury sustained by any one person. It does not apply to Coverage A because it does not reference Coverage A. Rather, it limits Coverage B. Aspen's declarations state that the personal and advertising limit is $1 million. Thus here, because one person was subject to false imprisonment, only one personal and advertising injury limit is available. Therefore, Aspen's $1 million personal and advertising limit under Coverage B was also triggered.

C. Aspen's General Aggregate Limit Caps Indemnity Under Coverages A and B at $2 Million.

The policy further provides a general aggregate limit which caps Aspen's total liability when both Coverage A and Coverage B are triggered. It states:

> 2. The General Aggregate Limit is the most we will pay for ***the sum*** of:
>
> a. Medical expenses under Coverage C;
>
> b. Damages under ***Coverage A***, except damages because of "bodily injury" or "property damage" included in the "products-completed operations" hazard; ***and***
>
> c. Damages under ***Coverage B***.

Again, this is a straightforward provision. It states that the general aggregate limit applies to the *sum of damages under both Coverage A and Coverage B*. Therefore, if a claim triggers both coverages, the general aggregate is the most Aspen can owe. This is an example of a limits section that actually applies to both Coverage A and Coverage B, and thus an example of how Aspen would have to draft that clause addressing the per occurrence limit for it to function as Aspen claims it does. Here, the declarations state that the general aggregate limit is $2 million,

which means that no matter how many occurrences took place under Coverage A and no matter how many people were injured under Coverage B, Aspen's liability is capped at $2 million. Thus, it had $2 million available to settle the underlying suit.

D. Aspen's Per Occurrence Limit Does Not Apply to Coverage B Because Coverage B Does Not Require an Occurrence.

Coverage A and Coverage B have different limits because they are designed to cover different types of injuries caused by different kinds of actions. As well-explained by the International Risk Management Institute ("IRMI"), a leading insurance industry source:[2]

> Coverage A of the standard commercial general liability (CGL) policy covers the insured's liability for "property damage" and "bodily injury." . . . Liability in connection with any of these forms of injury or damage is determined by tort law—the branch of law that governs civil wrongs not arising out of contract or statute. Some torts are negligent torts; bodily injury and property damage liability as covered by a CGL policy is based on negligence. But another category of torts—intentional torts—includes forms of injury different from bodily injury or property damage. These torts consist of a person's intentional acts that result in offenses such as libel or slander, wrongful eviction, invasion of privacy, and copyright infringement. Liability for acts of these kinds is insured by CGL Coverage B—Personal and Advertising Injury.
>
> The CGL policy defines these offenses as constituting "personal and advertising injury" . . . and makes injury of that kind the subject of the policy's Coverage B. Because negligent torts resulting in bodily injury or property damage, and intentional torts resulting in personal and advertising injury, are so different, ***the policy assigns completely different sets of provisions and exclusions to the two forms of coverage.*** For instance, while bodily injury and property damage under Coverage A must be caused by an "occurrence," which is defined as an accident, personal and advertising injury must be caused by an "offense." ***The kind of intentional tort that results in covered "personal and advertising injury" cannot usually be termed an "accident," so the requirement of an "occurrence" under Coverage B would defeat coverage from the outset in most instances.*** Similarly, there is no exclusion of injury that is expected or intended by the insured under

[2] IRMI is an educational organization and 'the leading publication for coverage analysis.'" *Deters v. USF Ins. Co.*, 797 N.W.2d 621 at 4 (Iowa Ct. App. 2011) (disposition without published opinion). IRMI has been relied upon by courts across the country, including the Nevada Supreme Court, for policy interpretation. *See, e.g., McKellar Dev. of Nevada, Inc. v. N. Ins. Co. of New York*, 108 Nev. 729, 733, 837 P.2d 858, 860 n.4 (1992) (relying on an IRMI publication to glean industry intent regarding the alienated premises exclusion); *see also, e.g., Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648, 652 (9th Cir. (Or.) 1988); *Furzier v. Ins. Co. of the W.*, 59 Cal. App. 4th 1276, 1287, 69 Cal. Rptr. 2d 629, 634 (1997). As stated by one California court when citing IRMI: "insurance industry publications are particularly persuasive as interpretive aids where they support coverage on behalf of the insured." *Prudential-LIME Commercial Ins. Co. v. Reliance Ins. Co.*, 22 Cal. App. 4th 1508, 1512–13, 27 Cal. Rptr. 2d 841, 844 (1994).

> Coverage B. . . . Instead, personal and advertising injury coverage is subject to exclusions that approach the insured's intentions from a different perspective, since the liability being insured is liability arising from an intentional tort. . . .
>
> ***As a separate coverage under the CGL policy, personal and advertising injury is also subject to its own set of policy limits.***

https://www.irmi.com/online/cli/ch005/1l05e-coverage-b-personal-and-advertising-injury-liability.aspx (emphasis added).

IRMI explains that Coverage A requires negligence, which is achieved through defining occurrence as an accident. In contrast, Coverage B does not have an occurrence requirement, and indeed, never uses that term, because its covered offenses often include intent as an essential element. *See also, Mez Indus., Inc. v. Pac. Nat. Ins. Co.*, 76 Cal. App. 4th 856, 865 (1999) (the personal and advertising injury coverage "does not depend upon an accident, but may be based (and often is) on the intentional acts of the insured."); *Stein-Brief Group v Home Indem.*, 65 Cal. App. 4th 364, 372 (Cal. App. 4th 1998) ("Stein–Brief correctly points out personal injury coverage is not dependent on an occurrence, as is bodily injury and property damage coverage, but arises out of one or more offenses specified in the policy."); *Gen. Accident Ins. Co. v. W. Am. Ins. Co.*, 42 Cal. App. 4th 95, 103 (1996) ("Unlike liability coverage for property damage or bodily injury, personal injury coverage is not based on an accidental occurrence. Rather, it is triggered by one of the offenses listed in the policy."). It is therefore nonsensical for Aspen to assert that the per occurrence limit impacts its indemnity obligation under Coverage B.

Indeed, the essential elements of false imprisonment include intent. *Hernandez v. City of Reno*, 97 Nev. 429, 433 (1981) ("'An actor is subject to liability to another for false imprisonment 'if (a) he acts ***intending*** to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it.'"). Therefore, false imprisonment would not qualify as an accident, *i.e.*, an occurrence under Coverage A. However, it need not, because it is a covered offense under Coverage B, which does not require an occurrence. Aspen's position that the per occurrence limit restricts coverage for an offense which would not qualify as an occurrence is absurd, and would effectively render Coverage B illusory, by obviating coverage for specifically

covered offenses. However, this is not what its policy says. Rather, the personal and advertising injury limit applies to Coverage B, not the per occurrence limit of Coverage A.

Thus, because the underlying suit triggers both coverages, both limits apply.

E. Insurers Are Free to Issue Policies Where Multiple Limits Apply.

Cases nationally also conclude multiple limits within a policy can apply to a single claim when the plain language of the policy so provides. For example, in *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wash. 2d 567, 581–82, 964 P.2d 1173, 1180 (1998), the Washington Supreme Court held that where pollution implicated both the property damage coverage and the personal injury coverage of the policy through the offense of trespass, two sets of limits were triggered. It reasoned:

> There is, in short, no rule of law that we are aware of that prevents an insurance company from providing overlapping coverage in any policy that it issues. By the same token, we know of no authority for the proposition that an insured must elect which coverage it chooses if it has been furnished with overlapping coverage in a policy. Any insurer that is a party to this suit provided the coverage that can be ascertained from a plain reading of its entire policy or policies. If the claims against Kitsap County constitute "personal injury" as that term is defined in any policy, then coverage is available under that policy, notwithstanding the fact that additional coverage may be provided to the insured by other provisions in the policy.

Id. at 581-82.

In other words, if a suit includes both property damage and personal injury, and the policy provides separate limits for each of these injuries, then both limits apply. Other cases nationally are in accord. *See, e.g.*, *FLM, LLC v. Cincinnati Ins. Co.*, 24 N.E.3d 444, 457 (Ind. Ct. App. 2014), *aff'd on reh'g*, 27 N.E.3d 1141 (Ind. Ct. App. 2015) ("We are also unaware of any rule of law that prevents an insurance company from providing overlapping coverage, and Cincinnati's CGL policy does not prohibit it under the facts of this case."); *DAE Aviation Enterprises, Corp. v. Old Republic Ins. Co.*, No. 11-CV-554-LM, 2012 WL 3779154, at 10 (D.N.H. Aug. 31, 2012); *see also*, *Granite State Ins. Co. v. Conner*, 83 Mass. App. Ct. 1133, 987 N.E.2d 620 (2013) (example of three overlapping coverages). Accordingly, here too, Aspen provides two limits.

F. The Cases Cited by Aspen Involved Only Coverage A.

Aspen ignores its policy language and instead cites cases involving only damages under Coverage A, and to which only the per occurrence limit therefore applied. For instance, *Century Sur. Co. v. Casino W., Inc.*, 99 F. Supp. 3d 1262 (D. Nev. 2015) involved hotel guests dying from

carbon monoxide poisoning. That was a bodily injury case under Coverage A. It had nothing to do with any personal injury offense under Coverage B. Thus, the number of occurrences there limited total indemnity, because indemnity was only available under Coverage A. Likewise, *Bish v. Guar. Nat. Ins. Co.*, 109 Nev. 133, 848 P.2d 1057 (1993) involved a car accident that injured a child. That bodily injury implicated only Coverage A, not Coverage B, because there was no personal injury offense involved. That only the per occurrence limit applied in cases that only involved Coverage A is as axiomatic as it is irrelevant. The issue here is whether both the per occurrence limit and the personal and advertising injury limit apply in a case that implicates both Coverage A and Coverage B. Aspen cites no case holding that both limits do not apply in that context because it cannot. Rather, as its policy plainly states, both limits apply.

G. Aspen's Coverage Part Argument Is Contrary to the Plain Policy Language.

In desperation, Aspen cites its Common Policy Conditions endorsement, which purports to restrict coverage to one limit when multiple "Coverage Parts" apply. In its moving papers, St. Paul explained in exhausting detail that that endorsement does not apply to Coverage A and Coverage B, and incorporates by reference that discussion again here. As Aspen failed to respond to any of those arguments, it necessarily concedes they are correct.

