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 XIV of XVI

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CERTIFICATE OF SERVICE

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

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ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1-25; inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT. NO.: XXVI **DEFENDANT'S ASPEN SPECIALTY INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS COUNTERMOTION FOR SUMMARY JUDGMENT**

COMES NOW, Defendant ASPEN SPECIALTY INSURANCE COMPANY (hereinafter "Defendant") by and through its attorneys of record, MESSNER REEVES LLP, and hereby submit its Reply in Support of its Countermotion for Summary Judgment as follows:

/ / /

/ / /

Preliminary Statement

Plaintiff requested an extension of the briefing and continuance of the hearing on the parties' competing motions for summary judgment. Aspen agreed. Aspen's counsel was involved in pretrial proceedings in another manner, and also wanted to time to respond to Plaintiff's Opposition to Countermotion, which the current briefing schedule would not allow for.

However, less than one week before the hearing on the competing motions, Plaintiff filed a 30 page Reply/Opposition to Aspen's Countermotion that it already had ready to go, which included close to 100 separate legal authority citations, and pulled its agreement to continue the hearing, in order to obtain a tactical advantage and prevent Aspen from adequate time to respond and file its reply papers in advance of the hearing.

Aspen then submitted an Ex Parte Motion to the Court to continue the hearing the next day but Aspen was informed the judge was out of town that Thursday and Friday. As of Monday, Aspen did not hear back the continuance would be allowed, so it filed a reply to the extent possible that day. Aspen contends the hearing should be continued to afford it time to fully respond to Plaintiff's opposition, as parties should not be rewarded for gamesmanship, and cases, especially serious issues of new impression as may be at issue here, should be heard on the merits.

I. INTRODUCTION

Plaintiff's theory about a $2 million limit applying is unsupported by law, unsupported by the plain language of the Aspen Policy, and would render the subject Endorsement limiting coverage meaningless. Instead, the law holds that the policy limit is the $ 1 million per occurrence limit for all injuries, whether bodily or personal advertising, that are caused by one causal event, as here. The Aspen policy also excludes coverage for bodily injury caused as a result of personal and advertising injury such that the personal and advertising injury coverage is not even implicated here. And, the Aspen policy also expressly limits coverage by Endorsement to the maximum coverage applicable under any one coverage part, which Plaintiff admits is $1 million under either coverage part A or coverage part B—Plaintiff just seeks to confuse the Court through its misplaced analysis of what constitutes a coverage part, an argument that would turn insurance law on its head and increase premiums beyond affordable levels for insureds.

Plaintiff's analysis of subrogation claims is likewise misplaced. It argues the Court cannot rely on unpublished cases and then *only* cites to an unpublished federal case for the adoption of a brand new claim in Nevada--equitable subrogation--that has never been recognized here before. This alone is cause for summary judgment in Aspen's favor. The Court has not recognized contractual subrogation either, and the principles behind it do not allow for its adoption here either. Even were the Court to recognize equitable subrogation for the first time here, "essential elements" are lacking as a matter of law, so Aspen is still entitled to summary judgment on the claim. And, because estoppel is derivative of the other claims, Aspen is entitled to summary judgment on that 'claim' as well.

II. ARGUMENT

A. Aspen's Policy Excludes Coverage for "Bodily Injury' arising out of 'personal and advertising injury'"; Coverage Part B, Personal And Advertising Injury, Cannot Therefore Provide An Extra $1 Million Coverage For The Same Injuries.

Plaintiff's Reply/Opposition contends that Coverage Part A and Coverage Part B are "designed to cover different types of injuries caused by different types of actions." Pl.'s Reply/Oppo., 6:5-6. Plaintiff further contends that Coverage Part A is intended to apply to negligent bodily injury from tortious conduct, but that Coverage Part B, personal and advertising injury, is intended to cover different types of damages in different types of suits from intentional conduct, such as libel, slander claims, or false imprisonment claims. *Id.* at 6:9-14.

Nevertheless, Plaintiff incorrectly argues that the two coverage parts double coverage for the same injuries and action. In the *Moradi* action, Plaintiff alleged claims concerning bodily injury and resultant damages. The Aspen Policy is not here covering different types of injuries in different actions; rather it is covering for the bodily injury claims and damages for the Moradi action.

The Aspen policy specifically excludes coverage for "Bodily Injury' arising out of 'personal and advertising injury'" such that Coverage Part A (bodily injury) and Coverage Part B (personal and advertising injury) do not double coverage here. *See* Exhibit A1 to Aspen's Opposition/Countermotion.

The Policy provides:

> **2. Exclusions**
>
> This insurance does not apply to ....
>
> **o. Personal and Advertising Injury**
>
> "Bodily injury" arising out of "personal and advertising injury."

Id. at p.4 of 13. Because bodily injury as a result of personal or advertising injury is specifically **excluded** from coverage, Coverage B for personal and advertising injury does not apply to add another $ 1 million of coverage to the Moradi action for Moradi's injuries. Plaintiff ignore this exclusion of coverage in the hopes the Court will too.

B. Aspen's Policy Excludes Coverage for The False Imprisonment Claim Too.

The Aspen Policy also excludes coverage for *intentional* personal and advertising injury. Plaintiff's Reply/Opposition also argued Coverage Part B, personal and advertising injury, was otherwise meant to cover *intentional* type conduct (for different claims and different actions). However, the Aspen Policy, under Coverage Part B, specifically excludes coverage for "knowing" conduct like that that results out of intentional type acts such as false imprisonment:

> **COVERAGE PART B PERSOANL AND ADVERTISING INJURY LIABILITY** ...
>
> **2. Exclusions**
>
> This Insurance does not apply to:
>
> **a. Knowing Violation of Rights of Another**
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."

Id. at p. 5 of 13. Once again, Coverage Part B is not implicated by the false imprisonment claim and provides no coverage here because it is excluded from coverage.

C. Aspen's Endorsement Expressly Applies to Limit Coverage To The Maximum Implicated Under Any One Coverage *PART*--$1 Million Here; A Construction Otherwise Would Render The Endorsement Meaningless.

Plaintiff's argument about how the subject Endorsement applies is obviously disputed by Aspen; the suggestion in its Reply/Opposition otherwise is ridiculous. Plaintiff's argument that the

Endorsement limits coverage to $2 million, which is already limited through the aggregate limit to $2 million, would render the Endorsement meaningless. Plaintiff's argument that the Endorsement applies to the policy as a whole, in that the CGL Coverage form and the Liquor liability Coverage Form are instead the coverage parts, likewise renders the Endorsement meaningless. In order to reach this absurd result, Plaintiff plays games with the Policy's language, but the plain language of the Aspen Policy is clear that the maximum that applies under any one coverage part is the limit of insurance.

Here, Plaintiff has conceded that the maximum under Coverage Part A is $ 1 million and the maximum under Coverage Part B is $ 1 million. Thus, the maximum under either is at best $1 million, which the Endorsements' first paragraph limits coverage to.

Plaintiff's Reply/Opposition argues Coverage Part A applies to "occurrences" and that Coverage Part B applies to "offenses." Tellingly though, Plaintiff then fails to set forth the subject Aspen Endorsement limiting coverage because its express, plain terms show that Plaintiff's construction is contrary to the terms of the Endorsement and the policy as a whole:

> **G. Other Insurance with This Company**
>
> **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.**
>
> If this policy and any other policy issued to you by us apply to the same "occurrence," "accident," "cause of loss," "injury," "loss" or offence, the maximum limit of insurance under all of the policy shall not excess the highest limit of insurance under any one policy. This condition does not apply to any policy issued by us which specifically provides that the policy is to apply as excess insurance over this policy.

See Exhibit A1 at Endorsement ASPGL044 05 04 (emphasis added).

First, the language of the first paragraph states if the policy applies to the same *occurrence*, *offense*, cause of loss, etc., as the two subject coverage parts are argued to do so here by Plaintiff, the maximum limit under all coverage parts is the maximum under any one. This shows that, even under Plaintiff's 'occurrence vs. offense' rationale, the endorsement limits coverage that would otherwise implicate both, to the maximum under any one. Plaintiff concedes that maximum under

Coverage A is $ 1 million and coverage B is $ 1 million. Thus, the $ 1 million limit applies under the first paragraph of the Endorsement.

In addition, the Policy states that the Aggregate Limit ($2 million) is the most the Policy pays for coverage parts A, B, and C. *Id.* at CGL Coverage Form p, 8 of 13. Plaintiff's construction arguing that the Endorsement limits the coverage to two million would also render it meaningless because it would be superfluous of the general aggregate limit that otherwise already applies to coverage parts A-C.

Thus, under any construction by Plaintiff, Plaintiff's reading of the Endorsement renders it meaningless which is untenable. The Endorsement applies to *limit* coverage, not confirm already existing coverage as Plaintiff's argument really boils down to, under parts A, B, and C. That's why Plaintiff cites no law holding this Endorsement applies otherwise.

Plaintiff has not offered evidence of *anyone* including the insured treating the Aspen limit as $2 million at any point of the underlying case or even in settlement, a settlement which was based on the Aspen $1 million limit (and the other primary insurer's $ 1 million limit). Plaintiff does not sue its' primary insurer, Zurich, for an additional $ 1 million either.

Instead, all the objective evidence shows that everyone including the insured treated Aspen's limit as a $ 1 million limit. Thus, while Aspen has not argued that the subject provisions are ambiguous (again, contrary to Plaintiff's disingenuous statement otherwise), it stated that to the extent *the Court believes so*, coverage would not automatically be construed in favor of a $2 million dollar policy limit, but that the evidence, should the Court believe the Endorsement or other provisions ambiguous, would show the $1 million limit applies.

D. Plaintiff's Arguments That The Occurrence Limit Does Not Apply To Limit Coverage Is Contrary To Law—Policy Limits Are Determined By The Cause of the Damage.

As Aspen's Opposition/Countermotion demonstrated, there was one cause of the injuries and therefore the artful pleading of claims for the same injuries does not implicate a second million dollars of coverage under personal advertising injury; a ruling otherwise would be disastrous to the insurance industry and the insureds trying to obtain coverage.

"'When all injuries emanate from a common source ..., there is only a single occurrence for purposes of policy coverage." *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.*, 178 Cal.App.4th 620, 633, 55 Ca.Rptr..3d 844 (2007). "**It is irrelevant that there are multiple injuries or injuries of different magnitudes, or that the injuries extend over a period of time.**" *Id.*, at 633-634. "[T]he existence of only one cause or event means there was only one occurrence for determining policy limits." *Id.* at 634. "**[P]olicy limits are determined by the cause of the damage.**" *Id.* at 634

In *Safeco*, the Court acknowledged that the personal injury liability coverage did *not* add more coverage to the same injuries all caused by the single causal event:

> Safeco's reliance on the policy's "Limit of Liability" provision is misplaced. That provision stated in part that "[a]ll 'bodily injury ' and 'property damage' resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful conditions shall be considered to be the result of 'one occurrence.' " (Italics added.) Safeco deems it significant that Fireman's Fund did not include "personal injury " in the provision. This omission, **Safeco contends**, means **that a single occurrence of property damage can simultaneously give rise to additional occurrences under the personal injury coverage in determining policy limits—for example, a second occurrence for wrongful entry and yet a third for wrongful eviction. But, as we have explained, policy limits are determined by the cause of the damage. Here, there was only one cause regardless of the number of injurious effects**.

Id. at 634. This is precisely what Plaintiff attempts to do here by arguing the occurrence limit does not apply to prevent an additional $1 million of coverage being implicated under the personal and advertising injury coverage part. But California and Nevada law show the policy limits are construed by the single cause of injuries rule, which makes sense under the law. *See, e.g., Century Sur. Co. v. Casino West, Inc.,* 99 F.Supp.3d 1262, 1264 (D. Nev. Mar. 27, 2015), citing *Bish v. Guaranty Nat'l Ins. Co.,* 109 Nev. 133, 137, 848 P.2d 1057, 1058 (1993) ("injuries arising from multiple "causes" are nonetheless attributable to a single 'occurrence' when those causes 'act[ ] concurrently with and [are] directly attributable to' a single first cause.").

Thus in *Safeway*, under four successive liability insurance policies each providing limits of $500,000 per "occurrence," a landslide from the insured's property happening during the first policy period, *which gave rise to both personal injury and property damage*, was single "occurrence,"

thus insurer was liable for only $500,000 of $4 million judgment against insured. *Id.* The Court further explained:

> Our interpretation of the policy—that there was one occurrence—is consistent with the reasonable expectations of the insured. According to Safeco, when the landslide happened, it simultaneously gave rise to personal injury and property damage in a variety of ways. As the mud and debris initially crossed the Rauches' property line, it caused a wrongful entry; as it moved onto their property, it caused physical injury; and after it ended, it resulted in a wrongful eviction and an ongoing loss of use. Yet, notwithstanding these various types of harm, the insured would perceive them all as the result of a single discrete event—the landslide. Nor would the insured believe that by paying annual premiums of around $1,600, he was entitled to an additional $500,000 per year in benefits, for a total of $2 million, based on conditions that remained static after the landslide: The insured's slope and the Rauches' backyard were unchanged during the successive policy periods, resulting in a jury award of around $88,000 for loss of use.