In summary, Aspen's Coverage Part endorsement applies only to those Coverage Parts as that term is used in the policy, such as the CGL Coverage Part, the Liquor Liability Coverage Part, the Commercial Property Coverage Part, etc. It does not apply to coverages *within a Coverage Part*, such as Coverage A and Coverage B of the CGL Coverage Part. Among the most glaring of the abundant evidence St. Paul cited to this effect were Aspen's other insurance provision, which states that that clause applies to "loss we cover under Coverages A and B of ***this*** Coverage Part," singular, referring to the CGL Coverage Part, as well as the language of the Coverage Part endorsement itself, which states, among other things, that it applies to the CGL Coverage Part, not Coverage A and Coverage B within that Coverage Part.

For this reason, the same argument regarding the analogous term "Coverage Form" has been rejected by multiple courts. *FLM, LLC v. Cincinnati Ins. Co.*, 24 N.E.3d 444, 458 (Ind. Ct. App. 2014) ("The different coverages are called precisely what they are—'coverages'—and the

policy itself is called a 'form.' . . . An example of an 'other Coverage Form' would be an automobile liability coverage form. Because there is no 'other Coverage Form' at issue here, the provision does not apply"); *see also, e.g., Argonaut Great Cent. Ins. Co. v. Casey,* 701 F.3d 829, 833–34 (8th Cir.2012) (finding "Two or More Coverage Forms" provision inapplicable in single policy with separate liability coverage and underinsured motorist coverage limits); *Philadelphia Indem. Ins. Co. v. Austin*, 2011 Ark. 283, 9, 383 S.W.3d 815, 821 (2011). Likewise, here the Coverage Part endorsement by its own terms does not apply to coverages within a Coverage Part such as Coverage A and Coverage B, making Aspen's position wrong.

H. Aspen's Policy Is Not Ambiguous, But If It Were, That Ambiguity Would Be Resolved in Favor of Coverage.

Instead of actually addressing St. Paul's textual arguments, because it can't, Aspen immediately pivots from a discussion of its Coverage Part endorsement into an ambiguity argument. Frankly, counsel for St. Paul has never before seen an insurer attempt to rely on ambiguity to restrict coverage, because for an insurer to concede ambiguity without simultaneously presenting any extrinsic evidence of intent is to effectively concede it must lose. Because Aspen drafted the policy, all ambiguities are construed against it. *National Union v. Reno Executive Air,* 100 Nev. 360, 365 (1984). Aspen offers no extrinsic evidence to deviate from its clear policy language, because there is none. The policy says exactly what it was intended to say, as the IRMI industry source attests. Conversely, St. Paul has no obligation to submit extrinsic evidence because St. Paul is not asking the Court to do anything other than enforce the plain language of Aspen's policy. Thus, both limits apply. But, again, if Aspen's ambiguity position is followed there is coverage under Nevada law.

Aspen also makes a half-hearted attempt to argue that if it is found liable for two limits this would constitute "double recovery," but this is not the case. Double recovery would occur only if the insured were seeking to be indemnified twice for the same damages. Here, the $161 million in damages actually awarded exceeded Aspen's $2 million in limits, as did the ultimate settlement, making a double recovery argument irrelevant. Rather, Aspen simply provides another limit to pay for additional damages that well exceed not only its occurrence limit but also its aggregate

limit. There is nothing inherently offensive or unfair about this. Aspen simply issued a policy with two million in applicable limits rather than one. What is unfair is Aspen arguing that, contrary to its plain policy language, it is only ever obligated to pay half its available limits.

Accordingly, St. Paul requests that this Court grant its motion for partial summary judgment, holding the underlying suit triggered both Aspen's per occurrence limit and its personal and advertising injury limit for a total of two million dollars in limits available to settle the underlying case.

II. St. Paul Is Entitled to Subrogate to Cosmo's Rights Against Aspen.

A. The General Law of Subrogation Nationally.

1. Misapplication of the Doctrine of Subrogation

Courts are sometimes confused by the doctrine of subrogation. As one highly influential opinion in this area stated, it is "difficult to think of two legal concepts that have caused more confusion and headache for both courts and litigants than have contribution and subrogation." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1291 (1998) (describing cases properly and improperly applying the doctrine of subrogation); *see also, Herrick Corp. v. Canadian Ins. Co.*, 29 Cal. App. 4th 753, 756, 34 Cal. Rptr. 2d 844, 845 (1994 ("Even lawyers find words like 'indemnity' and 'subrogation' ring of an obscure Martian dialect."); *U.S. Fid. & Guar. Co. v. Federated Rural Elec. Ins. Corp*., 37 P.3d 828, 832 (Oklahoma 2001). For this reason, litigants are sometimes able to mislead courts about the nature of subrogation and how it operates, which is what, whether through intent or ignorance, Aspen is doing here. This is dangerous, because, as the *Fireman's v Maryland* court also explained, misapplying these rules encourages insurers to delay in paying claims, in the hopes that whichever carrier blinks first will be forever burdened with a particular loss in derogation of the equitable principals these doctrines were created to serve. *Id*. at 1297.

Accordingly, we provide a comprehensive overview of the history, purpose, and application of the doctrine of subrogation nationally and in Nevada below. It demonstrates that St. Paul has the right to subrogate to Cosmo's claims against Aspen because equity requires Aspen pay for the damages it caused by its wrongful actions for which St. Paul paid.

2. The Origin, Meaning, and Purpose of the Doctrine of Subrogation.

The doctrine of subrogation has been an integral part of the law for over three centuries. M. L. Marasinghe, "An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine I", 10 Val. U. L. Rev. 45, 48 (1975); *see also*, M. L. Marasinghe, "An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine II," 10 Val. U. L. Rev. 275 (1976). It originated in the courts of equity in the 17th and early 18th Centuries as an offshoot of the doctrines of contribution and constructive trust, and was specifically developed for cases involving indemnities such as insurance and surety. *Id*. at 49. The earliest case in the common law courts permitting subrogation was *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782), where a first party insurer subrogated to its insured's rights against rioters who had damaged his property. "Since *Mason v. Sainsbury*, the right of the insurer to stand in the place of the assured has been unquestionably accepted and applied in the common law courts, with the same ease as it has been in the courts of equity." *Id*. Over the centuries, the doctrine has been expanded to other areas not involving insurance in the service of equity, but this in no way limits application of the doctrine to the insurance context for which it was originally developed. *See id.*

"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); *Konkel v. Acuity*, 2009 WI App 132, ¶ 19, 321 Wis. 2d 306, 322, 775 N.W.2d 258, 265. Subrogation is "defined as the substitution of one person in the place of another with reference to a lawful claim or right." 73 Am. Jur. 2d Subrogation § 1; *Fireman's Fund Ins. Co. v. Maryland Cas. Co*., 65 Cal. App. 4th 1279, 1291, 77 Cal. Rptr. 2d 296, 302 (1998); *E. Boston Sav. Bank v. Ogan*, 428 Mass. 327, 329, 701 N.E.2d 331, 333 (1998). Under this doctrine, when one person, such as 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 cost of the injury from the wrongdoer. *Id.* This allows the burden of the loss to be 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).

In other words, because the insurer is the one who paid for the loss, it has the right to seek recovery for it, as if it were the party who would have been damaged had the insurer not paid. Foundational to the operation of subrogation is that the party who would have been injured was not in fact injured, because the insurer paid for the injury. Indeed, in the very first subrogation case under the common law, *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782), the central issue was whether the insurer could stand in the shoes of its insured given that the insured had not itself suffered injury because the insurer had already paid its loss. The court rejected the argument that the insurer could not seek recovery because the loss should fall on the wrongdoers, thereby introducing the doctrine of subrogation to the common law. *Id*. at 540 ("The principle is, that the insurer and insured are one, and, in that light, ***paying before or after can make no difference***."). Thus the fact that the injured party has not paid the loss itself, far from being a reason to deny subrogation, is the reason subrogation exists at all.

The fundamental reason for subrogation is that it is necessary to achieve a fair and just result. 73 Am. Jur. 2d Subrogation § 11 (subrogation "has its roots in natural justice and is an equitable remedy."); *see also*, 73 Am. Jur. 2d Subrogation §2 ("[T]he purpose of subrogation is to prevent injustice; it is designed to compel the ultimate payment of an obligation by the person who in justice, equity, and good conscience should pay it."); *see also, Republic Underwriters Ins. Co. v. Fire Ins. Exch.*, 1982 OK 67, 655 P.2d 544, 547("Subrogation is a creature of equity intended to achieve the natural justice of placing the burden where it ought to rest . . ."); *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435 (1960); *Sourcecorp, Inc. v. Norcutt*, 227 Ariz. 463, 467 (Ct. App. 2011). Subrogation is just not only because it allows a party who did not cause a loss to recover the cost of paying for it, but also because it makes those parties who cause injury bear the burden of the wrongs they commit.

Given the effectiveness of subrogation in placing the burden of wrongdoing where justice demands it belongs--on the wrongdoer--the courts have repeatedly held that it is to be liberally and expansively applied, even in situations 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.
>
> The doctrine of subrogation embraces all cases where, without it, complete justice cannot be done. Grounded upon this premise, there is no limit to the circumstances that may arise in which the doctrine may be applied, particularly if applying the doctrine will provide the most efficient and complete remedy which can be afforded.

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); *Smith v. Clavey Ravinia Nurseries*, 329 Ill. App. 548, 552, 69 N.E.2d 921, 923 (Ill. App. Ct. 1946); *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 521, 475 N.W.2d 294, 298 (1991); *W. Sur. Co. v. Loy*, 3 Kan. App. 2d 310, 313, 594 P.2d 257, 260 (1979); *Fenly v. Revell*, 170 Kan. 705, 711, 228 P.2d 905, 909 (1951).

This is why subrogation has expanded so far beyond the insurance context where it originated. This also, of course, necessarily encompasses situations in the insurance context that a particular court has not yet had the opportunity to address because no appropriate case has arisen, as often happens in Nevada. Conversely, to argue that subrogation should not be applied in a particular context simply because it has not been applied there before is to misunderstand the basis of the doctrine in natural justice, equity, and good conscience. 73 Am. Jur. 2d Subrogation § 7.

3. Types of Subrogation

There are a three principal types are subrogation: equitable (sometimes referred to as legal), contractual (also referred to as conventional), and statutory.[3] 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). Equitable subrogation was the original type of subrogation, which, as explained above, follows from equity and natural justice. 73 Am. Jur. 2d Subrogation at § 5 n.5 *citing Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 278 n.4. (Minn. 2010). It "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

[3] Statutory subrogation is governed by whatever statute authorizes it. 73 Am. Jur. 2d Subrogation § 3. In this case, as no statute applies to Aspen, none is discussed herein.

been discharged by the latter." *Id.* It does not arise by contract but 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 "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); *Bennett Truck Transp., LLC v. Williams Bros. Const.*, 256 S.W.3d 730, 734 (Tex. App. 2008); *see also, id.* at § 5 n.3.

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). Insurers often include subrogation provisions in their policies toward the ends of "***prevention of a windfall*** to the insured or to the third party wrongdoer, and the ***reduction of the cost of insurance*** to both the insurer and the insured by ***making third party wrongdoers pay*** for the wrong done." Turner, *Insurance Coverage of Construction Disputes* § 5:5 (2d ed.) (Thomson Reuters 2018); *see also,* Rejda, et al., *Principles of Risk Management and Insurance* at 194 (13th Ed. Pearson 2016) ("*subrogation helps hold down insurance rates.* Subrogation recoveries are reflected in the rate-making process, which tends to hold rates below where they would be in the absence of subrogation. Although insurers pay for covered losses, subrogation recoveries reduce loss payments.") (emphasis in original); https://www.claimsjournal.com/news/national/2017/07/06/279219.htm ("Subrogation is the necessary evil of recovering as much of our insureds' claim dollars as possible in order to help hold down insurance premiums and soften the blow a claim event might otherwise have on them."); https://www.thehartford.com/resources/alarm/subrogation-insure-harmony ("Subrogation Actually Helps Lower Premium Costs").

As contractual subrogation is based on contract, it is governed by the terms of the agreement. 73 Am. Jur. 2d Subrogation § 4. Accordingly, most courts hold that a right to contractual subrogation can expand an insurer's rights beyond those available under equitable subrogation. *See, e.g., Fortis Benefits v. Cantu,* 234 S.W.3d 642, 646 (Tex. 2007); *see also, Sereboff v. Mid Atl. Med. Servs., Inc*., 547 U.S. 356, 126 S. Ct. 1869, 164 L. Ed. 2d 612 (2006); *Puente v. Beneficial Mortg. Co. of Indiana,* 9 N.E.3d 208 (Ind. Ct. App. 2014); *Allstate Ins. Co. v.*

Hugh Cole Builder, Inc., 772 So. 2d 1145, 1146 (Ala. 2000); *Puente v. Beneficial Mortg. Co. of Indiana*, 9 N.E.3d 208, 217 (Ind. Ct. App. 2014); *Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864, 866 (Utah 1988); *Capitol Indem. Corp. v. Strike Zone*, 269 Ill. App. 3d 594, 596, 646 N.E.2d 310, 312 (1995). For example, "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 also*, Windt, Insurance Claims and Disputes Section 10:5 (Thomson Reuters 2018); *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); *Liberty Mut. Ins. Co. v. Thunderbird Bank*, 113 Ariz. 375, 379, 555 P.2d 333, 337 (1976); *Mut. Serv. Cas. Ins. Co. v. Elizabeth State Bank*, 265 F.3d 601, 628 (7th Cir. 2001).

All types of subrogation may exist independently and simultaneously alongside the others, *i.e.*, they are not mutually exclusive, and a bar to one does not preclude the others. 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); *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1538 (10th Cir. 1996). Thus a party may assert claims for equitable, contractual, and statutory subrogation simultaneously where it has grounds to do so. However, because an insurer's natural right to equitable subrogation is so broad, some courts have opined that it most situations a contractual subrogation provision has nothing to add to it. *See, e.g., Progressive W. Ins. Co. v. Yolo Cty. Superior Court*, 135 Cal. App. 4th 263, 37 Cal. Rptr. 3d 434 (2005).

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

1. Nevada Recognizes Subrogation Applies as an Equitable Remedy Whenever It Is Just, Such As In the Instant Case.

In accord with jurisdictions nationally, Nevada has long applied subrogation expansively and flexibly in the interests of justice. While subrogation originated in the insurance context, the first opportunity the Nevada Supreme Court had to apply it was with regard to a refinanced mortgage. *Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250, 251 (1915).[4] There, the court expanded

[4] The Nevada Supreme Court commented on the propriety of subrogation as early as 1879, first in *Quilled v. Quigley*, 14 Nev. 215, 217 (1879), where the court noted that a surety had not been deprived of its right of subrogation, and also in *Revert v. Henry*, 14 Nev. 191, 197 (cont.)

subrogation in 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 from well over a dozen jurisdictions to find subrogation should be broadly permitted. Even at that early date, the court quoted with approval the following:

> "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."

Id. at 252 (emphasis added).

In other words, subrogation should be applied expansively to promote justice, rather than limited in a way which allows wrongdoers to profit from their wrongs. Thus, the Nevada Supreme Court stated "[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). Thus the court had no trouble extending subrogation to the mortgage context.

The Nevada courts adhere to these same principles today. The Nevada Supreme Court stated as recently as 2010 that Nevada courts have "full discretion" to apply subrogation as an equitable remedy "based on the facts and circumstances of each particular case." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538–39 (2010); *see also, Zhang v. Recontrust Co., N.A.*, 405 P.3d 103 (Nev. 2017); *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368–69, 252 P.3d 206, 208 (2011); *NAD, Inc. v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 115 Nev. 71, 76, 976 P.2d 994, 997 (1999). 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 observe that Nevada "has recognized the doctrine of equitable subrogation in a

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(1879), where it observed that a surety which paid a claim subrogated to rights against responsible third party parties. Thus, even then the court was familiar with and accepted the concept, which is unsurprising given it had existed for over a century in the insurance and surety contexts, even if the court had not yet had a chance to apply the doctrine itself.

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 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 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, but it did not matter, because the general doctrine of subrogation is well-established in Nevada, and that doctrine applies beyond any specific context.

The Nevada Supreme Court has only limited subrogation in rare instances consistent with other jurisdictions. These include situations involving a loan receipt agreement, which eliminates the requirement the insured suffered a loss (*Cent. Nat. Ins. Co. of Omaha v. Dixon*, 93 Nev. 86, 87, 559 P.2d 1187, 1188 (1977)), preventing an insurer from subrogating against its own insured, which undermines the purpose of insurance (*Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980)), or when the court is concerned an insured might not be fully compensated for its loss (*Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 778, 121 P.3d 599, 604 (2005). In other words, all these limitations are based on the nature of subrogation itself, meaning they are not so much exceptions to as parameters of the rule. Therefore, Aspen's assertion that allowing subrogation here is without precedent is incorrect. In fact, it is Aspen's proposal that it be protected from subrogation when equity demands it applies that has no precedent in Nevada law.

2. Nevada Law Supports Equitable Subrogation Between Insurers.

This is why the Nevada federal district court had no difficulty concluding that current Nevada law supports equitable subrogation by an excess carrier against a primary carrier for bad faith failure to settle, even though Nevada state courts have not yet had the opportunity to specifically address that situation. *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943

(D. Nev. June 9, 2016); *see also, Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. July 5, 2018). In *Colony*, 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 Nevada had not "recognized" the right of an excess carrier to do so, so it need not pay for the damages its bad faith caused.

The court rejected this claim based on established Nevada law. The court relied 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."

Colony Ins. Co. v. Colorado Cas. Ins. Co., 2016 WL 3360943 at 3 (D. Nev. June 9, 2016).

In other words, application of equitable subrogation where it serves justice is well established in Nevada. The only exception the court noted was where subrogation is precluded by statute, which was not the case there, and not the case here. The instant case is comparable to *Colony*, in that St. Paul is also suing Aspen for the excess judgment Aspen's bad faith failure to settle caused, though St. Paul has additional grounds for suit, as explained below. Thus, as in *Colony*, St. Paul has a right of subrogation against Aspen under Nevada law. *See also, Riverport Ins. Co. v. State Farm*, 2019 WL 4601511, at *8 (D. Nev. Sept. 20, 2019) (following *Colony* to permit equitable subrogation, but denying relief because additional insured carrier did not cover the loss, and its named insured was not responsible for the loss).

Notably, in arguing that Nevada should not permit subrogation, Aspen does not actually cite any jurisdictions that prevents subrogation between carriers. This is because such a rule makes no sense, so any cases it could cite would be poorly-reasoned outliers which would undermine its position. To forbid subrogation would be to reward wrongdoers, and to undermine the insurance industry. There is no Nevada public policy in favor of either. Accordingly, established Nevada law support subrogation between insurers.

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3. Nevada Permits Contractual Subrogation.

While Aspen rejects *Colony*'s holding that Nevada law supports equitable subrogation based on Nevada's long history of employing that doctrine whenever justice so requires, it embraces that court's position that in some situations a contractual subrogation claim cannot be maintained, and asserts this is such a situation.

In fact *Colony* was incorrect when it held Nevada does not permit contractual subrogation. Nevada generally permits contractual subrogation, and has only barred it in the very limited context of med-pay cases, as was explained by the Nevada Supreme Court in *Canfora v. Coast Hotels & Casinos, Inc*., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). There, the court enforced a contractual subrogation clause. The court first cited the principal that in Nevada the court will not rewrite unambiguous contracts, and then concluded:

> 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).

In other word, the court enforced the subrogation clause because it is not in the business of revising contracts. It distinguished a prior case--*Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 506 (1986)--which held contractual subrogation was not available in the med-pay context as a matter of public policy as reflected in NRS 41.100 because of concerns the insured would not be fully compensated.[5] *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 778 (2005). ("We have previously prohibited an insurer from asserting a subrogation lien ***against medical payments*** of its insured as a matter of public policy."). However, "where an insured receives 'a full and total recovery, *Maxwell* and its public policy concerns are inapplicable." *Id.* In other words, the

[5] As explained previously, case law is abundant across the country not only recognizing contractual subrogation but holding it is not limited by equitable doctrines such as the doctrine of superior equities. It is, however, the case that 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."). While that was the case in *Maxwell*, it is not the case here.

Nevada Supreme Court specifically held that where the insured is fully compensated, contractual subrogation is permitted.

Aspen concedes the insured was fully compensated here because that is the basis of its no damages argument. Thus this limited bar on contractual subrogation does not apply in this case. Unfortunately, the *Colony* court concluded Nevada did not allow contractual subrogation because it did not recognize *Maxwell* had been so limited by the Nevada Supreme Court. Indeed, *Maxwell* was the only Nevada case *Colony* relied on for this point. In doing so, it erred. Likewise, the California cases it relied on--*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 med-pay claims, and both cases specifically limited their reasoning to that context.

Likewise, those sections of *Progressive W.* cited by the *Colony* court for the proposition that contractual subrogation adds nothing to equitable subrogation are a misreading: those sections only mean that equitable subrogation is very broad, not that contractual subrogation is disfavored. Further, California is one of those 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 at equity, as explained above. Even the California appellate courts have opined it would make more sense for contractual subrogation to not be bound by equitable limitations. *Id.* Therefore, these opinions cannot circumscribe St. Paul's right to contractual subrogation here.