Id. at 637.

Nevada also construes the aggregate limit to apply where there are multiple occurrences, unlike here. *See Century Sur. Co.*, 99 F.Supp.3d at 1262 ("The Policy, however, has an aggregate limit of $2,000,000 if the damages at issue arise from more than a single occurrence.").

If there was any question, the Aspen Policy excludes personal and advertising injury coverage arising out of bodily injury, further confirming, even under Plaintiff's misplaced rationale, that the one occurrence limit applies here. There was one causal even that caused all Moradi's injuries, and the Aspen policy limit was therefore $1 million.

E. Nevada Has Not Recognized Equitable Or Contractual Subrogation, And It Does Not Apply Here.

Plaintiff argues Nevada has a long history of equitable subrogation generally but cannot dispute Nevada has never adopted it in the context here, and this Court should not do so here for the first time. Plaintiff cannot point to any Nevada state law allowing its subrogation claims to proceed either. The unpublished, non-controlling Nevada federal case (*Colony*) Plaintiff relies on its papers (which as unpublished and non-controlling this Court cannot rely on), has *not* been relied upon by other courts to adopt the claim, and the federal unpublished *Riverport* case Plaintiff cites

did *not* "adopt" equitable subrogation either, but instead held it could not apply there because justice did not require it anyways, as here.

Further, Plaintiff's Reply/Opposition confirms whether the equitable subrogation claim can be adopted *here* would be "based on the facts and circumstances of each particular case" (*see* Pl.'s Reply/Opposition, p.17:17-18), but here, Plaintiff also concedes it is seeking only rulings as matter of law *without* resort to the facts of the case. In other words, there are no facts before the court other than the parties' two insurance policies. Thus, there are no facts and circumstances at issue showing Plaintiff is entitled to *summary judgment* that it's claim is viable here such that this Court can rule as a judgment that the claim should be adopted here as a new claim.

However, because Nevada has not recognized it, specifically rejected versions of it some similar contexts, and because essential elements are lacking as a matter of law, the Court may grant summary judgment on the subrogation claims as a matter of law in favor of Aspen.

The law does not provide for contractual subrogation under the circumstances here. Contractual subrogation is based on the implied covenant of good fair dealing. *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 21 Cal. App. 4th 1586, 1599 (1994). Nevada also recognizes the implied covenant of good faith and fair dealing where a contract exists. *A.C. Shaw Construction, Inc. v. Washoe County,* 105 Nev. 913, 914 (1989). Without a contractual underpinning, there is no independent claim for breach of the implied covenant. *Fireman's Fund Ins. Co*, 21 Cal. App. 4th at 1599.

Here, Plaintiff is an excess insurer of Cosmopolitan, and Aspen is a primary insurer of Marque. In *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, the court held that where two contracts existed, one between the insured and the insurance company for primary coverage, and the other between the insured and another insurance company for excess coverage, that no direct contractual relationship existed. 21 Cal. App. 4th at 1599. The Court then analyzed, and found, that the excess insurer could not be considered a third party beneficiary to the primary insurance company's policy such that that the excess carrier could maintain its action. *Id.* The Court ruled that the contract must be expressly made for the benefit of the third person and that it is not enough

that an excess insurer incidentally benefits from the primary insurance company's contract with the insured. *Id.* at 1600.

Nevada follows the same approach. *Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-605 (2005) (c*iting Jones v. Aetna Casualty & Surety Co.*, 26 Cal. App. 4th 1717, 33 Cal Rptr 2d 291 (requiring that the an individual be more than merely an incidental beneficiary to a contract to have standing to enforce a covenant in an insurance policy intended to benefit the lessor); *see also Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 505, 728 P.2d 812, 814-815 (Nev. 1986) (rejecting contractual subrogation in insurance context as against public policy).

California law, which Plaintiff asks this Court to adopt, recognizes equitable subrogation (though Nevada does not), not contractual subrogation under the circumstances of a primary and excess insurer. But, under California law, elements are lacking as a matter of law here such that, even were the Court considering adopting a new claim in Nevada for the first time, the elements are not present. While Plaintiff states it "alleges" the conclusory elements, it must establish each the law shows the elements do not exist here.

Plaintiff argues not all elements need be proven, but this is contrary to the express language of *Fireman's Fund*, on which *Colony* relied, on which Plaintiff relies, which states "The **essential elements** of an insurer's cause of action for equitable subrogation" to include the listed elements. *Fireman's Fund*, 65 Cal.App.2d at 1292. *Fireman's Fund* lists eight elements that the *Colony* Court adopted by the statement that those are the "essential elements" of the claim. 65 Cal. App. 4th at 1292. The plain meaning of this explanation is that each of the eight elements is "essential." The *Fireman's Fund* decision does not state the elements should be weighed and balanced as opposed to determined satisfied or unsatisfied. It does not state they are 'factors,' or 'considerations,' to be weighed, but rather are "essential elements" of such a claim. *See also National Union Fire Ins. Co. v. Tokio Marine & Nichido Fire Ins. Co.*, 233 Cal. App.4th 1348, 1361 185 Cal. Rptr. 3d 296 (2015).

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These decisions do not state that an equitable subrogation plaintiff can be excused from proving certain of these elements. The equitable nature of the cause of action of equitable subrogation does not permit the Court to excuse proof of some of these elements.

The *Fireman's Fund* decision emphasized:

> "The right of subrogation is purely derivative. An insurer entitled to subrogation is in the same position as an assignee of the insured's claim, and succeeds only to the rights of the insured. The subrogated insurer is said to 'stand in the shoes' of its insured, because it has no greater rights than the insured and is subject to the same defenses assertable against the insured. Thus, an insurer cannot acquire by subrogation anything to which the insured has no rights, and may claim no rights which the insured does not have."

65 Cal. App. 4th at 1292.

In *National Union v. Tokio Marine*, a published case, the California court of appeal upheld dismissal of an equitable subrogation claim because there was no allegation that Costco (the insured) suffered harm as a result of Tokio Marine's bad faith conduct for which National Union paid. The court explained: "Specifically, the settlement payment made by National Union was not a loss suffered by Costco, and Costco's payments toward the settlement were not reimbursed by National Union. Thus, neither of the payments claimed in this cause of action meet the specific requirements for pleading a bad faith subrogation claim." *National Union*, 233 Cal. App.4th at 1362.

Plaintiff also argues the Court may not consider a case cited by Aspen (*California Capital*) because it was unpublished (despite it relying on published law, including the *Fireman's Fund* case on which *Colony* relies), but then argues for the adoption of an entirely new claim in Nevada based on an the *Colony* unpublished case. California Capital recognized there was no assignable cause of action as here because the insured did not have an assignable cause of action. *See* California *California Capital Ins. Co. v. Scottsdale Indemnity Ins.*, 2018 WL 2276815 (Cal.Ct.App. 2018) at *7, citing *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1291–1292. It also listed the "essential elements" of an equitable subrogation claim as including an "assignable cause of action." *Id. citing Fireman's Fund*65 Cal.App.4th at p. 1292. To say the Court did not decide a subrogation claim where it held there is no assignable interest, as plaintiff

appears to argue, is mere form without substance; if the there is no assignable interest, and that it as we know an essential element of the claim, it is lacking as a matter of law here.

In addition, because Aspen only had a $1 million policy limit as demonstrated above, and there was no settlement offer within its limit, Plaintiff is not in a superior equitable position (another essential element) to apply the doctrine here. In determining who has superior equites in an equitable subrogation claim, California courts focus on whether the defendant is a wrongdoer who caused the underlying loss: "An insurer cannot establish its position is equitably superior to the party to be charged if the party is not the wrongdoer whose act or omission caused the underlying loss or is not otherwise legally responsible for the underlying loss." *San Diego Assemblers, Inc. v. Work Comp for Less Insurance Services, Inc.*, 220 Cal.App.4th 1363, 1368, 163 Cal.Rptr.3d 621, 624 (2013).

Because the superior equitable position is premised on the misnomer that Aspen refused to settlement within a purported $2 million limit, this element is also lacking, and Aspen is entitled to summary judgment in the equitable subrogation claim even if the Court were inclined to adopt a new claim for relief in Nevada.

F. Aspen Is Also Entitled To Summary Judgment On Plaintiff's Estoppel Allegations, Styled As A Claim for Relief.

Aspen's Countermotion seeks summary judgment on Plaintiff's claim for equitable estoppel. Aspen argued in part it is based on claims against National Union and is derivative of other claims for which Aspen is also entitled to summary judgment. Plaintiff only argues that it is based on additional *allegations* too, but it offers no support for such allegations rendering summary judgment still proper for Aspen.

Plaintiff has not opposed the argument that Aspen is entitled to summary judgment on this claim as derivative of other claims for which it is entitled to summary judgment. *See Mahlan v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597, 691 P.2d 421 (1984). If judgment on the other claims on which equitable estoppel is based is obtained, there is no basis for the estoppel claim to remain and Aspen is entitled to judgment on it as well.

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G. Plaintiff Concedes Its Evidence In Support Cannot Be Considered.

Plaintiff offered various lengthy documents and items to this Court which Aspen showed to be unreliable and not authenticated for this Court to consider. Plaintiff's Reply/Opposition concedes it is mostly irrelevant to its Motion and that only the underlying complaint and the two policies can be considered, yet accuses Aspen of wasting party and Court time addressing items improperly submitted by Plaintiff's papers. Plaintiff's contradictory positions and unprofessional accusations against Aspen here are similar to its circular reasoning arguments elsewhere; they contradict each other, are not based in fact or law, and should be disregarded by the Court. In any event, the Court cannot rely on the evidence challenged by Aspen, which Plaintiff's Reply/Opposition concedes and appears to withdraw anyways.

Without evidence to demonstrate the essential elements and equities of subrogation apply to the undisputed facts and circumstances of this case, the Court cannot grant summary judgment for Plaintiff here *at all*. Plaintiff concedes only the underlying complaint and two policies are considered here on its Motion (Pl.'s Reply/Opposition at 29:27-28), and thus the Court cannot grant judgment for Plaintiff that there are facts and circumstances present here for the Court to recognize a new cause of action for the first time in Nevada; this is unlike a pleading stage where the court construes the facts, if true, in favor of Plaintiff. This does not preclude summary judgment for Aspen because it is based e lack of essential elements as a matter of law as well as that no such claim exists under Nevada law currently.

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III. CONCLUSION

For the foregoing reasons and arguments, Aspen's Countermotion for Summary Judgment should be GRANTED in full, and summary judgment entered in favor of Aspen on all claims against it accordingly.

DATED this 7th day of October, 2019.

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PROOF OF SERVICE

St. Paul Fire & Marine Insurance Company v. Aspen Specialty Insurance Company

Case No.: A-17-758902-C

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

On this 7 day of October, 2019, I served the following document(s):

DEFENDANT'S ASPEN SPECIALTY INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS COUNTERMOTION FOR SUMMARY JUDGMENT

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

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

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

An employee of Messner Reeves LLP

Electronically Filed
10/17/2019 9:13 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE
TUESDAY, OCTOBER 8, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

For the Plaintiff: RAMIRO MORALES, ESQ.

For Aspen Specialty Insurance Company: RYAN A. LOOSVELT, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, October 8, 2019

[Case called at 10:06 a.m.]

THE COURT: We're going to be calling the -- we've got somebody on the phone there, I think. So, yeah, this would be the St. Paul v. Aspen. And we'll call --

MR. MORALES: Good morning, Your Honor.

THE COURT: -- I believe there is somebody who was going to be participating telephonically.

MR. MORALES: Okay.

THE CLERK: Mr. Herold. Hello.

MR. MORALES: Good morning, Your Honor. [Indiscernible} on their way.

UNIDENTIFIED SPEAKER: Hello.

THE CLERK: Do I have Mr. Herold on the line?

THE COURT: Okay. The Court has called St. Paul Fire & Marine v. Aspen Specialty Insurance, 758902. Is there anybody on the telephone who wishes to participate in St. Paul Fire & Marine v. Aspen Specialty? If not, then you'll just need to hold pending your matter.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: Okay. All right. Thanks. So it appears that he did not call in. Okay. So I guess we can --

MR. MORALES: Okay. Good morning. Ramiro Morales, counsel for St. Paul, bar number 7101.

MR. LOOSVELT: Good morning, Your Honor. Ryan Loosvelt

for Aspen.

THE COURT: Okay. All right. Great. So this is the motion for partial summary judgment, and this is the question of the policy limits.

MR. MORALES: Yes. Yes, Your Honor.

THE COURT: Okay.

MR. MORALES: Again, this is a single issue motion. The issue was whether there was two million available --

THE COURT: Uh-huh.

MR. MORALES: -- if there was two million or one million available.

THE COURT: Uh-huh.

MR. MORALES: In reviewing the papers from Aspen, they seem to raise three issues. One, that they have a coverage part endorsement that limits coverage is to a single limit. Two, that the policy is limited by the number of occurrences. And, three, that there is ambiguity in the policy.

My view of that is the easiest way to deal with it is really just to read the policy because -- so what I've done is I just have a short PowerPoint just to run through the policy terms, because the arguments that Aspen has made in response, is they don't dispute that there's a $2 million aggregate limit. They don't dispute that there is a $1 million personal injury limit, and a $1 million coverage paid bodily injury limit. They just say they're combined. There's really no authority for that in their papers because when you read the policy it is very clear that in fact

it is -- they are separate limits.

So I just ran through here and to just go through the policy terms, I think is the easiest thing to do. When you look at the declaration page of the policy, you'll see that they have the coverage part argument that the coverage part limits all coverage to one limit, but you'll see that the coverage parts are actually separate. There's the commercial general liability coverage part and the liquor liability coverage part, those are separate coverage parts. That's what the endorsement that they refer to, to limit coverage to.

THE COURT: I thought this was a stacking case when I read it, and I didn't understand why it wasn't being approached that way. If this policy contains two or more coverage parts --

MR. MORALES: Yes.

THE COURT: -- providing coverage for the same occurrence. And I thought this was your argument, maybe I'm wrong about it. I thought your argument was these were two different occurrences. That he had an advertising injury and the actual slamming his head into the concrete floor injury?

MR. MORALES: That is true, but in a precise reading of the policy that's actually not an occurrence argument --

THE COURT: Okay.

MR. MORALES: -- because the advertising injury coverage is driven by personal injury offenses. And the law is that advertising injury is not driven by occurrence. And I actually have a slide that will address that, if you give me a moment.

THE COURT: Uh-huh.

MR. MORALES: You'll see this is the limit of liability section of the policy. And you'll see that paragraph four refers to the personal and advertising injury limit, referring to coverage B. And paragraph five says -- refers to the coverage A, and it refers to each occurrence.

So it is somewhat conflating the concepts when you say that the advertising injury coverage is an occurrence limit. The advertising injury coverage is an offense limit --

THE COURT: Uh-huh.

MR. MORALES: -- and the bodily injury coverage is an occurrence limit. And you have separate limits for those. Let me just get to that.

You'll see there that in the policy there is an occurrence limit of $1 million and a separate personal injury limit of $1 million bound by the aggregate limit. And here, because you have a unique set of factual circumstance where they actually have both claims of false imprisonment and claims of bodily injury, and it's ultimately a judgment on both, you get two limits.

THE COURT: Okay. I'm going to go back to their other -- they call it another insurance. They don't call it standby stacking. In your policy, I believe it's specifically identified as anti-stacking. In their policy, they term it other insurance.

If this policy contains two or more coverage parts providing coverage for the same occurrence, accident, cause of loss, loss, or offense -- so they have both occurrence and offense -- the maximum

limit of insurance under all coverage parts shall not exceed the highest limited insurance under any one coverage part.

MR. MORALES: Okay. So you're referring to the coverage part, Your Honor.

THE COURT: Right.

MR. MORALES: The coverage part is the commercial general liability coverage. There are separate coverage parts in the policy. Let me get --

THE COURT: Yes, there are two. There are three, actually.

MR. MORALES: No, there is a liquor liability coverage part and a commercial general liability coverage part. Within the commercial general liability coverage part, there are two separate coverages. Those are not coverage parts. The commercial general -- the personal injury coverage and the bodily injury coverage are not coverage parts. Those are coverages within a single coverage part.

THE COURT: Uh-huh.

MR. MORALES: What the endorsement does is it prevents combining of the liquor liability coverage and the -- the liquor liability and the commercial general liability coverage.

THE COURT: Okay. And so -- I mean, is there anything further? I didn't want to cut you off.

MR. MORALES: No, I mean, it's --

THE COURT: For purposes of having a clear record, we would -- if you could email the slides so that it's clear in the Court's records. And so, we have them --

MR. MORALES: Okay. I have copies here. Would you preferred them emailed?

THE COURT: Well, if you got a hard copy, we'll absolutely take a hard copy. I don't know, counsel, if you wanted to see that. So, again, I look at it as a stacking case, and I believe you provided -- and we should make it clear, I don't think any of these policies were -- I mean there's nothing in here that we need to worry about it being sealed, right? Because I mean we do have a really -- a lot of confidentiality agreements governing us.

MR. MORALES: Yes. Yes.

THE COURT: So I just want to make clear that the pleadings that we've got filed, we don't have to worry about any -- nobody's got any issues with any of this having to be sealed or be confidential.

MR. LOOSVELT: I don't. Do you?

MR. MORALES: No, Your Honor.

THE COURT: Okay. Got it. Okay. Because I looked at the two different policies. They call it anti-stacking in their policy. You provided that. And then they provided your policy, which has this other insurance clause and, which, kind of is the same thing. So that's what I look at it as. And counsel's point is that I'm reading this too restrictively. That the coverages are the CGL versus the liquor, not the three coverage parts that are under this one policy, because there were three.

MR. MORALES: Your Honor, we cite to ten different portions of the CGL policy where they refer to it as a single coverage part.

THE COURT: Right. So commercial general liability has the

insurance agreement, and then let's see what we got up here. We got the chart. Because it contains within it coverage -- it's coverage B, personal and advertising, it's two different -- they're both coverage parts. I mean, I don't --

MR. MORALES: They're not coverage parts. They use coverage part as a definition of different coverages. When you look at the declarations page of the policy --

THE COURT: Okay.

MR. MORALES: -- they refer to coverage part as the liquor liability coverage part, the commercial general liability --

THE COURT: Yeah, let me get back to that.

MR. MORALES: -- coverage part, and the property coverage part.

THE COURT: Let me get back to --

MR. MORALES: Within those --

THE COURT: -- let me back to those.

MR. MORALES: -- there are different coverages.

THE COURT: Let me get back to these. Okay. Okay. Great. I'm back there. Common policy declarations.

MR. MORALES: Yes.

THE COURT: Okay. Common policy declarations, page 32. Commercial general, commercial property coverage, liquor liability coverage part --

MR. MORALES: They all say part at the end.

THE COURT: -- terrorism premium, and the total events

premium. Okay.

MR. MORALES: So they're each separate parts. Then within the CGL there are two limits bound by the aggregate. So the protection is the aggregate limit, the 2 million. You have two different coverages, the personal injury coverage and the bodily injury coverage.

THE COURT: Okay. All right. So then when I look at the CGL policy, it has coverages and in the policy -- because I don't know that the declarations page is a binding contract. The policy it calls it coverages. Coverage A, bodily injury and property damage. Coverage B, personal and advertising injury liability. And Cover C, I think was med pay.

MR. MORALES: An then there was another form as well. There is a separate coverage.

THE COURT: Oh, separate. Uh-huh.

MR. MORALES: It's got a completed operations coverage and a general aggregate.

THE COURT: Okay. All right. So just this interpretation of what is the other insurance --

MR. LOOSVELT: Yeah. So the endorsements is just one aspect of what we need to look at here. But just to address that quickly. The way Your Honor read it -- and we submitted our reply yesterday. I don't know if you had a chance to read it.

THE COURT: I got it here.

MR. LOOSVELT: Okay.

THE COURT: Uh-huh.

MR. LOOSVELT: And the reason is for that is we had an

agreement to continue the hearing, and that was pulled last week, so we wanted to get the reply on file before the hearing today. But in any event, the endorsement, as you read it, it does include -- it states occurrence, offense. And those are the words within those coverage points in bodily injury, in the personal advertising injury. We think it's pretty plain on its face that that's what it covers, and it limits it to the maximum for any one, which he concedes is the 1 million in their papers.

But there's more -- there's other reasons here outside of this endorsement. Everyone knows it's a $1 million policy. This is how they've been treated always. This is not a new interpretation Aspen is advancing. This is a new interpretation that St. Paul is asking the Court to adopt. They filed a 30 page reply with 98 authorities in it, none of which state what they want this Court to adopt. We did discuss in our reply the *Safeco Insurance Company* case, where this very argument was made. The artful pleading of claims is not going to double the coverage just because they have -- they allege false imprisonment in addition to the negligence claim. That doesn't double coverage. What's the effect it's going to be. And any plaintiff is going to be able to double the coverage on the policy just by artful pleading of the claims.

And that's not what the law says. The law for the policy limits, it looks at the causal nexus of all the injuries. Here there is no dispute it was all just one cause, what happened at the nightclub that evening that caused all the injuries.

THE COURT: Right. And so, again, just to be clear, I had

nothing to do with the trial. So I don't know anything about the underlying trial. So I don't think it's really disputed how they describe the accident. I mean what happened is what happened. I mean, I think, we're all in agreement on that. That he was -- you know, ran into this altercation with management in the club. You know, hit his head on the doorframe. Then they took him into the bathroom and allegedly beat him up before letting him go.

So each of those, hitting his head on the floor of the holding cell, versus hitting his head on the doors as they're taking him out aren't separate occurrences.

MR. LOOSVELT: Correct. And I don't even think Plaintiff is arguing there's multiple occurrences.

THE COURT: Right. So I mean --

MR. LOOSVELT: They're just saying --

THE COURT: -- but it's the same thing.

MR. LOOSVELT: Right.

THE COURT: I mean, occurrence is defined.

MR. LOOSVELT: Right. Right. So it's all one continuous act. It's all one cause. So there's one occurrence here. And the way the law looks at it, that's how the policy limits are applied. So if there are multiple occurrences, then it would -- then the aggregate might come into play, but it doesn't here. And this is a new interpretation that they're asking the Court to adopt and frankly there's no support for it.

It's how the policy reads, it's how it's treated, it's how the law construes the limits. And, frankly, it's how it was treated throughout the

entire case. So there was a $26 million settlement offer. Well, what did that represent? That's the 1 million primary Aspen and the 25 million National Union.

THE COURT: Okay. I don't think we're supposed to talk about settlement or policy limits.

MR. LOOSVELT: Oh, okay.

THE COURT: I think that was part of the agreement.

MR. LOOSVELT: But the same thing with the -- if we look at the post-judgment settlement. That represents --

MR. MORALES: It's all confidential, Your Honor.

THE COURT: Right.

MR. LOOSVELT: I understand, but that represents the --

THE COURT: You're not going to talk about numbers.

MR. MORALES: Okay.

THE COURT: I think we all agreed we wouldn't talk about the numbers.

MR. LOOSVELT: Right. So we all know what those numbers are, and we know what those represented. And so that's how it was treated the whole time here. So we think the plain language applies to a $1 million policy. We haven't seen anything else to show us otherwise here in the 30 page reply. There was nothing on point there that would -- that would allow us to adopt this new doubling the coverage, because he pled alternative claims here. And a duty to defend is different than a duty to indemnify. And the law is pretty clear on this.

So what we have, we have Plaintiff's claims, contractual

subrogation, which isn't recognized in Nevada with equitable subrogation, which hasn't been recognized yet, and they're asking the Court to recognize it here. But because -- most importantly because there's a 1 million policy limit, there's been no bad faith refusal to settle within the policy limit. They contend the settlement was the 1.5 million offer. That's in excess of that.

So there's no security equity here for St. Paul to even have these equitable subrogation claims, were the Court even to recognize it here for the first time.

THE COURT: Now -- so their request for relief on their motion for partial summary judgment was for the Court to interpret this as a $2 million limit. Your countermotion?

MR. LOOSVELT: Was for the $1 million limit and summary judgment on the claims against Aspen.

MR. MORALES: No. I think all we pled was the $1 million limit and dismissal of the equitable estoppel claim.

THE COURT: Yeah, the estoppel. Uh-huh.

MR. MORALES: I didn't see anything else.

MR. LOOSVELT: We would --

THE COURT: So I'm just trying to figure out what you're asking for because --

MR. LOOSVELT: Well, we're asking for summary judgment on the claims because there -- it was a countermotion based on the relief. They're seeking the viability of these subrogation claims. And our countermotion in opposition, they're not viable, and they can't be

recognized, and because we have this $1 million limit, they couldn't be viable even if it were going to be recognized as equitable subrogation claims.

MR. MORALES: Your Honor --

MR. LOOSVELT: So those are at issue here, just like they're at issue in the summary judgment motions you're hearing next week with the other Defendants, whether or not contractual subrogation and equitable subrogation, summary judgment should be granted --

THE COURT: Okay.

MR. LOOSVELT: -- in favor of Defendants.

MR. MORALES: Your Honor, if could just -- because we're going a little far afield here --

THE COURT: Okay.

MR. MORALES: -- but I just want to make a couple of things clear. We asked for a very specific issue. He's referring to Aspen's conduct during the underlying case. There will be evidence that even when they could have settled for the one-five, they never even offered $1 million. They offered nothing. So there will be evidence about improper conduct throughout. It's just --

THE COURT: Right. I mean that seems kind of premature to me.

MR. MORALES: Yes.

THE COURT: I mean because you had a very narrow issue, just what are the limits.

MR. MORALES: Yes. And then -- but just to respond.

Counsel repeatedly says the law doesn't support it. This is a novel concept. Not a single citation. Okay. It's -- if you read the record he could say, look, it's not supported by the law. It's not supported by the law. We gave you law that says the advertising injury limit and the coverage A, bodily injury limit, are separate limits. They are driven separately. If you look at page 6 of our reply brief, we cite to the IRMI article, which is well regarded authority cited by the Nevada Supreme Court in the *McKinney* case as authoritative. It explains the difference between coverage A and coverage B, that one is different by offenses, the other is different by occurrences. To say these are all the same occurrence is the wrong starting point.