Lastly, the *Capitol* court referenced "windfalls" to the insurer as a reason to avoid contractual subrogation, because premiums are supposedly not calculated by taking into account anticipated subrogation recoveries. This argument was also employed in *Maxwell* based on cases from the 1960s. It is obsolete. Whatever underwriting practices may have been over a half century ago, today the technology exist for carriers to take into account anticipated subrogation recoveries in premiums, as explained above in that section regarding the basis of contractual subrogation by citation to industry sources. Therefore, there is no windfall to St. Paul. Rather, the

windfall would be to Aspen to the extent it is not bound to pay for the damages it caused by its bad faith.

In addition, as other courts have explained, where the defendant caused the loss, that the insurer received a premium that requires it to pay for that loss does not alter the equities between them: the party that caused the loss should still pay for it, because the insurance was not purchased for the wrongdoer's benefit. *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal. App. 4th 23, 45, 105 Cal. Rptr. 3d 606, 624 (2010). Or as a California court put it, "it would be better for the windfall to go to the one that undisputedly fulfilled its contractual obligations, rather than to the one that allegedly breached them." *Id*. at 47. Justice would be better served by awarding recovery to St. Paul, which honored its contract, rather than Aspen which breached.

Accordingly, as there is no public policy reason to protect an insurer which committed bad faith from paying for the consequences of its actions, St. Paul is entitled to contractual subrogation to Cosmo's claims under Nevada law.

C. St Paul Alleges All Necessary Elements of an Insurer's Subrogation Claim.

"There is no general rule to determine whether a right of subrogation exists. Thus, ordering subrogation depends on the equities and attending facts and circumstances of each case." 73 Am. Jur. 2d Subrogation § 10. In the insurance context, an influential California court of appeal opinion broke down subrogation into eight elements:

> (a) the insured suffered a loss for which the defendant is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer; (b) the claimed loss was one for which the insurer was not primarily liable; (c) ***the insurer has compensated the insured*** in whole or in part for the same loss for which the defendant is primarily liable; (d) ***the insurer has paid the claim*** of its insured to protect its own interest and not as a volunteer; (e) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (f) ***the insurer has suffered damages*** caused by the act or omission upon which the liability of the defendant depends; (g) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (h) the insurer's damages are in a liquidated sum, generally ***the amount paid to the insured.***

Fireman's v. Maryland, 65 Cal. App. 4th 1279, 1292 (1998).

In the context of subrogation by an excess carrier against a lower level carrier, the Nevada

federal district court held that while Nevada will weigh the California factors, because subrogation is an equitable remedy, none are dispositive except that only the insured's rights may be asserted. *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965, at *5 (D. Nev. July 5, 2018).

Under the California test, St. Paul is entitled to subrogation from Aspen because: a) Cosmo suffered a loss for which Aspen is liable, namely the $161 million excess judgment caused by its bad faith; b) St. Paul is not primarily liable like Aspen because Aspen breached its duty to settle and St. Paul did not, because Aspen breached its duty to provide an adequate defense and St. Paul did not, and because St. Paul's policy responds after Aspen's; c) Cosmo has been compensated for the loss through the settlement of the underlying action and the payment by St. Paul of its limit; d) St. Paul paid to protect its own interest, not as a volunteer, because the claim underlying the judgment was potentially covered under St. Paul's policy; e) Cosmo had an existing assignable cause of action for bad faith against Aspen that it could have asserted had it not been compensated for its loss by St. Paul; f) St. Paul has suffered damages because of Aspen's bad faith, in that it had to pay its limit to protect Cosmo; g) justice requires the entirety of the loss be shifted to Aspen, because its equitable position is inferior because: i) it breached its duty to settle; ii) it breached its duty to defend by providing a conflicted defense; and iii) St. Paul's policy is excess to Aspen; h) the damages are in a liquidated sum, the $25 million St. Paul paid to protect Cosmo.

Again, for purposes of this motion, the Court does not need to decide that St. Paul has evidence sufficient to prove these allegations. Rather, all the Court need decide now is that, if it can, it is entitled to subrogation. As what St. Paul seeks to prove is more than adequate to establish this right, the Court should grant this motion for partial summary judgment.

D. Aspen's Position That Subrogation Fails Because Cosmo Has No Damages Is Fundamentally Contrary to the Nature of Subrogation.

Aspen argues St. Paul's subrogation claim fails because the insured suffered no damages, because St. Paul paid them. In other words, because St. Paul stepped up and protected its insured from Aspen's bad faith, Aspen gets away with its tortious conduct.

While this argument is a trap courts occasionally fall into, it is only possible based on ignorance 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. *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782). Modern cases are in accord. *See, e.g., Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal. App. 4th 23, 105 Cal. Rptr. 3d 606 (2010); *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."); *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 307 (5th Cir. 2010) (same). This is because that is what subrogation is: the insurer paying for the insured's damages, thereby protecting the insured, and thereby gaining the right to pursue whoever was responsible for causing those damages. Conversely, if the insurer paying to protect the insured obviated subrogation, then subrogation would not exist. As bluntly explained by one court:

> 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. Not only is this illogical, it contradicts decades of cases consistently holding that an insurer may be equitably subrogated to its insured's indemnification claims.

Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co., 182 Cal. App. 4th 23, 34 (Cal. 2010).

Subrogation demonstrable does exist Nevada, including in the insurance context, as explained above. Therefore, Aspen is necessarily wrong.

To support its position, Aspen cites and misrepresents *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815 (Cal. Ct. App. May 18, 2018), which the California Supreme Court has made unpublished and thus uncitable in California courts. In that case, ***the insurer did not assert a cause of action for subrogation***. Rather, after Capital breached its duty to settle, resulting in an excess judgment, it was sued by another insurer under an ***assignment***. The court held Capital had no right under the assignment because it had paid the judgment, relying exclusively on cases in which insureds tried to sue their insurers directly after another insurer had compensated them, *i.e.*, double recovery cases, not subrogation cases. While this is of course wrong, because even an assignee has the right to sue for damages for which it paid, Aspen is

incorrect that the court denied subrogation on a no damages argument, since such a claim was not asserted.

It is true that Capital tried to correct its deficient pleadings by arguing its indemnity cause of action included subrogation. The court held that even that even if such a claim had been made, it would fail ***because Capital did not have equitable superiority.*** It ***did not*** reject subrogation based on a no damages argument. It held Capital lacked equitable superiority because: 1) ***Capital's bad faith had caused the excess judgment in the first place***; and 2) of a lack of indemnity agreements between the underlying parties. There would therefore be no equitable reason to shift the loss to the other carrier, since both were in breach.

The instant case is entirely different. This case involves subrogation, not assignment. St. Paul has equitable superiority, as outlined above, for numerous reasons. Aspen, not St. Paul, caused the excess judgment. Aspen is in breach and bad faith, while St. Paul is not. The underlying insured parties do have indemnity agreements with each other, allocating the risk to Aspen's named insured, and away from St. Paul's. Regardless, even if *Capital* did say what Aspen says it does, it would be wrong, because subrogation presupposes the insurer paid the loss and protected the insured.

Aspen also cites *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Tokio Marine & Nichido Fire Ins. Co.*, 233 Cal. App. 4th 1348, 1362 (2015) to support its misapplication of subrogation. This is an example of a case where the court misunderstood the fundamental nature of subrogation, as was later explained by the California federal court in *Pub. Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp.*, 2017 WL 3601381 (E.D. Cal. Aug. 22, 2017), the only case to have ever cited *Tokio*. In rejecting *Tokio*, the court relied on *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal. App. 4th 23, 105 Cal. Rptr. 3d 606 (2010), reasoning:

> When Interstate sued Cleveland for breach of contract as its insured's subrogee, Cleveland demurred on grounds, inter alia, that because Interstate had fully compensated the indemnitee, it could not sue for subrogation on the indemnitee's behalf. The *Interstate* court squarely rejected this contention, stating that "Cleveland's insistence that [the insured] suffered no loss because Interstate paid [the insured's employee], and Interstate therefore suffered no loss because it stands in the shoes of its insured, ***is circular and erroneous***." *Id*. at 35, n.3. As the Court observed, if Cleveland's "***Illogical***" contention were accepted "***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 insureds.***" *Id.* at 34. In the court's view, that would contradict "decades of cases consistently holding that an insurer may be equitably subrogated to its insured's indemnification claims." *Id.*

Pub. Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp., 2017 WL 3601381 (E.D. Cal. 2017).

In other words, *Tokio* is necessarily wrong, because if it were correct subrogation would not exist, and centuries of precedent demonstrate it plainly does. The federal court therefore held that subrogation was in fact available both for breach of contract and bad faith, not despite the fact the subrogating insurer paid the claim to protect its insured, but because of it.

Furthermore, part of the reason the *Tokio* court held the insured suffered no damages was because there was no excess judgment, because the case settled on the first day of trial. Some cases suggest that an excess judgment is necessary for bad faith exposure. *See J.B. Aguerre, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 59 Cal. App. 4th 6, 13, 68 Cal. Rptr. 2d 837, 841 (1997). In the instant case, there was a $161 million excess judgment which constituted actual damage to the insured when it was rendered. Thus, while this should not matter so long as the claim is paid, on this ground also, *Tokio* is distinguishable.

Accordingly, the Court should not be misled by Aspen's no damages argument, which is, quite frankly, profoundly ignorant. St. Paul's payment does not obviate its right to subrogation. It creates it. This is made plain by a simple question: if paying the claim obviates the right to subrogation, then how would such a right ever arise? The answer is, if that were true, it could not. Centuries of precedent, including that of the Nevada Supreme Court, would be wrong. Aspen's position is analogous to arguing a breach of contract claim fails whenever it is based on a contract. It is inherently absurd. Therefore, because St. Paul paid for the insured's damages caused by Aspen, St. Paul is entitled to subrogation.

E. Aspen's Argument That a Contract Must Exist Between Aspen and St. Paul for St. Paul to Bring a Subrogation Action Against Aspen is Nonsensical and Contrary to the Nature of Subrogation.

Aspen's argument that for St. Paul to bring a contractual subrogation claim against Aspen St. Paul must have contracted with Aspen directly is just as ignorant as its no damages argument. As explained above, subrogation is when one party steps into the shoes of another, such that the

first party can assert the rights of the second against a third. Thus, for example, through subrogation, St. Paul steps into Cosmo's shoes, and can assert Cosmo's contractual rights against Aspen, even though St. Paul did not have its own contract with Aspen. St. Paul is not asserting its own contact rights against Aspen, but rather Cosmo's. That is the point of subrogation. Therefore, St. Paul does not need a contract with Aspen. Rather, it need only pay for Cosmo's injury, because Cosmo has a contract with Aspen. As authority, St. Paul cites every subrogation case to have ever been decided, including those cited above in its explanation of the fundamental nature of subrogation. Aspen of course cites nothing supporting it, because its argument is contrary to the very nature of subrogation. If Aspen were correct, subrogation would not exist.