THE COURT: Okay. Well --

MR. MORALES: There is an offense and an occurrence.

THE COURT: Okay. But we have this other insurance clause, which includes all of those definitions.

MR. MORALES: It includes all of those for a coverage form for separate coverage forms.

THE COURT: Uh-huh.

MR. MORALES: This is not a separate -- the maximum limit on this coverage form is $2 million.

THE COURT: Uh-huh.

MR. MORALES: It's the aggregate. The maximum limit on this coverage form, coverage A, before you, is $2 million.

THE COURT: Okay. And so then again reading your client's anti-stacking endorsement, regardless of the limits testified in the

declarations of this policy, if any bodily injury, property damage, personal injury, or advertising injury covered by this policy is also covered by any other named insured certificate issued by whatever this entity is, the maximum that we will pay for all such bodily injury, property damage, personal injury, or advertising injury will be the highest applicable, each occurrence limit under any one of those certificates.

So your position being that an anti-stacking clause as written by -- in your client's policy, where it's dependent on the certificates and encompasses all those different kinds of coverage, is operative to limit the exposure under the anti-stacking.

MR. MORALES: That anti-stacking endorsement --

THE COURT: Uh-huh.

MR. MORALES: -- goes to different policies --

THE COURT: Uh-huh.

MR. MORALES: -- not coverages within a policy.

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

MR. MORALES: So anti-stacking is a different concept there.

THE COURT: Right.

MR. MORALES: Okay. So it is different.

THE COURT: Okay. And so, again, I just want to make it clear that -- because when I look at this, I just thought, well, it's with the stacking. I thought we settled stacking 30 years ago when I first moved here. So --

MR. MORALES: You have a personal injury event and a

bodily injury event.

THE COURT: Uh-huh.

MR. MORALES: Two limits.

THE COURT: Okay. Perfect. So did you want to say anything further with respect to his motion, because to the extent that I view this as -- you had narrowed the issue pretty clearly. I do think that these other issues are questions of fact about whether or not you can recover on any of these --

MR. MORALES: Okay.

THE COURT: -- causes of action or --

MR. MORALES: That's fine. Yeah.

THE COURT: The policy limit part I understood is very limited. I don't know if you want to address it any further with respect to why I should go beyond the one narrow issue that they started with, which was the policy limit. Your counter-motion seemed to expand just to more -- a couple more issues.

MR. LOOSVELT: Yeah, we discussed it, and I kind of hit it already, but we discussed the law and how it construes the policy limits and the one cause. We went over that as well. We did cite a case in our reply brief, when you get a chance to look at it. I know it was submitted yesterday. It kind of rejects this argument that you're going to double cover just because you have a personal injury claim, and then also a claim in the other coverage part. So it's a $1 million policy. It's how everyone treated it.

THE COURT: And so, as I said, pointing to they had -- they

specifically called theirs anti-stacking. Your client's policy was other insurance. Same concept. They differentiated it in theirs by the basis of certificates and types of policies, that anti-stacking of the policies. Whereas, in this one it's anti -- it looks to me -- I mean this is an anti-stacking clause. We've had them for 35 years.

So I'm going to grant the countermotion, deny the motion. I believe that the other insurance clause in this policy operates to limit coverage to $1 million. Whether they should have made any offers, whether they could have made an offer or could have gone over any of those other issues that kind of were talked about a little bit it in this wonderful, you know, 550 page reading, thank you very much guys, which I did. I read it.

MR. MORALES: Your Honor, if I could clarify for the record the Court is relying on the conditions endorsement for -- that they're limited to one --

THE COURT: The other insurance clause, yeah.

MR. MORALES: Yes.

THE COURT: Let me -- I appreciate the fact you had your pages numbered. So this was -- it appears to be -- it's page 68. And I read that, but I didn't limit it to that. I read that. And then, as I said, I went back, and I looked at all these -- the way all these other things were defined, because I went back and read the definitions. I read the definition of occurrence. It's not in here. Occurrence. I read the definition of injury, and it wasn't -- some of these weren't defined.

MR. MORALES: Personal injury is defined as an offense.

THE COURT: Yeah. And so where's my definitions. Okay. So we have bodily injury -- definitions. Where's my definitions? I have all these different tabs. There was supposed to be different colors, so I can tell what I was looking at with the different colors, and then I forgot what my colors mean.

MR. LOOSVELT: Your Honor, just also for the --

MR. MORALES: I can -- Your Honor, personal injury is an offense defined as a number of offenses including false imprisonment, false arrest, libel, slander, defamation.

THE COURT: Uh-huh.

MR. MORALES: It runs through that. That's personal injury and advertising injury definition.

THE COURT: Uh-huh.

MR. MORALES: You have the bodily injury definition, which is --

THE COURT: And occurrence on page -- well, it's page 12 of the policy, in your pleading it's page 53.

MR. MORALES: -- an accident including continuous repeated exposure to the --

THE COURT: Right.

MR. MORALES: -- same conditions.

THE COURT: Yeah.

MR. MORALES: You will find that the word occurrence is not found in the personal injury coverage.

THE COURT: Uh-huh.

MR. MORALES: Okay. So it is not part of the personal injury coverage.

MR. LOOSVELT: Your Honor, the denial of the summary judgment on the other claims are without prejudice to be brought later.

MR. MORALES: Your Honor, this is the third time we've dealt with this.

MR. LOOSVELT: The subrogation claims.

MR. MORALES: Those are fact questions.

THE COURT: Yeah, I mean that seems very factual to me. The other insurance starts on page 9 of the policy, in addition to the endorsement that's on page -- it's page 50, if you look at the page numbers.

MR. MORALES: Okay. So the --

THE COURT: Other insurance there. And then there's other insurance endorsement and that's -- the other insurance is in the commercial general policy. They have a specific other insurance clause in there. Then they have the other insurance endorsement. We have the term occurrence defined. I mean I read the definitions. I looked through them and tried to find where the words were defined.

MR. MORALES: Yeah, I just wanted to --

THE COURT: Some of them were defined and some of them weren't.

MR. MORALES: Right. I get that. And so, just if we're relying on that endorsement, that's fine. I just want the record clear because --

THE COURT: The endorsement as well as the language of the specific coverages and how they define --

MR. MORALES: Okay.

THE COURT: -- what they cover, and the definitions of their coverages.

MR. MORALES: Okay.

THE COURT: And page 49, limits of insurance, I read that, to see how they were defining limits of insurance. I read the other insurance. I mean, I read it.

MR. MORALES: I understand.

THE COURT: I read the policy.

MR. MORALES: I'm just trying to make sure we have a clear record. The limits of insurance has paragraph 4 and 5, which has a separate limit for personal injury and advertising.

THE COURT: Right.

MR. MORALES: I just wanted to make sure the record --

THE COURT: Right. And I read -- and I had to read that in connection with the other insurance clause, and then go back and read the definitions and look up the definitions, some of which -- some of those other terms they use in that other insurance endorsement are defined in the policy and some of them aren't --

MR. MORALES: Yes.

THE COURT: -- which is a little bit challenging.

MR. MORALES: I understand, Your Honor.

THE COURT: So -- but that's -- it appeared to me to be a

pretty clear --

MR. MORALES: So you don't think it's ambiguous. You think it's clear.

THE COURT: I thought it was.

MR. MORALES: It is a single limit regardless of coverage parts, regardless of whether or not --

THE COURT: Correct.

MR. MORALES: -- you have both an advertising injury, a personal injury offense, and a bodily injury occurrence.

THE COURT: I think it all rises out of the -- because if you read occurrence, it all arises out of the same occurrence, the way they define occurrence in the policy. So to me -- and that's why I said -- I mean if we were going to get down in the weeds as to what's an occurrence, you know --

MR. MORALES: I don't think --

THE COURT: -- I didn't really see that.

MR. MORALES: Yeah.

THE COURT: To me it looked like it all arose out of the same incident. He might have had coverage under potentially two different parts, but it didn't increase the insurance coverage. It's one limit.

MR. MORALES: Thank you, Your Honor.

MR. LOOSVELT: Thank you, Your Honor.

THE COURT: Okay. All right. So that's a partial summary judgment. Did you want a 54(b) certificate on that, or are you just going to -- do you want to take it up in the interim?

MR. MORALES: I'll need to discuss it with my client, if I can.

THE COURT: Okay. Because it's going to be the same issue next week. We'll take -- there's a little bit of difference, but I just didn't know, given the fact that we were making these interim rulings if these were going to be appealable. If we would need that kind of language in there. You might want to discuss.

MR. MORALES: Yes, we'll discuss it with -- I mean, certainly on the subrogation issue there are fact questions.

THE COURT: Yeah, those -- that's absolutely -- to me we've talked about that time and time again. For another day.

MR. MORALES: So as far as findings of fact and conclusions of law, do I prepare it on the --

THE COURT: You know, I'm going to deny the initial motion, grant the counter-motion only as to coverage limits. I'm not getting into the other issues that you argued.

MR. LOOSVELT: Fine. We'll prepare it and run it by him.

THE COURT: And, as I said, if they want a 54(b), then you guys can work on some language for that, and then we'll just take those slides if you kindly brought them for us --

MR. MORALES: Oh, can --

THE COURT: -- and we'll give them to the --

MR. MORALES: -- may I approach, Your Honor?

THE COURT: -- Clerk. She'll make that part -- so it's clear in the record that they've got that. That's why I asked. If it goes up, they'll need that. So I just want to make sure we've got a clear record for him.

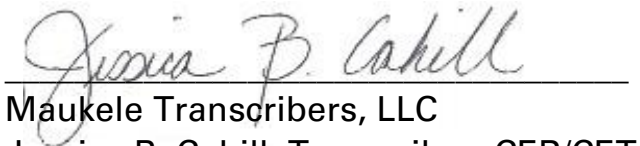
Okay. Thank you.

MR. MORALES: Thank you, Your Honor.

THE COURT: Okay. So I think that was everything.

[Proceedings concluded at 10:32 a.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.



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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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

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Nevada Rules of Civil Procedure

Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") hereby submits the following Reply in Support of its Motion for Summary Judgment on Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Second, Fourth, Seventh and Eighth Causes of Action in the First Amended Complaint ("FAC").

I.

INTRODUCTION

St. Paul's Opposition does not contest that the Nevada Supreme Court has never recognized a subrogation claim between insurers. Equitable or contractual subrogation between insurers would be an entirely new claim and remedy in the Nevada state courts. If the Court allows St. Paul to proceed with its subrogation claims, new law in Nevada will be created. This Court should refrain from creating that new Nevada law. National Union respectfully submits that decision is for the Nevada Legislature or Supreme Court. Those branches of government are well equipped to evaluate the judicial economy issues that will result from the State of Nevada becoming a hotbed for "Monday-morning-quarterback" litigation among insurance companies about how lawsuits, settlement discussions, mediation, and trials should have or could have been differently handled, after-the-fact.

However, if this Court takes the plunge, St. Paul's subrogation claims still cannot survive summary judgment. That is because the undisputed factual record before this Court is that St. Paul and National Union were excess insurers in different towers of insurance coverage. No case in any jurisdiction has ever permitted subrogation in that circumstance. The Opposition cites no such cases. This Court should not be the first in Nevada – or anywhere else in the United States – to create that new law.

From the outset of this lawsuit, St. Paul refused to attach to its pleadings or provide to this Court its insurance policy covering Cosmopolitan. After stalling for nearly two years after filing this action to disclose its policy, the St. Paul policy has now been produced, authenticated, and submitted. St. Paul concealed its own policy for as long as it could because that policy proves, as a matter of law, that St. Paul and National Union were each excess insurers in different towers of insurance coverage. Further, it is now clear and undisputed that St. Paul's policy is not excess to

National Union's. St. Paul desperately attempts to create a genuine issue by fabricating insurance terminology and labeling itself a "higher level excess carrier" and National Union a "lower level excess carrier." (Opp. 20.) But these terms are found nowhere in the policies. This made-up nomenclature is inadmissible argument with no factual support in the record or reality.

The Opposition does not dispute that Cosmopolitan's defense and indemnification in the Underlying Moradi Action were fully paid by its insurers, and that Cosmopolitan has suffered no contract damages. St. Paul's subrogation breach of contract claim cannot survive summary judgment in the face of these undisputed facts.

Like its subrogation claims, St. Paul's claim for equitable contribution cannot survive summary judgment. Nevada state courts have not recognized an equitable contribution claim between insurers. The Opposition concedes as much. But even if such a claim existed under Nevada law, St. Paul does not dispute that National Union's policy limit was exhausted. Equitable contribution does not allow for the recovery of damages beyond the limits of an insurer's policy.

It is telling that the Opposition's lead argument proffers misrepresentations about the case's procedural history. Contrary to St. Paul's revisionist history, this Court did not previously reject the arguments in Defendants' pending Motions. The Opposition ignores how this Court invited National Union's Motion 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." This Court's denial of National Union's second motion to dismiss was "without prejudice" to allow it to properly authenticate and lay the foundation for the at-issue insurance policies, which National Union has now done.

The Opposition seeks to bog this Court down with unnecessary allegations that have no bearing on National Union's Motion. Lacking evidence to support the Opposition's arguments, St. Paul has improperly made its own litigation counsel attest to statements for which they have no personal knowledge. The Opposition also makes an unsupported and unsubstantiated request under Rule 56(d), which should also be rejected.

For the reasons stated in National Union's moving papers and in this reply, the Court should grant its Motion for Summary Judgment in its entirety.

II.

DENYING SUMMARY JUDGMENT WILL CREATE NEW LAW IN NEVADA

St. Paul does not dispute that the Nevada Supreme Court has never recognized a subrogation claim between insurers. The Opposition cites no Nevada state court decision – published or unpublished – permitting an insurer to pursue subrogation against another insurer, let alone any Nevada state court case allowing an insurer to pursue another insurer for a purported failure to settle. The Opposition provides a dissertation on the origins of subrogation, but no amount of academic recitations or ramblings can change a simple concept: if this Court allows St. Paul's subrogation claims to survive summary judgment, new subrogation and insurance law in Nevada will be created.

A. Nevada State Courts Have Never Allowed Equitable Subrogation Between Insurers

Equitable subrogation between insurers would be an entirely new claim and remedy in the Nevada state courts. In misleading fashion, the Opposition cites Nevada state cases in purported support of its contention that Nevada recognizes equitable subrogation claims between insurers.[1] But *none of those cases* involved equitable subrogation between insurers. There is a good policy reason for this: judicial economy in preventing a tsunami of subrogation and insurance litigation throughout the state among insurance companies about how lawsuits, settlement discussions, mediation, and trials should have or could have been differently handled, after-the-fact. If the State of Nevada is going to recognize new claims and remedies not previously permitted, the Nevada Supreme Court or Legislature should make that decision.

Even the unpublished federal district court case heavily relied on by St. Paul acknowledged that the Nevada Supreme Court has never addressed the question of whether equitable subrogation applies between insurers. *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL3360943 at *4 (D.

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[1] *See* Opp. 12-13. *AT&T* involved a self-insured employer's statutory subrogation claim against its employee injured by a third-party tortfeasor. *American Sterling Bank* involved equitable subrogation in the context of mortgage lienholders. *Federal Ins. Co.* involved subrogation rights of a surety against a bank. *Globe* involved the scope of a surety's subrogation rights on a public works bond arising from a contractor's failure to perform. *Laffranchini* involved the subrogation rights of a subsequent mortgagee as to the original mortgagee. *In re Fontainebleau* involved equitable subrogation in the context of a mechanic's lien. *Lumbermen's* involved the subrogation rights of a builder's risk insurer against a negligent subcontractor on a construction project.

Nev. June 9, 2016); *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 at *5 (D. Nev. July 5, 2018). The unpublished *Colony* case failed to engage in a substantive analysis of the policy considerations (such as those noted above and others) against such a vast expansion in Nevada law. *Colony* also did not address equitable subrogation between excess insurers in the different towers of insurance coverage, which is the specific legal issue before this Court. Notably, the Opposition cites no case law in Nevada (or any other jurisdiction) permitting equitable subrogation between excess insurers in different towers of insurance coverage.

B. Nevada State Courts Have Never Allowed Contractual Subrogation Between Insurers

Contractual subrogation between insurers would also be an entirely new claim and remedy in Nevada. The Opposition cites *no Nevada cases* permitting contractual subrogation between insurers. *See* Opp. 14-16. The only case law cited in either the Opposition or the Motion that addressed contractual subrogation between insurers rejected that theory. *See* Mot. 15 and Opp. 14-16 (each citing *Colony Ins. Co.*, 2016 WL3360943 at *6, which rejected contractual subrogation claims between insurers finding that "in the insurance context, contractual subrogation is generally applied not by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor").

The Opposition focuses on the *Canfora* decision, but that case involved a dispute between an insured and an employer-insurer, and had nothing to do with contractual subrogation between insurers. (Opp. 14 citing *Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771 (2005).)

The Opposition also ignores the *Sapiano* case cited in National Union's Motion. Although not Nevada law, that case stands for the well-established proposition in California that any right to subrogation an insurer may have arises by operation of law, and is not dependent on or enlarged by contract or policy provisions. *Sapiano v. Williamsburg Nat'l Ins. Co.*, 28 Cal.App.4th 533, 538 (1994).[2]

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[2] *See also 21st Century Ins. Co. v. Superior Court*, 47 Cal.4th 511 (2009); *Progressive W. Ins. Co. v. Yolo Cty. Sup. Ct.*, 135 Cal.App.4th 263 (2005); *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal.App.4th 1098, 1107 (2006). The Opposition quibbles that California law on this issue is not the majority rule, but offers no meaningful reason why that should dissuade the Court from considering these decisions.

The Opposition relies heavily on the *Colony* decision in the context of equitable subrogation (Opp. 13) but takes issue with its rejection of contractual subrogation claims between insurers. (Opp. 14-15.) St. Paul argues the *Colony* decision somehow "misapplied" the *Maxwell* case, which the Opposition contends is limited to the context of medical payments. (*Id.* citing *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502 (1986).) The Opposition provides no support for this purported limitation, and its argument ignores *Maxwell's* holding that "[w]hether the subrogation clause is viewed as an assignment of a cause of action or as an equitable lien on the proceeds of any settlement, the effect is to assign a part of the insured's right to recover against a third-party tortfeasor...We hold such an assignment is invalid." *Maxwell*, 102 Nev. at 505. The Opposition misses the point of how *Maxwell* reflects the Nevada Supreme Court's unwillingness to expand contractual subrogation in that context, albeit a different one than this case.

The *Colony* case cited *Maxwell* as support for its decision to reject contractual subrogation claims between insurers. As noted above, St. Paul has failed to provide this Court with any Nevada case law permitting contractual subrogation between insurers. As the plaintiff, St. Paul bears the legal burden to establish that a claim for equitable or contractual subrogation between insurers can be pursued in Nevada state court. The Opposition fails, as a matter of law, to carry St. Paul's burden. No Nevada state court has allowed such a claim. It is not enough, as the Opposition argues, that Nevada state courts have not (yet) expressly prohibited St. Paul's claims. A plaintiff cannot invent claims for trial that do not actually exist. National Union respectfully submits that if St. Paul wants to proceed with unfounded subrogation theories new to the Nevada state court system, it is up to Nevada's Supreme Court or Legislature to permit that. For the reasons in National Union's Motion and above, St. Paul's Second and Fourth Causes of Action for subrogation cannot survive summary judgment. The Court should grant National Union's Motion as to those claims.

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III.

THE SUBROGATION CLAIMS CANNOT SURVIVE SUMMARY JUDGMENT BECAUSE ST. PAUL'S POLICY IS NOT EXCESS TO NATIONAL UNION'S

Even if Nevada recognized subrogation claims between insurers (which it does not), those claims fail as a matter of law here because St. Paul cannot carry its threshold burden of establishing its policy is excess to National Union's. *See, e.g., Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 1291-1292 (2013) (explaining distinctions between contribution and subrogation). In those jurisdictions outside Nevada where subrogation between insurers has been in certain circumstances recognized, an essential threshold requirement is that one insurer *was primarily liable* and the other insurer *was not primarily liable*, such that subrogation only applies to insurers providing *different levels of coverage*. *Id.* As the undisputed record before this Court establishes, National Union and St. Paul provided excess coverage to Cosmopolitan on the same level under different towers. (Declaration of Richard C. Perkins ("Perkins Decl."), Ex. 1; Declaration of Nicholas Salerno ("Salerno Decl."), Ex. 3.) Accordingly, even if Nevada recognized subrogation between insurers, such recognition would still preclude St. Paul's subrogation claims against National Union because they each provided excess coverage to Cosmopolitan on the same level under different towers of insurance coverage.[3]

Cognizant of the legal flaws fatal to its subrogation claims, St. Paul resorts to fabricating insurance terminology found nowhere in the factual record before this Court. In the Opposition, St. Paul speciously classifies itself as a "higher level excess carrier" and National Union as a "lower level excess carrier." (Opp. 20.) But these made-up terms are not found anywhere in the policies. (Perkins Decl., Ex. 1; Salerno Decl., Ex. 3.) St. Paul has asserted these fictional and misleading classifications solely for the purpose of this litigation. In any event, it cannot reasonably contest the

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[3] The Opposition cites out-of-state cases applying Kentucky and Illinois law. But those cases are neither Nevada authority nor persuasive because they involved actions between primary and excess insurers in the same tower of insurance coverage. *See* Opp. 20 (citing *National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493F.3d 752 (6th Cir. 2007) and *Central Illinois Public Service Co. v. Agricultural Ins. Co.*, 378 Ill.App.3d 728 (2008)).

undisputed nature of each of the St. Paul and National Union excess policies by calling them something they are not.

Desperate to save the subrogation claims, St. Paul invokes the Nightclub Management Agreement ("NMA") at issue in Marquee's Motion for Summary Judgment. But contrary to the Opposition's argument, the NMA does not control the priority of coverage issues between St. Paul and National Union. That is because (1) neither excess insurer was a party to the NMA, and (2) in actions between insurers over priority of coverage, the insurance policies control over the insureds' contracts. *See Travelers Cas. & Surety Co. v. American Equity Ins. Co.*, 93 Cal.App.4th 1142, 1157-1158 (2001) (holding that disputes between two insurers should be governed by general principles governing the interpretation and enforcement of the policies, as opposed to contractual indemnification clauses).[4]

Even if St. Paul's subrogation claims did not require new law in Nevada in order to survive summary judgment, those claims fail, as a matter of law, because St. Paul's policy is not to excess to National Union's.[5] For this independent reason, the Court should grant National Union's Motion as to these claims.

IV.

THE SUBROGATION CLAIM FOR BREACH OF CONTRACT CANNOT SURVIVE SUMMARY JUDGMENT BECAUSE THERE ARE NO CONTRACT DAMAGES

Even if Nevada recognized subrogation claims between insurers (it does not), and even if St. Paul was excess to National Union (it is not), the subrogation breach of contract claim fails for St. Paul's failure to carry its burden in establishing the damages element of the claim. A claim for

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[4] St. Paul's reliance on the *Rossmoor* and *Mt. Hawley* cases is misplaced. (Opp. 17-18.) These California cases involved a *primary insurer* stepping into the shoes of its *insured* to pursue its insured's contractual right to indemnity from *another primary insurer*. St. Paul is not stepping into Cosmopolitan's shoes to pursue any claim against National Union for express indemnity under the NMA. These cases are also inapposite because National Union and St. Paul are each excess insurers, not primary insurers. (Perkins Decl., Ex. 1; Salerno Decl., Ex. 3.)

[5] In addition, the Opposition fails to create a disputed fact relevant to the Motion's argument upon lack of superior equity. St. Paul's arguments rely on its counsel's factually inaccurate statements (for which they lack personal knowledge) and the undisputedly false position that St. Paul's excess policy (immediately above the Zurich primary policy in the Cosmopolitan tower) is somehow excess to National Union's excess policy (immediately above the Aspen primary policy in the Marquee tower).

breach of contract that presents no admissible evidence of contract damages is subject to dismissal on summary judgment. (Mot. 17.) In the insurance context, damages for breach of an insurance policy are limited to amounts for policy benefits owed under the policy. *Morris v. Paul Revere Life Ins. Co.*, 109 Cal.App.4th 966, 977 (2003); *Avila v. Century National Ins. Co.*, 2010 WL 11579031 (D. Nev. Feb. 10, 2010).

The Opposition does not dispute that (1) Cosmopolitan's defense in the Underlying Moradi Action was fully paid by its insurers; (2) Cosmopolitan was fully indemnified by its insurers, (3) Cosmopolitan did not contribute toward its defense or the settlement of the Underlying Moradi Action, and (4) Cosmopolitan has not suffered any breach of contract damages. (*Compare* Mot. 17 *with* Opp. 23-24.) These undisputed facts require the Court to dismiss St. Paul's subrogation breach of contract claim.

Failing to address these undisputed facts, the Opposition's irrelevant arguments only emphasize how St. Paul is seeking extra-contractual damages for an alleged breach of the duty to settle. (Opp. 24.) But those damages cannot be recovered under a breach of contract theory. Even if St. Paul could step into Cosmopolitan's shoes (which it cannot), St. Paul would only have the same remedies available to Cosmopolitan. Because Cosmopolitan has suffered no damages for any alleged breach of contract, St. Paul likewise has no claim. The subrogation cause of action against National Union for breach of contract cannot survive summary judgment.

V.

THE CONTRIBUTION CLAIM CANNOT SURVIVE SUMMARY JUDGMENT

The Nevada state courts have never established an equitable contribution claim by an insurer against another insurer. (Mot. 19.) The Opposition concedes the Nevada Supreme Court has never done so. (Opp. 25.) Rather, it erroneously contends this case is still "at the pleading stage" (*id.*), which is clearly not the case. And that somehow being "at the pleading stage" precludes the Court from granting summary judgment as to St. Paul's unfounded contribution claim. Not so.