Fireman's v. Maryland's, 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762 (1994), which Aspen misunderstands, analyzed whether carriers at different levels had a contract between them because there ***the insured had released one of them***. Therefore, ***the carriers could not proceed via subrogation***, because the insured had given up its contractual rights, *i.e.*, it no longer had any rights left to subrogate to. As the carriers had no direct contract with each other, there was thus no legal conduit remaining to assert a claim. The whole point of the case was that subrogation was not available.

Here, in contrast, Cosmo has not released Aspen. Therefore, St. Paul's subrogation to Cosmo's breach of contract and bad faith claims against Aspen is perfectly viable. Likewise, Aspen's rambling about the need for St. Paul to be a third party beneficiary on Cosmo's contract with Aspen also has nothing to do with St. Paul's right to subrogate to Cosmo's existing rights, since again, it is Cosmo's rights against Aspen it is asserting, not its own.

Fundamentally, what Aspen is trying to do here is avoid the consequences of its bad faith. If there are no consequences for bad faith, then there is nothing to prevent it. Indeed, that is why bad faith is available in tort along with extra contractual damage; because it is so very important that insurers be prevented from committing bad faith. If this Court fails to allow subrogation here, it not only rewards Aspen for its conduct, it essentially tells St. Paul, "Well, you should have committed bad faith too if you didn't want to be stuck with the bill." That cannot be the right answer. It is certainly contrary to the equitable principals for which subrogation was created, and

pursuant to which the Nevada Supreme Court has enforced subrogation in the past. Accordingly, this Court should grant St. Paul's motion, holding that St. Paul can subrogate to Cosmo's rights against Aspen because subrogation, both equitable and contractual, is available in Nevada.

III. St. Paul's Equitable Estoppel Claim Includes Aspen.

Aspen countermoves for summary judgment on St. Paul's cause of action for equitable estoppel on the ground it only alleges liability against AIG. This is not correct. Because Aspen's argument is not evidence-based, but rather pleading-based, it can be easily disposed of on the face of the pleading.

Equitable estoppel includes the following elements:

> (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.

S. Nevada Mem'l Hosp. v. State, Dep't of Human Res., 101 Nev. 387, 391 (1985).

St. Paul alleges a number of facts in its pleading supporting equitable estoppel against Aspen. It alleges Aspen is estopped to assert Marquee's direct coverage (including both Aspen and AIG) is not wholly responsible for this loss rather than Cosmo's direct coverage (including both Zurich and St. Paul). Among other bases for this, Aspen appointed a single, conflicted defense counsel to defend Marquee and Cosmo together, based on both the implicit and explicit representation that Marquee's coverage would cover this loss, not Cosmo's. Cosmo relied on this conduct by not asserting its own cross-complaint against Marquee, which could have allocated all liability to Marquee, and by not requesting a special verdict which would have clearly allocated liability between them. Aspen knew that its conduct would be relied upon by Cosmo, and Cosmo did not know Aspen would argue its own direct coverage had to share the loss. Therefore, Cosmo, and thus St. Paul via subrogation, is entitled to equitable estoppel. Likewise, Aspen behaved toward St. Paul in a way that estops Aspen from asserting it is not wholly responsible for this loss, by failing to tender the claim to St. Paul until the eve of trial, failing to inform St. Paul of trial until after it had begun, and preventing St. Paul from participating in handling the case. All these actions caused St. Paul to rely to its detriment on Aspen's representations that St. Paul would not

be responsible, Aspen knew the truth was to the contrary and intended its actions to be relied upon so that it could maintain control of the defense and thus prevent a cross-complaint against Marquee and a special verdict form laying out the allocation of liability, and St. Paul did not know of Aspen's schemes to the contrary. This also supports equitable estoppel. St. Paul believes Aspen takes the position that St. Paul had the same duty to settle the underlying case that Aspen did, even though its actions belied that position. If that last belief is not so, St. Paul is happy to take Aspen's concession on this point. However, the other points are perfectly valid bases for equitable estoppel, and Aspen is plainly included in the cause of action as drafted. Accordingly, Aspen's countermotion for dismissal of the equitable estoppel claim should be denied.

IV. Aspen's Evidentiary Objections Are Irrelevant.

Aspen has decided to waste St. Paul and this Court's time by objecting to certain evidence Aspen knows is perfectly reliable and which, in any event, is not critical to the issues addressed on this motion. These objections do not in any way support denial of St. Paul's motion.

First, Aspen raises its judicial notice objection only generally, and cites only three specific documents with respected to its authentication objection, Exhibits 15-17. Objections must be specific. *In re J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012) ("When objecting to the admission of evidence, a party must state the specific grounds for the objection. NRS 47.040(1)(a). This specificity requirement applies not only to the grounds for objection, but also to the particular part of the evidence being offered for admission."); *State v. Kallio*, 92 Nev. 665, 668, 557 P.2d 705, 707 (1976); Nev. Rev. Stat. Ann. § 47.040 (West). Therefore, Aspen only effectively objects to authentication of the three documents specified.

Exhibits 15 and 16 are Aspen's reservation of rights to Cosmo and Marquee respectively, in which it appoints conflicted defense counsel, and Exhibit 17 a defense analysis from this counsel to Aspen and Cosmo explaining the defendants faced excess exposure. None of these documents impacts the specific issues currently before the Court, *i.e.*, whether both Aspen's per occurrence limit and personal and advertising injury limit were triggered and whether St. Paul alleges a viable subrogation claim under Nevada law. The only facts the Court needs to determine these issues are: 1) the underlying complaint; 2) Aspen's policy; and 3) St. Paul's policy. Even the

underlying special verdict is not strictly necessary to prove both limits were in play, though it does prove the viability of both Coverage A and Coverage B claims. Aspen does not dispute introduction of this evidence, including the special verdict, because it cannot. Aspen provided its own policy, St. Paul provided its policy, and the other two are subject to judicial notice. Thus Aspen's evidentiary objections are irrelevant. The three disputed documents merely provide broader factual context for the Court. The same holds true as to Aspen's vague judicial notice objection, which also does not appear to encompass these documents. Therefore, these objections should not be a basis for denying this motion.

CONCLUSION

For all the foregoing reasons, St. Paul's motion for partial summary judgment should be granted, establishing that Aspen's policy had $2 million in limits available to settle Moradi's claims, and that St. Paul has the right to assert subrogation against Aspen under Nevada law.

Dated: October 2, 2019

MORALES FIERRO & REEVES

By: /s/ Ramiro Morales
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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:

ST. PAUL'S REPLY SUPPORTING ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY, AND OPPOSITION TO ASPEN'S COUNTERMOTION FOR SUMMARY JUDGMENT

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.

_____ BY U.S. Mail: By placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice, mail is deposited with pre-paid postage with the United States Postal Service in the ordinary course of business.

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

Dated: October 2, 2019

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S OPPOSITION TO PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COUNTERMOTION FOR SUMMARY JUDGMENT

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

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Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"), by and through its attorneys of record HEROLD & SAGER and KELLER/ANDERLE LLP, hereby submits the following Points and Authorities in Support of its Opposition to Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Countermotion For Summary Judgment.

POINTS AND AUTHORITIES

I.

INTRODUCTION

St. Paul's Countermotion ignores how this Court invited Defendants' motions for summary judgment during the motion to dismiss phase, when it found that "[b]ased on the record before the Court at this time, there appears to be no material questions of fact and the only issues remaining are purely questions of law." Pretending the Court never made this finding, the Countermotion is largely based on the false contention that "Cosmo's claims against Marquee are not barred or impacted by any terms of conditions of the [Nightclub] Management Agreement." But as detailed in Marquee's Motion for Summary Judgment, the NMA relied on by St. Paul in its attempt to step into its insured Cosmopolitan's shoes contains a "waiver of subrogation" provision: "All Owner Policies . . . shall contain a waiver of subrogation against [Marquee]." As a matter of law, the NMA's waiver of subrogation provision is fatal to St. Paul's claims.

St. Paul inconceivably argues that Cosmopolitan somehow benefitted from the NMA without ever being "bound by it." The NMA and Cosmopolitan Lease attached to it prove otherwise. Cosmopolitan was undisputedly a signatory to the NMA. And as described in Marquee's pending Motion, Cosmopolitan expressly assumed – through Section 17.2 of the Lease – the obligation to procure insurance compliant with the NMA's terms, including the NMA's waiver of subrogation obligation.

Similarly, the Countermotion does not sufficiently address other "purely" legal issues fatal to St. Paul's claims, such as St. Paul's express indemnity claim against Marquee. As explained in Marquee's Motion, that claim fails because under the express terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan *only applies to losses not covered by insurance*. Cosmopolitan was defended and indemnified by the insurers in the underlying action. It is

undisputed that Cosmopolitan did not sustain any uninsured losses. As a matter of law, Cosmopolitan has no shoes for St. Paul to step into for any purported subrogation claim against Marquee.

The Countermotion's inability to address these undisputed facts is exemplified by its failure to provide any declaration from Cosmopolitan addressing the evidence in Marquee's Motion or supporting the Countermotion's erroneous arguments. It is telling that St. Paul's counsel was unable to secure a declaration from their insured which support the "facts" and positions they assert. The Countermotion's failure to provide any declaration from Cosmopolitan is reason alone to deny it.

Failing to fill that void, the Countermotion relies on the inadmissible and speculative declaration testimony from St. Paul's two lead litigators in this action. But those attorneys had nothing to do with the NMA, Marquee, Cosmopolitan, the Lease, the Underlying Moradi Action, or National Union. How desperate is St. Paul to escape Marquee's Motion for Summary Judgment that it forces its litigation counsel in this case to make sworn statements for which they have absolutely no personal knowledge rather that muster a single fact witness to support its assertions. The Court should reprimand St. Paul's counsel for submitting declarations swearing to "personal knowledge of all facts set forth" and then making purported factual assertions about disputed events obviously outside their personal knowledge. A party cannot make a wish list of disputed "facts" needed as undisputed for summary judgment and offer them as true and with personal knowledge in their own litigators' declarations. The Countermotion should be rejected for this reason alone.