But even if such a claim existed under Nevada law (which it does not), equitable contribution does not allow for the recovery of damages beyond the limits of an insurer's policy. *See* Mot. 19-20 (citing *Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, 2012 WL

870289 at *3 (D. Nev. Mar. 14, 2012) ("once the [limits are] reached, the insurer's duties under the policy are extinguished.")). No jurisdiction permits for contribution beyond policy limits and there are numerous cases explicitly finding equitable contribution does not allow for recovery beyond policy limits. *See, e.g., Nucor Corporation v. Employers Ins. Co. of Wausau*, 2014 WL 11514491 (D. Ariz. Nov. 18, 2014); *Century Indemnity Company v. American Home Assurance Company*, 2017 WL 5983716 (App. Ct. Ill. Nov. 29, 2017); *Travelers Indem. Co. v. Liberty Mut. Ins. Co.*, 1997 WL 102506 (N.D. Cal. Feb. 5, 1887). The Opposition does not dispute that National Union exhausted its policy limit in settlement of the Underlying Moradi Action nor that St. Paul seeks extra-contractual damages. (*Compare* Mot. 10, 19 *with* Opp. 26.)

The Opposition ignores the case law cited in National Union's Motion. (Opp. 26.) It has no meaningful answer to this purely legal issue. (*Id.*) St. Paul's only response, which is factually unsupported and irrelevant under the law, is to allege that National Union somehow only exhausted its policy limit through payments made on behalf of Marquee, rather than Cosmopolitan. (Opp. 26.) St. Paul provides no evidence or legal authority in support of this contention. (*Id.*) Because National Union has no further obligation under its exhausted policy, St. Paul cannot obtain contribution from National Union. *Everest Indem. Ins. Co.*, 2012 WL 870289 at *3

For the reasons stated in National Union's moving papers and above, the Court should grant its Motion as to St Paul's equitable contribution claim.

VI.

THE EQUITABLE ESTOPPEL CLAIM CANNOT SURVIVE SUMMARY JUDGMENT

In its Motion, National Union accurately asserted that St. Paul's equitable estoppel claim cannot "seek monetary damages." (Mot. 20, n.2.) St. Paul does not dispute its equitable estoppel claim cannot and does not seek damages. (Opp. 26-27.) Although the Opposition appears to dispute that its equitable estoppel claim is not dependent on the legal viability of its other causes of action, St. Paul provides no explanation for how that is the case here. St. Paul offers no meaningful argument why this claim should survive summary judgment if its other claims do not. Because St. Paul's subrogation and contribution claims cannot survive summary judgment, neither can its equitable estoppel claim.

VII.

THE OPPOSITION RAISES IRRELEVANT MISINFORMATION UNRELATED TO THE MOTION'S "PURELY QUESTIONS OF LAW" AND RELIES ON INADMISSIBLE ALLEGATIONS

St. Paul unsuccessfully attempts to muddy the clear questions of law presented in National Union's Motion. The Opposition's strategy is to bog this Court down with unnecessary allegations that have no bearing on National Union's Motion. (*See*, *e.g.*, Opp. 3-4.) As stated above, the Court previously found that National Union's pertinent arguments present "no material questions of fact and the only issues remaining are purely questions of law." The Opposition raising allegations about National Union's alleged bad faith has no legal effect on the "purely questions of law" that are the grounds for National Union's Motion.

Not only does the Opposition attempt to inject these pointless distractions into National Union's Motion, but it also relies almost exclusively on inadmissible misinformation that fails to rebut the evidence in National Union's Motion or support the Opposition's erroneous arguments. For example, the Opposition cites liberally to the declaration of St. Paul's litigation counsel in this case, Marc Derewetzky. (*See*, *e.g.*, Opp. 3-4.) But Mr. Derewetzky clearly lacks personal knowledge to make under-oath declarations about, among other things, National Union, the Underlying Moradi Action, what National Union did or did not do in connection with that case, Marquee, Cosmopolitan, or the NMA. (*See*, *e.g.*, Derewetzky Decl., ¶¶25-36; *see generally*, National Union'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 – and are irrelevant to the Motions for Summary Judgment – include the following: "AIG provided a single attorney to represent Cosmo and Marquee"; "Aspen and AIG mishandled the claims"; "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. If Mr. Derewetzky's statements are not stricken, and this case continues, he will need to sit for a deposition in this action about his purported factual testimony.

VIII.

ST. PAUL'S RULE 56(D) REQUEST SHOULD BE DENIED

The Opposition fails to articulate why St. Paul needs any discovery to address the purely legal issues in National Union's Motion. It similarly fails to identify what discovery St. Paul purportedly needs to address those legal issues. Although the Mr. Derewetzky's declaration lists a few bullet points as "areas of inquiry" (Derewetzky Decl. p. 6), St. Paul fails to explain how those "areas" have any connection to the dispositive legal issues in National Union's Motion. For example, St. Paul fails to explain how the "areas of inquiry" would:

- Affect St. Paul's concession that the Nevada Supreme Court has never recognized a subrogation claim or an equitable contribution claim between insurers.
- Locate Nevada state court case law permitting an insurer to pursue subrogation or equitable contribution against another insurer.
- Alter the fact that National Union and St Paul each provided excess coverage to Cosmopolitan on the same level under different towers of insurance coverage.
- Change the fact Cosmopolitan has not suffered any breach of contract damages.
- Challenge that National Union exhausted its policy limit in settlement of the underlying action.

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The "areas of inquiry", if relevant at all, relate to St. Paul's allegation of bad faith. But National Union is not moving on bad faith. This Court can and should rule on the legal issues raised in National Union's Motion without the distraction of allegations or discovery that relate to issues not presented in that Motion. For the reasons set forth above, St. Paul's Rule 56(d) request should be denied.[6]

IX.

CONCLUSION

For the above reasons, and those in the moving papers, National Union's Motion for Summary Judgment should be granted.

DATED: October 10, 2019

HEROLD & SAGER

By: _____

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[6] St. Paul asserts its Opposition was timely filed. (Opp. 3, n.3) It was not. Pursuant to the Court's Administrative Order effective March 12, 2019, the Opposition needed to be filed by September 23. It was not filed until September 27. The Court can disregard the Rule 56(d) request, the Opposition in its entirety, or reject any or all of its arguments due to St. Paul's failure to meet its required filing deadline.

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 10, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

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

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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 10th day of October, 2019.

JuRee A. Bloedel

OBJ

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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 NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'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 REQUEST FOR DISCOVERY PER NRCP 56(d)

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

Pursuant to NRCP 56(c)(1), National Union Fire Insurance Company of Pittsburgh, PA ("National Union") 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 Request for Discovery for Discovery Per NRCP 56(d).

FACTS/EVIDENCE	OBJECTION
1. "There was no evidence presented at trial that Cosmo was directly liable for Moradi's injuries and no evidence that Cosmo had any role in hiring, training or supervising the Marquee personnel. Declaration of Marc J. Derewetzky in Support of Opposition to AIG's Motion for Summary Judgment, filed concurrently herewith ('Derewetzky Decl.'), ¶ 25." (Opp., at 3:7-11.) Declaration of Marc J. Derewetzky ("Derewetzky Decl."), ¶ 25	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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 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.
2. "No Cosmo employee or manager testified at trial. Derewetzky Decl., ¶ 25." (Opp., at 3:11-12.) Derewetzky Decl., ¶ 25	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance

FACTS/EVIDENCE	OBJECTION
	Contract; Equitable Estoppel; and Equitable 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 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.
3. "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 to not subject others to an unreasonable risk of harm. Derewetzky Decl., ¶ 25." (Opp., at 3:12-14.) Derewetzky Decl., ¶ 25.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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 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.
4. "In response to a tender, Aspen agreed to provide a joint defense to both Marquee and Cosmo while AIG, based on the large exposure, agreed to do the same. Exhibits L., M." (Opp., at 4:1-3.) Declaration of William Reeves ("Reeves Decl."), ¶ 2. Derewetzky Decl., ¶¶ 14-15. Consolidated Appendix of Exhibits in Support of Plaintiff's Opposition to Motions for Summary Judgment Filed by AIG and Marquee ("Appendix"), Ex. L – March 21, 2017 Letter from Robin Green of AIG to Randy Conner of the Cosmopolitan of Las Vegas; Ex. M – March 21, 2017 Letter from Robin Green of AIG to John R. Ramirez of Roof Deck Entertainment, LLC and the Restaurant Group.	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 National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits L and M through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 14-15. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit L is a true and correct copy of a March 21, 2017 Letter from Robin Green of AIG to Randy Conner of the Cosmopolitan of Las Vegas, and/or whether Exhibit M is a true and correct copy of a March 21, 2017 Letter from Robin Green of AIG to John R. Ramirez of Roof Deck Entertainment, LLC and the Restaurant Group. 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 L and M are inadmissible hearsay. NRS § 51.065.
5. "AIG provided a single set of attorneys to represent Cosmo and Marquee jointly, despite the fact that Cosmo was entitled to be	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the

FACTS/EVIDENCE	OBJECTION
indemnified by Marquee pursuant to contract, thus improperly waiving Cosmo's rights. Exhibit A, Derewetzky Decl., ¶ 26." (Opp., at 4:4-6.) Derewetzky Decl., ¶ 26.	claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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.
6. "AIG mishandled the claims and then failed to accept reasonable settlement offers within their limits. Exhibits G, H, I, K; Derewetzky Decl., ¶ 27." (Opp., at 4:6-8.) Reeves Decl., ¶ 2. Derewetsky Decl., ¶¶ 9-11; 13; 27. Appendix, Ex. G – Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000; Ex. H – December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle; Exhibit I – November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000; Exhibit K – March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and	St. Paul offers an offer of judgment served by Moradi in the Underlying Action, as well as three pieces of correspondence issued by counsel for the parties in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits G, H, I, and K through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 9-11; 13; 27. Marc Derewetzsky and William Reeves lack personal knowledge

FACTS/EVIDENCE	OBJECTION
Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.	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, 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, whether Exhibit I is a true and correct copy of a November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000, and/or whether Exhibit K is a true and correct copy of a March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000. 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 and the offer of judgment offered by St. Paul through Exhibits G, H, I and K are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits G, H, I and K purporting to offer evidence assume facts that have been established in the evidence.

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FACTS/EVIDENCE	OBJECTION
7. Aspen and AIG failed to inform either Cosmopolitan or St. Paul or opportunities to settle before the offers expired. Derewetzky Decl., ¶ 28." (Opp., at 4:8-9.) Derewetzky Decl., ¶ 28.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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.
8. "These offers included a statutory offer of judgment for $1.5 million dated December 10, 2015 and offers to settle for $26 million (the undisputed amount of the combined Aspen and AIG limits) presented on November 2, 2016 and March 9, 2017, shortly before trial commenced. Exhibits G, H, I, K." (Opp., at 4:9-12.) Reeves Decl., ¶ 2. Derewetsky Decl., ¶¶ 9-11; 13; 27. Appendix, Ex. G – Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000; Ex. H – December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle; Exhibit I – November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy	St. Paul offers an offer of judgment served by Moradi in the Underlying Action, as well as three pieces of correspondence issued by counsel for the parties in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits G, H, I, and K through the Declaration

FACTS/EVIDENCE	OBJECTION
Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000; Exhibit K – March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.	of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 9-11; 13; 27. Marc Derewetzsky and William Reeves lack 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, 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, whether Exhibit I is a true and correct copy of a November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000, and/or whether Exhibit K is a true and correct copy of a March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000. 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 and the offer of judgment offered by St. Paul through Exhibits G, H, I and K are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits G, H, I and K purporting to offer evidence assume facts that have been established in the evidence.

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9. "And throughout the Underlying Action, AIG consistently represented that its coverage for Cosmopolitan was primary to St. Paul's coverage and, therefore, that AIG was responsible for defending and resolving the Underlying Action. Derewetzky Decl., ¶ 29." (Opp., at 4:12-15.) Derewetzky Decl., ¶ 29.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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.
10. "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." (Opp., at 4:16-18.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that 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, whether through affidavit,

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	declaration, or any other evidence. NRCP 56(c)(1).
11. "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." (Opp., at 4:20-23.) Derewetzky Decl., ¶ 31.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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.
12. "Throughout, AIG conducted itself by word and deed as though its policy was obligated to pay the Moradi claims before St. Paul was required to pay, rendering the St. Paul policy excess to the AIG policy. Derewetzky Decl., ¶ 32." (Opp., at 4:23-25.) Derewetzky Decl., ¶ 32.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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

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	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.
13. But AIG failed to avail itself of opportunities to spend its limits to protect *both* of its insureds, opportunities that were never presented to St. Paul. Derewetzky Decl., ¶ 32, Exhibits, I, K." (Opp. At 4:25-27.) Reeves Decl., ¶ 2. Derewetsky Decl., ¶¶ 11, 13. Appendix, Exhibit I – November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000; Exhibit K – March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.	St. Paul offers two pieces of correspondence issued by counsel for Moradi in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits I, and K through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 11, 13. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit I is a true and correct copy of a November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000, and/or whether Exhibit K is a true and correct copy of a March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.

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	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 I and K are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits I and K purporting to offer evidence assume facts that have been established in the evidence.
14. "With a joint and several judgment hanging over its named insured's head, St. Paul funded Cosmo's portion of the settlement. Derewetzky Decl., ¶ 32." (Opp., at 4:27-28.) Derewetzky Decl., ¶ 32.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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 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

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	any party in the Underlying Action that participated in trial of the Underlying Action.
15. "AIG's argument that St. Paul should have settled the case simply ignores that fact that St. Paul had no opportunity to do so in part because AIG did not inform St. Paul of the settlement opportunities." (Opp., at 17:5-7.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that 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, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
16. "Therefore, because this claim arose out of the negligent or willful acts of Marquee's employees, and Cosmo was only vicariously liable and did not itself commit any negligent or will act, Marquee owes Cosmo indemnity." (Opp., at 18:7-9.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that because this claim arose out of the negligent or willful acts of Marquee's employees, and Cosmo was only vicariously liable and did not itself commit any negligent or will act, Marquee owes Cosmo indemnity, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
17. "St. Paul was not notified about the *Moradi* claim 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	St. Paul offers correspondence issued in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action

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settlement demand. Exhibit J." (Opp., at 20:17-19.) Reeves Decl., ¶ 2. Derewetzky Decl., ¶ 12. Appendix, Ex. J – E-Mail Dated February 13, 2017 From Crystal Calloway to BSIclaims and First Report.	and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit J through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 12. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit J is a true and correct copy of an E-Mail Dated February 13, 2017 From Crystal Calloway to BSI claims and First Report. 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 J are inadmissible hearsay. NRS § 51.065.
18. "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." (Opp., at 20:19-21.) Derewetsky Dec., ¶ 33.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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

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	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.
19. "To the contrary, after it became known that Cosmo had a policy with St. Paul, it is unlikely that Moradi would have settled for just the limits of the St. Paul policy as evidenced by the fact that the settlement demand post-verdict was for the limits of all insurance, including the St. Paul policy. Derewetzky Decl., ¶ 34." (Opp., at 20:24-27.) Derewetzky Decl., ¶ 34.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. 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.
20. "Notably, events played out this way because AIG itself, contrary to its current position, knew St. Paul was a higher-level excess carrier and did not want St. Paul	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul

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interfering in the handling of the defense. Derewetzky Decl., ¶ 35." (Opp., at 21:9-11.) Derewetzky Decl., ¶ 35	has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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.
21. "AIG's argument, ludicrous as it sounds, is that a carrier (AIG) can provide a conflicted defense for years, fail to assert all of its insureds' rights to their detriment (e.g. failing to assert Cosmo's indemnity rights against Marquee) and refuse at least two opportunities to settle within limits and nevertheless have superior equities to a carrier that was not even tendered to, and was kept in the dark about the litigation to prevent it from interfering in AIG's determination to gamble with Cosmo's and St. Paul's money." (Opp., at 21:11-16.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that National Union provided a conflicted defense for years, failed to assert all of its insureds' rights to their detriment (e.g. failing to assert Cosmo's indemnity rights against Marquee) and refused at least two opportunities to settle within limits and nevertheless has superior equities to a carrier that was not even tendered to, and was kept in the dark about the litigation to prevent it from interfering in National Union's determination to

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	gamble with Cosmo's and St. Paul's money, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
22. "Here, Marquee's employees actually committed the beating that caused the underlying claimant's injuries." (Opp., at 22:2-3.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that Marquee's employees actually committed the beating that caused the underlying claimant's injuries, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
23. "St. Paul was only notified about the Underlying Action on February 13, 2017, shortly before trial began, and *after* AIG had already rejected an offer to settle the entire case against both Cosmo and Marquee within the AIG limits." (Opp., at 22:25-27.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that St. Paul was only notified about the Underlying Action on February 13, 2017, shortly before trial began, and *after* AIG had already rejected an offer to settle the entire case against both Cosmo and Marquee within the AIG limits, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
24. "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." (Opp., at 22:27 – 23:1.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St.

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Derewetzky Decl., ¶ 36.	Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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.
25. "St. Paul had no knowledge, and therefore no reasonable opportunity to settle." (Opp., at 23:1-2.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that St. Paul had no knowledge, and therefore no reasonable opportunity to settle, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
26. "And AIG would not even by arguing this point had it not insisted that the defense of Marquee and Cosmo be handled by a single firm which never informed Cosmo that its representation of both defendants created a conflict that at a minimum entitled Cosmo to independent counsel." (Opp., at 23:2-5.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the

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	Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that National Union insisted that the defense of Marquee and Cosmo be handled by a single firm which never informed Cosmo that its representation of both defendants created a conflict that at a minimum entitled Cosmo to independent counsel, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
27. "But AIG beached its obligations to Cosmo when it agreed to pay its limits only on behalf of Marquee. It paid nothing on behalf of its other insured, Cosmo." (Opp., at 26:4-6.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that National Union breached its obligations to Cosmo when it agreed to pay its limits only on behalf of Marquee and paid nothing on behalf of its other insured, Cosmo, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
28. "On the other hand, the exhaustion argument ignores the problem that AIG decided unilaterally to forgo multiple opportunities to settle all claims against both its insureds within its own limits, prejudiced Cosmo's rights and then choose to exhaust the policy limits to protect only Marquee while contributing nothing for Cosmo." (Opp., at 26:9-12.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that National Union decided unilaterally to forgo multiple opportunities to settle all claims against both its insureds within its own limits, prejudiced Cosmo's rights and

FACTS/EVIDENCE	OBJECTION
	then choose to exhaust the policy limits to protect only Marquee while contributing nothing for Cosmo, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
29. "Rather than accept a settlement demand within its limits that would have insulated both Marquee and Cosmo, AIG elected to reject the demands and instead unreasonably take its chances that they would do better at trial. 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 National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable 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 any party in the Underlying Action that participated in trial of the Underlying Action.

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DATED: October 10, 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 10, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'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 REQUEST FOR DISCOVERY PER NRCP 56(d) was made to the following interested parties in the following matter:

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

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Executed on the 10th 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 UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive,

Defendants.

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

DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S REPLY IN SUPPORT OF MOTION 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 Reply Points and Authorities in support of Marquee's Motion for Summary Judgment and in response to Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Opposition to that Motion.

I.

INTRODUCTION

St. Paul's Opposition makes no meaningful attempt to rebut the undisputed record supporting Marquee's Motion. The Opposition provides no statement of contested facts. It does not dispute that (1) Cosmopolitan signed the NMA; (2) the NMA contained a waiver of subrogation provision; (3) the waiver of subrogation applies to "Owner Policies" (defined as including Cosmopolitan); (4) the Cosmopolitan Lease attached to the NMA states that Cosmopolitan agreed to procure and maintain the insurance required under the NMA; (5) the St. Paul policy contains a waiver of subrogation endorsement; (6) that endorsement corroborates the NMA's waiver of subrogation; (7) St. Paul invoked the NMA in seeking indemnification on behalf of Cosmopolitan; (8) the NMA's indemnity obligations apply only to losses not covered by insurance; (9) Cosmopolitan was defended and indemnified by the insurers in the underlying action; (10) Cosmopolitan did not sustain any uninsured losses. These undisputed facts prevent St. Paul's subrogation claims for express indemnity and contribution from surviving summary judgment.

With dismissal looming, St. Paul's Opposition resorts to desperate measures during desperate times. *First*, St. Paul largely bases its untimely filed Opposition on the unsupported and false assertion that Cosmopolitan was never bound by NMA. But the NMA, St. Paul's invocation of it (through its third-party beneficiary contentions), and the Cosmopolitan Lease (attached to the NMA) establish, as a matter of law, that Cosmopolitan was bound by the NMA's terms.

Second, rather than muster a single fact witness to support its allegations, St. Paul relies heavily on its own litigation counsel's sworn statements about disputed events obviously outside their personal knowledge. The Court should address the lack of foundation for these sworn statements and reject the assertions therein.

Third, contrary to the Opposition's misrepresentations, this Court did not previously reject the arguments in Defendants' pending Motions. The Opposition 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." This Court's denial of Marquee's second motion to dismiss was "without prejudice" to allow it to properly authenticate and lay the foundation for the NMA and the relevant St. Paul policy, which Marquee has now done.

For the reasons stated in Marquee's moving papers and in this reply, the Court should grant Marquee's Motion for Summary Judgment in its entirety.

II.

THE NMA AND ST. PAUL'S POLICY BAR ITS SUBROGATION CLAIMS

In its Opposition, St. Paul has double-downed on its inaccurate and unsupported contention that it can somehow step into its insured Cosmopolitan's shoes to bring claims against Marquee when the NMA contains a "waiver of subrogation" provision. But the NMA is now properly authenticated, and the undisputed record before the Court establishes that (1) Cosmopolitan signed the NMA, (2) St. Paul invoked that agreement as the basis for its express indemnity claim against Marquee, and (3) Cosmopolitan, and now St. Paul by attempting to step into the shoes of Cosmopolitan, are each bound by the terms of the NMA. (Declaration of Bill Bonbrest ("Bonbrest Decl."), Ex. 1 at T000152; Opp., at pp. 12-13; Motion, at pp. 14 – 16.) St. Paul cannot rely on the NMA for third-party beneficiary status of Cosmopolitan in one argument yet disavow the NMA terms fatal to its subrogation claims in another. The NMA's waiver of subrogation puts an end, as a matter of law, to St. Paul's subrogation claims against Marquee.

The Opposition similarly fails to rebut how Cosmopolitan expressly assumed – through the Cosmopolitan Lease attached to the NMA – the obligation to procure insurance compliant with the NMA's terms, including the NMA's waiver of subrogation obligation. Section 17.2 of the Lease attached as Exhibit D to the NMA delegated NRV1's insurance requirements under the NMA to Cosmopolitan. Under Section 17.2, Cosmopolitan agreed to "carry and maintain all insurance required under paragraph 1(h)" of the Lease. (Bonbrest Decl., Ex. 1, at T000183.) Paragraph 1(h) of

the Lease titled "Landlord Insurance" in turn provided that Cosmopolitan would maintain "[a]ll insurance required to be obtained by [NRV1] under Section 12.1 of the [NMA]." (Bonbrest Decl., Ex. 1, at T000172.) In sum, Cosmopolitan agreed to procure and maintain the insurance required by NRV1 subject to the NMA, including its waiver of subrogation. The Opposition offers no meaningful argument in rebuttal.[1]

St. Paul also ignores how the NMA's express terms provide that the waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies," with "Owner Policies" defined as including Cosmopolitan. (Bonbrest Decl., Ex. 1, at T000126.) And although St. Paul asserts the NMA's waiver of subrogation is somehow unenforceable, the Opposition cites no authority to support this argument. The cases cited (at Opp. 9) – none of which are Nevada authorities – are inapposite because they did not involve waivers of subrogation. The Opposition also ignores case law holding that agreements to waive subrogation are enforceable even when there are misconduct allegations. *See, e.g., Abacus Federal Savings Bank v. ADT Security Services, Inc.*, 18 N.Y.3d 675, 684 (2012).

Since the beginning of this case, St. Paul refused to attach to its pleadings or introduce the relevant St. Paul policy insuring Cosmopolitan. That document has now been produced, authenticated, and is properly before this Court. (Declaration of Nicholas B. Salerno ("Salerno Decl."), Ex. 2.) It is obvious why St. Paul wanted to hide its own policy: it includes an endorsement precluding St. Paul from pursuing its subrogation claims against Marquee. (Salerno Decl., Ex. 2, at T000038.) The St. Paul policy precluding subrogation corroborates the NMA's waiver of subrogation provision preventing the same. The Opposition is silent about this corroboration. There simply is no legitimate dispute that, as a matter of law, the NMA and St. Paul's policy bar St. Paul from stepping into Cosmopolitan's shoes to pursue Marquee.

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[1] St. Paul argues that because NRV1 was not a party in the Underlying Moradi Action, that fact somehow negates Cosmopolitan's assumption of the obligation to procure the insurance required by the NMA. But the Opposition provides no explanation – let alone any legal or factual basis – for how that in any way alters what Cosmopolitan agreed to do, and did do. St. Paul's other argument – that the NMA did not require Cosmopolitan to procure insurance for itself – is similarly specious and irrelevant because Cosmopolitan did procure a policy – the very one at issue here that St. Paul refused to provide to the Court – and it included St. Paul's waiver of subrogation.

Although St. Paul argues that Cosmopolitan was somehow never bound by the terms of the NMA, Nevada law prevents St. Paul from picking and choosing 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"). The Opposition cites no Nevada case law to the contrary.[2]

St. Paul also offers no declaration or other evidence from Cosmopolitan to support its flawed arguments.[3] Instead, the Opposition relies on the inadmissible and speculative declaration testimony from St. Paul's two lead litigators in this action. But St. Paul's litigation advocates clearly have no personal knowledge about the NMA, Marquee, Cosmopolitan, or other past events, and they should be reprimanded for swearing – under penalty of perjury – that they do. Lacking evidence to support the Opposition's arguments, St. Paul has improperly made its own litigation counsel attest to statements for which they have no personal knowledge.