But St. Paul's failings don't end there. The Countermotion suffers from numerous other deficiencies requiring its denial:

- The Countermotion fails to identify each undisputed fact purportedly supporting it.
- St. Paul states the Moradi "verdict was never reduced to a judgment because the parties ultimately settled the Moradi action" and "in so doing . . . defendants Marquee and Cosmo admitted no fault," but then falsely claims "it is undisputed that Marquee acted both with negligence and willful misconduct."

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- St. Paul concedes "the relative fault of Marquee and Cosmo was never raised, pled or adjudicated," but inconsistently asserts it is "undisputed" that "Cosmo had no active role in managing or operating the venue."
- It erroneously contends as undisputed "Moradi's injuries and damages were caused solely by Marquee's actions," when the jury found both Marquee and Cosmopolitan liable for intentional torts (although that judgment was never entered).
- The Countermotion overlooks numerous other disputed facts (on topics unrelated and irrelevant to Marquee's Motion for Summary Judgment) to be addressed if and when Marquee's pending Motion is denied and the discovery stay is lifted (neither of which should occur).
- It provides insufficient notice as to which claims or defenses are subject to the Countermotion's request for summary judgment and which arguments are specific to the Countermotion, rather than the Opposition.
- St. Paul erroneously contends the Opposition and Countermotion were timely filed.

The Countermotion actually "counters" nothing in Marquee's Motion for Summary Judgment. It presents a confusing mish mash of disputed facts (none of which are relevant to Marquee's Motion for Summary Judgment as to purely legal issues), inadmissible "evidence" and "facts," as well as erroneous arguments. St. Paul unsuccessfully attempts to muddy the clear questions of law presented in Marquee's Motion for Summary Judgment. Just as counter-moving for summary judgment on alleged bad faith, causation, or damages at this stage of the litigation – while discovery has been stayed – would have no legal effect on any of Defendants' pending Motions for Summary Judgment on "purely questions of law," the same is true of this Countermotion. For the reasons set forth in this Opposition and Marquee's Motion (which is incorporated reference), the Court should deny St. Paul's Countermotion.

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II.

FACTUAL BACKGROUND

Marquee incorporates by reference the Factual Background in its Motion for Summary Judgment,[1] which for the convenience of the Court, is included below:

A. Underlying Action

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

Roof Deck Entertainment, LLC owns and operates the Marquee Nightclub. (FAC ¶ 4.) Nevada Property 1, LLC owns and operates The Cosmopolitan of Las Vegas. (*Id.* ¶ 10.) Marquee and Roof Deck Entertainment, LLC are the same entity. (*Id.* ¶ 4) Similarly, Nevada Property 1, LLC and Cosmopolitan are the same entity. (*Id.* ¶ 10) Cosmopolitan is the owner of the subject property where the Marquee Nightclub is located and leased the nightclub location to its subsidiary, Nevada Restaurant Venture 1, LLC ("NRV1"). (FAC ¶ 10.) NRV1 entered into a written agreement with Marquee to manage the nightclub. (FAC ¶ 10; Bonbrest Decl., Ex. 1.) Marquee is an insured

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[1] Citations in this Section are to the evidence submitted with Marquee's Motion for Summary Judgment.

under the National Union policy. (FAC ¶ 30.) Cosmopolitan is an insured under the St. Paul policy. (FAC ¶ 40; Declaration of Nicholas B. Salerno ("Salerno Decl."), Ex. 2.)

During the course of the Underlying Action, Moradi asserted that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breach of the non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.) Specifically, the Court held as a matter of law that the 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.)

After a five-week trial, the jury in the Underlying Action issued a special verdict on April 26, 2017 finding that Moradi established his claims for assault, battery, false imprisonment and negligence against Marquee and Cosmopolitan jointly and that the actions of the employees of the Marquee nightclub were a legal cause of injury or damage to Moradi and awarded compensatory damages in the amount of $160,500,000. (FAC, Ex. C.) After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.) National Union, St. Paul and the other insurers accepted the settlement demand and resolved the Underlying Action with the confidential contributions set forth in the FAC filed by St. Paul under seal. (FAC ¶¶ 67-70.) The settlement was funded entirely by the various insurance carriers for the entities at issue. No defendant in the underlying case contributed any money toward the settlement.

B. St. Paul's Claims Against Marquee

In its Fifth Cause of Action for Statutory Subrogation – Contribution Per NRS § 17.225, St. Paul asserts a subrogation right against Marquee under NRS § 17.225 for contribution to recoup a share of St. Paul's settlement payment. (FAC ¶ 113.) St. Paul alleges that Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct rather than any affirmative actions or unreasonable conduct on the part of Cosmopolitan. (FAC ¶¶ 117-118.) St. Paul further asserts that Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages. (FAC ¶ 118.) St. Paul alleges that its settlement payment on behalf of

Cosmopolitan was in excess of Cosmopolitan's equitable share of this common liability such that St. Paul is entitled to subrogate to Cosmopolitan's contribution rights against Marquee pursuant to NRS §§ 17.225 and 17.275 for all sums paid by St. Paul as part of the settlement of the Underlying Action. (FAC ¶¶ 119-120.)

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

C. Nightclub Management Agreement

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

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

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

> **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 T000126) (emphasis added.)

Notably, the St. Paul policy also 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.)

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

> **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.) (Emphasis added.) Under Section 13 of the NMA, any express indemnity obligation owed by Marquee to Cosmopolitan only applies to losses not covered by insurance.

III.

LEGAL STANDARD ON SUMMARY JUDGMENT

Under NRCP 56(a), summary judgment shall only be granted if the movant shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Frederic and Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 109 (Nev. 2018); *Wood v. Safeway*, 121 Nev. 724 (2005). A party asserting that a fact cannot be genuinely disputed must cite to particular parts of material in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. NRCP 56(c)(1). Affidavits or declarations in support of a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. NRCP 56(c)(4). Affidavits or declarations substantially defective in these respects may be stricken, wholly or in part. Eighth Judicial District Local Rule 2.21(c). Summary judgment motions that are not supported by any competent evidence should not be considered. *Hosmer v. Avayu*, 97 Nev. 584, 585 (1981); *Collins v. Union Federal Sav. & Loans Ass'n*, 99 Nev. 284, 298, fn. 7 (1983).

IV.

ARGUMENT

A. The Countermotion Fails To Counter The Undisputed Facts And "Purely Questions of Law" Set Forth In Marquee's Pending Motion For Summary Judgment

The Countermotion seeks to avoid this Court's findings during the extensively briefed motion to dismiss stage inviting Defendants' pending Motions for Summary Judgment:

> Based on the record before the Court at this time, there appears to be no material questions of fact and *the only issues remaining are purely questions of law*. (Emphasis added.)

As explained in Marquee's Motion for Summary Judgment, Section 12.2.6 of the NMA contains a "waiver of subrogation" provision that precludes St. Paul, as a matter of law, from attempting to step into Cosmopolitan's shoes. (Mot. 14-16.) Under Section 12.2.6 of the NMA, all policies issued to NRV1, Marquee, and Cosmopolitan are required to contain a waiver of subrogation for any claims against each other. Further evidencing this requirement, the St. Paul policy also 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 caused by an occurrence, then St. Paul agrees to waive its right of recovery for such payment. (*Id.*)

Unable to rebut the undisputed facts that the NMA and St. Paul's own policy bar its subrogation claims, the Opposition/Countermotion contends Cosmopolitan was never bound by the terms of the NMA. (Opp. 8.) But St. Paul offers no declaration or other evidence from Cosmopolitan to support this allegation. The undisputed facts before the Court establish that (1) Cosmopolitan signed the NMA, (2) St. Paul invokes that agreement for its indemnification argument on behalf of Cosmopolitan, and (3) Cosmopolitan is bound by the terms of the NMA. (Mot. 8.)

In addition, the NMA's express terms provide that the waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies." (Mot. 11.) "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in Sections 12.2.3 and 12.2.5 to include the Owner (NRV1), the Project Owner (Cosmopolitan), and the landlord and tenant under the Lease (also Cosmopolitan and NRV1). (Mot. 16.) The Countermotion has no answer to these undisputed facts.

The Countermotion's unsupported contention that Cosmopolitan is somehow not bound by the NMA also fails because St. Paul ignores that Section 17.2 of the Lease attached as Exhibit D to the NMA delegated NRV1's insurance requirements under the NMA to Cosmopolitan. Section 17.2 of the Lease provides that Cosmopolitan shall procure "all insurance required to be obtained

by" NRV1 under the NMA. (Mot. 15.) Through the Lease, Cosmopolitan assumed the obligation to procure insurance that complied with all of the terms of Section 12, including the waiver of subrogation obligation set out in Section 12.2.6. (Mot. 15-16.)

Nevada law does not permit St. Paul to pick and choose among the NMA provisions it likes and dislikes. In response to St. Paul's invocation of the NMA on behalf of Cosmopolitan, the Court is to apply that agreement to Cosmopolitan, especially since it was a signatory. *See, e.g., Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 779 (2005) ("an intended third-party beneficiary is bound by the terms of a contract even if she is not a signatory"); *Gibbs v. Giles*, 96 Nev. 243, 246-247 (1980) ("a third-party beneficiary takes subject to any defense arising from the contract that is ascertainable against the promisee"). St. Paul bases its arguments on the contention that Cosmopolitan was an intended third-party beneficiary of the NMA. St. Paul cannot invoke the NMA for third-party beneficiary status of its insured in one argument yet disavow the NMA terms when they are fatal to its subrogation claims in another.[2] *Id.*

The Countermotion also fails to rebut the other "purely" legal issues dispositive of St. Paul's claims. As detailed in Marquee's Motion, St. Paul's express indemnity fails for the separate reason that under the terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan *only applies to losses not covered by insurance*. (Mot. 16-18.) It is undisputed that Cosmopolitan did not sustain any uninsured losses. (Mot. 18.)

Accordingly, for these reasons and the others stated in Marquee's Motion for Summary Judgment "on purely questions of law," St. Paul's Countermotion should be denied.

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[2] Even if St. Paul offered a declaration from Cosmopolitan contending it never intended to be bound by the NMA, the Court should still reject St. Paul's Countermotion and grant Marquee's Motion for Summary Judgment. That is because, under Nevada law, the third-party beneficiary is subject to the same limitations of the contracting party and is afforded no greater rights. *Canfora*, 121 Nev. at 779; *Gibbs*, 96 Nev. at 246-247.

B. The Countermotion Contends That "Facts" Irrelevant to Marquee's Pending Motion Are Undisputed, When They Clearly Are Contested

The Countermotion attempts to bog this Court down with unnecessary allegations that have no bearing on Defendants' pending Motions and the undisputed facts supporting them. As stated above, the Court previously indicated that those pertinent arguments present "no material questions of fact and the only issues remaining are purely questions of law." Not only does the Countermotion attempt to inject these pointless distractions into Marquee's pending Motion, but it also falsely contends these unrelated "factual" allegations are undisputed, when in reality, they are contested.

For example, the Opposition/Countermotion correctly concedes that "the relative fault of Marquee and Cosmo was never raised, pled or adjudicated" in the Moradi trial. (Opp. 4.) But St. Paul then inconsistently asserts as "undisputed" that "Cosmo had no active role in managing or operating the venue." (Opp. 13.) Through a clumsy sleight-of-hand, St. Paul tries to convert Cosmopolitan's "alleged passive tortfeasor" status and its non-delegable duty *in the Moradi case* into an "undisputed" contention *in this case* that Cosmopolitan played no role in the alleged tortious wrongdoing. (Opp. 4-5, 13.) This tactic must be rejected, because, as noted above, St. Paul admits no active/passive findings were made in the Underlying Action and there was no allocation of fault between Marquee and Cosmopolitan. (Opp. 4-5.)

Contrary to St. Paul's assertion, a legal determination that a property owner had a non-delegable duty cannot be converted into an undisputed factual finding that property owner was only passively at fault. This issue is also irrelevant to Marquee's pending Motion. In Nevada, the active/passive distinction is relevant only to a claim of equitable indemnity. *See generally*, *The Doctors Co. v. Vincent*, 120 Nev. 644 (2004); *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27 (1997); *Piedmont Equip. Co. v. Eberhard Mfg.*, 99 Nev. 523, 526, (1983); *Black & Decker v. Essex Group*, 105 Nev. 344, 345 (1989). St. Paul, however, has not and cannot assert a claim for equitable indemnity where, as explained in Marquee's pending Motion, Cosmopolitan and Marquee entered an express indemnity relationship in the NMA.

The Opposition/Countermotion also rightly states the Moradi "verdict was never reduced to a judgment because the parties ultimately settled the Moradi action" and "in so doing . . .

defendants Marquee and Cosmo admitted no fault." (Opp. 10.) St. Paul simultaneously contradicts this representation by arguing it is "undisputed" that "Moradi's injuries and damages were caused solely by Marquee's actions" and "Marquee acted both with negligence and willful misconduct." (Opp. 13.) These so-called facts are contested. Although the jury found both Marquee and Cosmopolitan liable for intentional torts, that judgment was never entered. St. Paul even concedes that "questions of fact exist as to which damages were awarded" in the Moradi trial "as to any specific count or legal theory." (Opp. 9, n.6.) If the Court denies Marquee's pending Motion, these unrelated issues will need to be litigated in this action.

In addition to these examples, St. Paul fails to recognize throughout its submission other disputed factual issues on topics unrelated and irrelevant to Marquee's Motion for Summary Judgment. *See*, *e.g.*, Countermotion/Opposition at 4 (incorrectly contending as undisputed that Moradi was not an invitee of Cosmopolitan), *id.* (erroneously asserting as undisputed "Cosmo had no express or implied authority to control the Marquee"); *id.* at 8 (falsely claiming Cosmopolitan had no obligation to procure insurance coverage); *id.* at 9 (arguing as undisputed that Marquee recognizes for the purposes of this action "that it was responsible for the Moradi claim"); *id.* at 10 (asserting as undisputed that Marquee "manipulated the proceedings" against Cosmopolitan in the Moradi action); *id.* (claiming without evidence no "unreasonable conduct on the part of Cosmo"); *id.* at 13 (disputing, but simultaneously claiming as undisputed, that Cosmopolitan was not "held liable for its own intentional conduct"). As explained herein (and in Marquee's concurrently filed evidentiary objections), the Countermotion fails to carry its burden of establishing with admissible evidence that its factual allegations are accurate and undisputed.

In sum, the Countermotion heavily relies on alleged facts that are irrelevant to Marquee's Motion, but also contested in this action.

C. Without A Declaration From Cosmopolitan, The Countermotion Relies Almost Exclusively On Inadmissible Evidence.

The Countermotion relies on inadmissible misinformation and fails to satisfy its burden of proving undisputed facts with admissible evidence. Fatal to its arguments, St. Paul fails to provide a declaration from Cosmopolitan (1) rebutting the evidence in Marquee's Motion or (2) supporting

the Countermotion's erroneous arguments. The only declarations submitted in support of St. Paul's Countermotion are from its litigation counsel in the instant action, Marc Derewetzky and William Reeves, each of whom lacks personal knowledge of virtually all of the matters attested to. Those litigators are not able to provide admissible evidence about the NMA, Marquee, Cosmopolitan, the Lease, the Underlying Moradi Action, or National Union.

For example, Mr. Derewetzky lacks the personal knowledge required to declare that numerous exhibits to St. Paul's Appendix are true and correct copies. (*See*, *e.g.*, Derewetzky Decl., ¶¶3-20; *see generally*, Marquee's Objections to Facts not Supported by Admissible Evidence.) Support for the admissibility of those document must come in the form of a declaration from the authors or recipients of the documents or another person who can be shown to possess personal knowledge that a document is what it purports to be.

Mr. Derewetzky also lacks personal knowledge to make under-oath declarations about, among other things, the Underlying Moradi Action, what evidence was or was not available to the parties in that action, and what AIG did or did not do in connection with that case. (*See*, *e.g.*, Derewetzky Decl., ¶¶25-36; *see generally*, Marquee's Objections to Facts not Supported by Admissible Evidence.) It is simply false – and outrageous – for Mr. Derewetzky to claim in his declaration that he has "personal knowledge of all facts set forth in this Declaration" and in that same document, make purported factual assertions about disputed events obviously outside his personal knowledge. Examples of inaccurate statements Mr. Derewetzky makes in his declaration for which he has absolutely no personal knowledge include the following: "AIG provided a single attorney to represent Cosmo and Marquee"; "Aspen and AIG mishandled the claims"; "AIG consistently represented that its coverage for Cosmopolitan was primary to St. Paul's coverage"; "AIG elected to . . . unreasonably take its chances"; "AIG lost this gamble"; and "AIG did not want St. Paul interfering in the handling of the defense." Each of these statements (and several others) should be stricken from the record, and Mr. Derewetzky should be reprimanded for offering the false statement that he has personal knowledge of these matters when he clearly does not. If his statements are not stricken, and this case continues, he will need to sit for a deposition in this action about his purported factual testimony.

As for Mr. Reeves' inadmissible declaration, he too lacks personal knowledge to authenticate documents referenced in his declaration. He asserts in blanket fashion that all the documents submitted by St. Paul "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." (Reeves Declaration, ¶3.) Mr. Reeves fails to identify or distinguish the documents which were purportedly produced in this case from the documents which can be judicially noticed from the Underlying Action. Nonetheless, even if he did, the mere fact a document was produced in a case does not make it or its contents admissible evidence, or judicially noticeable, without more foundation.

Accordingly, for the reasons set forth in Marquee's concurrently filed objections, as well as those above, the St. Paul litigation attorney declarations should be stricken from the record, and the Countermotion must be denied for its failure to offer admissible evidence.

D. The Countermotion Suffers From Other Procedural And Due Process Flaws Requiring Its Denial

Given the Countermotion's inability to comply with Nevada's summary judgment requirements and basic standards of due process, St. Paul's request for summary judgment fails to provide notice to Marquee of what it is even seeking or its legal basis for doing so. For example, the Countermotion fails to identify the claim(s) or defense(s) upon which St. Paul is moving. This is reason alone to deny the Countermotion. *See* NRCP 56(a). Similarly, St. Paul fails to identify what arguments are specific to the Countermotion and which to the Opposition. Marquee should not have to guess what claims or defenses are at issue in the Countermotion.

Separate from this deficiency, the Countermotion also fails to identify each of its undisputed facts or the purported evidence supporting them. This too is reason alone to deny the Countermotion. NRCP 56(c)(1); *Fergason v. LVMPD*, 131 Nev. 939, 943-944 (2015); *Allen v. U.S.*, 964 F.Supp.2d 1239, 1252 (D. Nev. 2013).

Moreover, the Countermotion is not actually one because it is not related to the legal issues raised in Marquee's Motion: St. Paul's ability, as a matter of law, to maintain its subrogation claims. The Countermotion is based on disputed allegations and genuine issues of material fact that are irrelevant and unrelated to the purely legal issues that were presented in Marquee's motion to

dismiss and now in its pending Motion for Summary Judgment. St. Paul also incorrectly asserts its Opposition and Countermotion were timely filed. Pursuant to this Court's Administrative Order effective March 12, 2019, the deadline for St. Paul to file its Opposition/Countermotion was September 23, 2019. Because St. Paul did not file until September 27, the Opposition/Countermotion was untimely and could be stricken for this reason as well.

V.

CONCLUSION

For the foregoing reasons, as well as those set forth in Marquee's Motion and the concurrently filed evidentiary objections, the Court should deny St. Paul's Countermotion.

DATED: October 7, 2019

HEROLD & SAGER

By: _____

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CERTIFICATE OF SERVICE

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

That on October 7, 2019, service of DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S OPPOSITION TO PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COUNTERMOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

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

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
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Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (*Pro Hac Vice)* Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (*Pro Hac Vice)* Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 7th day of October, 2019.

JuRee A. Bloedel

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S OBJECTIONS TO FACTS NOT SUPPORTED BY ADMISSIBLE EVIDENCE FILED IN SUPPORT OF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND COUNTERMOTION RE: DUTY TO INDEMNIFY

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

Pursuant to NRCP 56(c)(1), Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") hereby submits the following objections to facts not supported by admissible evidence filed in support of Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Opposition to Motion for Summary Judgment and Countermotion Re: Duty to Indemnify.

FACTS/EVIDENCE	OBJECTION
1. "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 of employees, including the security staff? A. Roof Deck Entertainment, LLC. Ex Q, 134:22-135:3." (Opp., at 3:19-25.) Declaration of William Reeves ("Reeves Decl."), ¶ 2; Declaration of Marc J. Derewetzky ("Derewetzky Decl."), ¶ 19; Consolidated Appendix of Exhibits in Support of Plaintiff's Opposition to Motions for Summary Judgment filed by AIG and Marquee ("Appendix"), Ex. Q – Excerpts of Trial Transcript in the Underlying Action From the Afternoon of April 18, 2017.	St. Paul offers the excerpts of trial testimony, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit Q through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 19. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit Q is a true and correct copy of transcript excerpts from the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit Q is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to

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	provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). Further, St. Paul fails to identify the background and capacity of the witness purporting to offer testimony through Exhibit Q such that St. Paul fails to establish the witness has personal knowledge of the cited testimony. NRS §§ 51.065; 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). In addition, the testimony from the witness purporting to offer testimony through Exhibit Q assumes facts that have been established in the evidence.
2. "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." (Opp., at 4:6-8.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 5-6; Appendix, Ex. C – September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance; Ex. D – Defendant's Answer to Complaint in the Underlying Action.	St. Paul offers correspondence issued by defense counsel for defendants in the Underlying Action, along with an answer filed on behalf of the defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits C and D through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 5-6. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit C is a true and correct copy of September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance and/or whether Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr.

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	Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit D is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). The portions of correspondence offered by St. Paul through Exhibit C are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits C and D purporting to offer evidence assume facts that have been established in the evidence.
3. "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." (Opp., at 4:8-11.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 5; Appendix, Ex. C – September 18, 2014 Letter from Martin Kravit and Tyler Watson of	St. Paul offers correspondence issued by defense counsel for defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025.

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Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance.	St. Paul attempts to establish the authenticity of Exhibit C through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 5. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit C is a true and correct copy of September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibit C is inadmissible hearsay. NRS § 51.065.
4. "Defense counsel proceeded to file an Answer on behalf of both Marquee and Cosmo. Appendix, Ex. D." (Opp., at 4:12-13.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 6; Appendix, Ex. D - Defendant's Answer to Complaint in the Underlying Action.	St. Paul offers an answer filed on behalf of the defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit D through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 6. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr.

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	Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit D is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2).
5. "By jointly representing both parties, no cross or counter claims were pursued between the parties. [Appendix, Ex. D.]" (Opp., at 4:13-14.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 6; Appendix, Ex. D - Defendant's Answer to Complaint in the Underlying Action.	St. Paul offers an answer filed on behalf of the defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit D through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 6. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr.

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	Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit D is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). In addition, the portions of Exhibit D purporting to offer evidence assume facts that have been established in the evidence.
6. "On December 10, 2015, Moradi made a settlement demand of $1,500,000. Appendix, Ex. G." (Opp., at 4:16-17.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 9; Appendix, Ex. G – Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000.	St. Paul offers an offer of judgment served by Moradi in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit G through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 9. Marc Derewetzsky and William Reeves lack

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	personal knowledge whether 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. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of Moradi's offer of judgment offered by St. Paul through Exhibit G are inadmissible hearsay. NRS § 51.065.
7. "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." (Opp., at 4:17-19.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 7-8; Appendix, Ex. E – November 13, 2014 Letter From Martin Kravitz and Tyler Watson of Kravitz Schnitzer & Johnson to Edward Kotite of Aspen Insurance; Ex. F – December 7, 2015 E-Mail From Tyler Watson of Kravitz Schnitzer & Johnson to Edward Kotite of Aspen and Robin Green of AIG.	St. Paul offers two pieces of correspondence issued by defense counsel for defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits E and F through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 7-8. Marc Derewetzsky and William Reeves lack personal knowledge whether 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, and/or whether Exhibit F is a true and correct copy of a December 7, 2015 E-Mail From Tyler Watson of Kravitz Schnitzer & Johnson to Edward

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	Kotite of Aspen and Robin Green of AIG. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibits E and F are inadmissible hearsay. NRS § 51.065.
8. Despite being aware of these claims, Aspen and AIG declined to accept the demand or even engage in settlement discussions. Appendix, Ex. H." (Opp., at 4:19-20.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 10; Appendix, Ex. H – December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle.	St. Paul offers correspondence issued by defense counsel for defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit H through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 10. Marc Derewetzsky and William Reeves lack personal knowledge whether 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. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he

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	avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibit H are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibit H purporting to offer evidence assume facts that have been established in the evidence.
9. "In advance of trial, the parties filed various motions to address what exposure, if any, Cosmo faced. Appendix, Exs. N, O, P." (Opp., at 4:21-22.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 16 – 18; Appendix, Ex. N – Defendants' Trial Brief for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 15, 2017; Ex. O – 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; Ex. P – Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty Dated April 12, 2017.	St. Paul offers Defendants' Trial Brief, Defendants' Reply to Plaintiff's Opposition to Motion for Determination of Several Liability, and Defendants' Opposition to Plaintiff's trial brief, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits N, O, and P through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 16-18. Marc Derewetzsky and William Reeves lack personal knowledge whether 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, whether 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, and/or whether 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-

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	Delegable Duty Dated April 12, 2017. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibits N, O, and/or P are properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2).
10. "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 Cosmo. Appendix, Ex. P, 5:20-6:4." (Opp, at 4:22-24.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 18; Appendix, Ex. P - Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty Dated April 12, 2017.	St. Paul offers Defendants' Opposition to Plaintiff's trial brief, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit P through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 18. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit P is a true

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	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. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit P is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). In addition, the portions of Exhibit P purporting to offer evidence assume facts that have been established in the evidence.
11. "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. (Opp., at 4:24-27.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 16 – 17; Appendix, Ex. N - Defendants' Trial Brief for Determination of Several Liability Under	St. Paul offers Defendants' Trial Brief and Defendants' Reply to Plaintiff's Opposition to Motion for Determination of Several Liability, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for

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NRS 41.141 in the Underlying Action Dated March 15, 2017; Ex. O – 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.	express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits N and O through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 16-17. Marc Derewetzsky and William Reeves lack personal knowledge whether 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, and/or whether 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. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibits N and/or O are properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2).

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	In addition, the portions of Exhibits N and O purporting to offer evidence assume facts that have been established in the evidence.
12. "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." (Opp., at 4:27-28.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 17; Appendix, Ex. O - 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.	St. Paul offers Defendants' Reply to Plaintiff's Opposition to Motion for Determination of Several Liability, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit O through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 17. Marc Derewetzsky and William Reeves lack personal knowledge whether 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. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit O is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a

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	proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). In addition, the portions of Exhibit O purporting to offer evidence assume facts that have been established in the evidence.
13. "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." (Opp., at 5:3-5.)	St. Paul offers this unsupported factual assertion in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that Cosmopolitan 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, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
14. "As both Cosmo and Marquee were represented by the same attorney, no crossclaims were asserted between the parties." (Opp., at p. 5:7-8.)	St. Paul offers this unsupported factual assertion in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that because Cosmopolitan and Marquee were represented by the same attorney, no crossclaims were asserted between the parties, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).

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15. "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." (Opp., at 9:19-20.)	St. Paul offers this unsupported factual assertion in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that Marquee accepted Cosmopolitan's tender of defense and indemnity, recognizing that it was responsible for the Moradi claim, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
16. "Marquee defended Cosmo in the Moradi action through its insurers, which provided joint counsel for Marquee and Cosmo. Appendix, Exs. C, D." (Opp., at 9:21-22.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 5 – 6; Appendix, Ex. C – September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance; Ex. D – Defendant's Answer to Complaint in the Underlying Action.	St. Paul offers correspondence issued by defense counsel for defendants in the Underlying Action, along with an answer filed on behalf of the defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits C and D through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 5-6. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit C is a true and correct copy of September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance and/or whether Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set

FACTS/EVIDENCE	OBJECTION
	forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit D is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). The portions of correspondence offered by St. Paul through Exhibit C are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits C and D purporting to offer evidence assume facts that have been established in the evidence.
17. "In this case, it is undisputed that Marquee acted both with negligence and willful misconduct. Appendix V." (Opp., at 13:16-17.)	St. Paul offers this unsupported factual assertion in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that Marquee acted both with negligence and willful misconduct, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1). Namely, there is no

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	"Appendix V" and to the extent St. Paul intended Exhibit V to its Appendix, that exhibit is an email exchange regarding the timeliness of St. Paul's opposition, which clearly has no relationship to the factual assertion made.
18. "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." (Opp., at 13:17-19.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 16 – 18; Appendix, Ex. N – Defendants' Trial Brief for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 15, 2017; Ex. O – 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; Ex. P – Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty Dated April 12, 2017.	St. Paul offers Defendants' Trial Brief, Defendants' Reply to Plaintiff's Opposition to Motion for Determination of Several Liability, and Defendants' Opposition to Plaintiff's trial brief, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits N, O, and P through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 16-18. Marc Derewetzsky and William Reeves lack personal knowledge whether 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, whether 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, and/or whether 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. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge.

FACTS/EVIDENCE	OBJECTION
	He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibits N, O, and/or P are properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). In addition, the portions of Exhibits N, O and P purporting to offer evidence assume facts that have been established in the evidence.
19. "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 nay 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." (Derewetzky Decl., ¶ 25.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 25. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which

FACTS/EVIDENCE	OBJECTION
	one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
20. "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." (Derewetzky Decl., ¶ 26.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025 St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 26. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
21. "Aspen and AIG mishandled the claims and then failed to accept reasonable settlement offers within their limits. Exhibits G, H, I, K." (Derewetzky Decl., ¶ 27.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 27. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set

FACTS/EVIDENCE	OBJECTION
	forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
22. "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, 2019, shortly before trial commenced. Exhibits G, H, I, K." (Derewetzky Decl., ¶ 28.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 28. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
23. "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.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth

FACTS/EVIDENCE	OBJECTION
	in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 29. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
24. "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." (Derewetzky Decl., ¶ 30.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 30. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for

FACTS/EVIDENCE	OBJECTION
	any party in the Underlying Action that participated in trial of the Underlying Action.
25. "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.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 31. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
26. "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 handing over its named insured's head, St. Paul funded Cosmo's portion of the settlement." (Derewetzky Decl., ¶ 32.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 32. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's

FACTS/EVIDENCE	OBJECTION
	Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
27. "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.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 33. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
28. "The settlement demand post-verdict was for the limits of all insurance, including the St. Paul policy." (Derewetzky Decl., ¶ 34.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025.

FACTS/EVIDENCE	OBJECTION
	St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 34. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
29. "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." (Derewetzky Decl., ¶ 35.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 35. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.

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FACTS/EVIDENCE	OBJECTION
30. "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 offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 36. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.

DATED: October 7, 2019

HEROLD & SAGER

By: _____

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CERTIFICATE OF SERVICE

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

That on October 7, 2019, service of DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S OBJECTIONS TO FACTS NOT SUPPORTED BY ADMISSIBLE EVIDENCE FILED IN SUPPORT OF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND COUNTERMOTION RE: DUTY TO INDEMNIFY was made to the following interested parties in the following matter:

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

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Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
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COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
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Executed on the 7th day of October, 2019.

JuRee A. Bloedel