For the reasons stated above and in Marquee's moving papers, St. Paul's subrogation claims for contribution and express indemnity fail, as a matter of law, because Cosmopolitan and St. Paul waived their subrogation rights.

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[2] St. Paul cites non-Nevada cases (at Opp. 7-8) that stand for the irrelevant proposition that non-signatories to an agreement "cannot avail themselves of the waiver-of-subrogation clauses" of the agreement. *See, e.g.*, Opp. at 8 citing *St. Paul Fire & Marine Ins. Co. v. FD Sprinkler Inc.*, 908 N.Y.S.2d 637, 639 (2010). Here, Cosmopolitan was a signatory to the NMA, it expressly assumed the obligation to obtain the insurance required under the NMA, and St. Paul is invoking that agreement for its third-party beneficiary arguments against Marquee. (Bonbrest Decl., Ex. 1 at T000152, T000172, T000183; FAC ¶ 122.)

[3] Even if St. Paul offered a declaration from Cosmopolitan contending it never intended to be bound by the NMA, the Court should still grant Marquee's Motion. 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.

III.

THE EXPRESS INDEMNITY CLAIM CANNOT SURVIVE SUMMARY JUDGMENT BECAUSE COSMOPOLITAN DID NOT SUSTAIN ANY UNINSURED LOSSES

Even if St. Paul's subrogation claims had not been waived, its express indemnity claims fails for the independent reason that Cosmopolitan did not sustain any uninsured losses. In its Opposition, St. Paul does not dispute the following facts requiring dismissal of its express indemnity claim:

- The indemnity obligations owed under Section 13 of the NMA only apply to losses not covered by insurance. (Mot. 11-12, 17.)
- Cosmopolitan was defended and indemnified by the insurers in the Underlying Moradi Action. (Mot. 17.)
- Cosmopolitan did not sustain any uninsured losses. (*Id.*)

Based on these undisputed facts, Marquee owes no express indemnity to Cosmopolitan and by extension, St. Paul, whose rights are no greater than its insured. (*Id.*)

The Opposition provides little in response, except to repeat that Cosmopolitan was somehow "not bound by" the NMA and "not required to maintain any insurance." (Opp. 8.) As addressed above, the Opposition provides no evidence from Cosmopolitan in support of these arguments. It ignores Nevada law precluding St. Paul from choosing those NMA terms it will live by, and those it will not. *Canfora*, 121 Nev. at 779; *Gibbs*, 96 Nev. at 246-247. And it ignores the undisputed facts that the NMA and the Cosmopolitan Lease required Cosmopolitan to procure and maintain insurance. (Bonbrest Decl., Ex. 1, at T000172, T000183.)

As a matter of law, St. Paul's express indemnity claim fails, independent of the subrogation waiver, because any indemnity obligation owed by Marquee to Cosmopolitan only applies to losses not covered by insurance, and Cosmopolitan has no such losses.

IV.

THE CONTRIBUTION CLAIM CANNOT SURVIVE SUMMARY JUDGMENT

In its Opposition, St. Paul concedes, as it must, that a litigant has no right to contribution under Nevada's Uniform Contribution Act when the litigant's rights are governed by a contractual indemnity provision. *See* Opp. at 12 (citing *Van Cleave v. Gamboni Const. Co.*, 101 Nev 524 (1985),

holding NRS 17.625 "provides that no contribution exists where indemnity exists). The Opposition also ignores the leading Nevada authority – *Calloway v. City of Reno* – cited in Marquee's Motion. (Mot. 19.) In *Calloway*, the Supreme Court held that "implied indemnity theories are not viable in the face of express indemnity agreements." 113 Nev. 564, 578 (1997). The Opposition has no answer to these Nevada authorities. Because there is no genuine dispute that St. Paul is attempting to pursue Cosmopolitan's express indemnity rights, the Court must dismiss Plaintiff's contribution claim under the Act.

St. Paul's Opposition also fails to rebut Marquee's other legal argument for why St. Paul's contribution claim fails: the jury's verdict in the Underlying Moradi Action unambiguously provided that Cosmopolitan and Marquee were jointly and severally liable for intentional torts. (FAC ¶¶ 13-14, Ex. C.) Under Nevada law, there is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury. NRS 17.255. Because Cosmopolitan was found liable for several intentional torts in the underlying action, St. Paul's statutory subrogation claim for contribution fails under NRS 17.255.

The Opposition erroneously contends the Moradi verdict is of no consequence under NRS 17.255 because that case settled before entry of judgment. St. Paul's argument relies on an unpublished federal decision, *Terrell v. Cent. Washington Asphalt, Inc.*, 2016 WL 8738266 at *3 (D. Nev. Mar. 4, 2016). (Opp. 10-11.) The *Terrell* court denied a motion for summary judgment which argued certain parties were not entitled to contribution under NRS 17.225 because the parties were intentional tortfeasors. But the court reasoned that such a denial was correct because "[n]o jury has found the CW Defendants engaged in intentional conduct..." *Terrell*, at *3. Unlike *Terrell*, the settlement here occurred after the Moradi jury already found Cosmopolitan liable for multiple intentional torts.[4]

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[4] Likewise, St. Paul's reliance on Hanson v. Johnson, 2011 WL 3847203 at *4 (D. Nev. Aug. 30, 2011) is similarly misplaced. That case involved defendants found jointly and severally liable for negligence claims, not intentional torts.

Even if its subrogation claims had not been waived, St. Paul's contribution claim fails, as a matter of law, for the above reasons and those in Marquee's moving papers. The Opposition provides to adequate reason why this claim should not be dismissed on summary judgment.[5]

V.

CONCLUSION

For foregoing reasons, Marquee's Motion for Summary Judgment should be granted. In addition, because St. Paul's Opposition failed to address the portion of Marquee's Motion regarding its right to recover attorneys' fees, Marquee should also be awarded its attorneys' fees and costs in defending against this action.

DATED: October 10, 2019

HEROLD & SAGER

By: _____

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[5] St. Paul also asserts its Opposition was timely filed. (Opp. 14-15) It was not. Pursuant to the Court's Administrative Order effective March 12, 2019, the Opposition needed to be filed by September 23. It was not filed until September 27. The Court can disregard the Opposition in its entirety or reject any or all of its arguments due to St. Paul's failure to meet its required filing deadline.

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 10, 2019, service of DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

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

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Executed on the 10th day of October, 2019.

JuRee A. Bloedel

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI REPLY TO OPPOSITION TO PLAINTIFF'S COUNTERMOTION DATE: October 15, 2019 TIME: 9:30 a.m.

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

Plaintiff St. Paul Fire & Marine Ins. Co. ("St. Paul") files the following Reply to Marquee's Opposition to St. Paul's countermotion.

Introduction

In its Opposition, Marquee boldly argues that only it is entitled to file a dispositive motion. In so doing, however, Marquee cites to no Order or ruling prohibiting Cosmo from filing a dispositive motion based on undisputed facts. Marquee's protestations, therefore, are neither justified nor warranted.

In opposing the countermotion seeking a ruling that Marquee owes a duty to indemnify St. Paul, Marquee ignores that the following core facts at issue in the countermotion, each of which are undisputed:

- Cosmo is not a party to the Management Agreement
- Cosmo had no affirmative obligation to insure itself

- Marquee solely operated and managed the nightclub
- Cosmo had no active role in any aspect of the nightclub

Of significance, these facts are derived from the Management Agreement itself (which Marquee relies upon in its motion) as well as court filings and trial testimony made by and on behalf of Marquee, all of which is subject to judicial notice. See Appendix, Exs. A, N-R. All core facts, therefore are supported and undisputed.

While Marquee argues that its own prior admissions and court filings are somehow neither inadmissible nor binding, it fails to offer any cogent explanation as to why its prior admissions made in the underlying matter do not remain binding on it in this case. More importantly, in opposing the relief St. Paul requests, Marquee fails to do two (2) core things:

- Offer any evidence to rebut its prior admissions that it solely operated and managed the nightclub and/or that Cosmo had no active role in any aspect of the nightclub
- Identify any discovery needed to rebut these prior admissions.

Marquee's failure to do either is legally significant as it confirms that all core facts are undisputed and that no additional (but unavailable) controverting facts exist.

Marquee's inability to offer controverting facts is both not surprising and legally significant since it, as both the nightclub operator and named defendant in the underlying matter, is intimately familiar with the facts and circumstances at issue in this case, and therefore readily able to dispute that it solely operated and managed the nightclub and/or that Cosmo had no active role in any aspect of the nightclub. Stated simply, if contrary facts existed, Marquee is in a position to offer them without the need for any discovery. Having failed to offer any controverting facts, this Court is empowered to adjudicate the issue of whether Marquee owes a duty to indemnify Cosmo for the sum St. Paul paid.[1]

Finally, Marquee's contention on page 15 of its Opposition that St. Paul's countermotion was somehow untimely (which it was not) is undercut by the agreement reached between the parties (at

[1] As the sum St. Paul paid toward the settlement is confidential, its countermotion omits the sum sought. Regardless, as the sum St. Paul paid is known to the parties and undisputed, however, the granting of the countermotion will have the effect of resolving all claims asserted against Marquee.

Marquee's request) to set a briefing schedule and extend the hearing date. See Exhibit W attached hereto. While Marquee ostensibly had the right to change its mind and renege on the agreement, it cannot now complain that it sustained any prejudice given its decision to do so.

Accordingly, for the reasons set forth herein, it is respectfully submitted that the countermotion is properly granted.

Discussion

A. Cosmo Is Not A Party To The Management Agreement And Had No Affirmative Obligation To Procure Insurance To Protect Itself.

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

Instead, as reflected in the Management Agreement, Cosmo is the owner of the real property that houses the Marquee Nightclub. As Cosmo leased the space to Master Tenant, the latter had legal possession of the nightclub such that, per the terms of the Management Agreement, the Master Tenant (and not Cosmo) retained Marquee to solely and exclusively operate the nightclub.

The fact that Cosmo was (and is) not a party to the Management Agreement is legally significant. In arguing that Cosmo's claims are legally barred, Marquee relies upon provisions in the Management Agreement obligating Master Tenant (defined as Owner) to procure insurance. **Absent from the Management Agreement is any requirement that Cosmo (defined as Property Owner) procure insurance for itself.** In the absence of this requirement, the provisions in the Management Agreement regarding "all [Master Tenant/Owner] policies" and insurance "required hereunder" are irrelevant.

The fact that Cosmo, via a separate, unexecuted version of a lease agreement with Master Tenant (not Marquee), agreed to procure and pay for insurance for Master Tenant is irrelevant. Per the express terms of the Management Agreement, Cosmo was under no obligation to procure insurance. Absent any requirement to do so, it is not bound by any limitations provided for via the Management Agreement.

B. Exculpatory Provisions Do Not Apply To Reckless And/Or Intentional Conduct.

Exculpatory contractual clauses such as "waiver of subrogation" provisions are unenforceable as to conduct which is willful, wanton, reckless or intentional. *Rhino Fund, LLP v. Hutchins*, 215 P.3d 1186, 1193 (Colo. App. 2008); *Wright v. Sony Pictures Entm't, Inc.*, 394 F.Supp.2d 27, 33 (D.D.C.2005); *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 158 P.3d 232, 240 (App.2007); *Finch v. Southside Lincoln–Mercury, Inc.*, 274 Wis.2d 719, 685 N.W.2d 154, 160, 163–64 (App.2004); *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952, 956–57 (Wyo.1999).

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

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

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

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

Appendix, Ex A, p. 64.

Meanwhile, NRS 12.225 provides as follows:

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

St. Paul's express indemnity claim is based on the fact that Cosmo is an intended third party beneficiary of the contractual indemnity provision itself such that it has the right to enforce the indemnity provision. *Morelli v. Morelli*, 102 Nev. 326 (1986) (recognizing that a nonparty to a contract has standing to enforce the contract only when the nonparty is an intended third-party beneficiary); see also *De Los Reyes v. Bank of America, N.A.*, 2016 WL 8735707 (D. Nev. 2016) (ruling that an intended third party beneficiary has standing to enforce a contract provision). As Cosmo is not a party to the Management Agreement, however, St. Paul (by standing in the shoes of Cosmo) is not bound by the Management Agreement such that St. Paul is separately entitled to pursue a claim for contribution against Marquee for the amount of St. Paul's settlement payment that exceeds Cosmo's fair share. NRS 17.225.

If St. Paul succeeds on its express indemnity claim and Marquee is ordered to pay the amount of St. Paul's settlement contribution, neither Cosmo nor Marquee may then pursue one another for contribution per NRS 17.225. If, however, the express indemnity provisions is held not to apply then St. Paul is entitled to pursue Cosmo's rights via statute. See *Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524 (1985) (holding NRS 17.265 merely provides that no contribution exists where indemnity exists.)

Either way, both causes of action are validly pled, appropriate and meritorious in light of the undisputed facts before this Court.

D. This Court Is Empowered To Rule On The Countermotion As No Controverting Facts Exist And No Showing Has Been Made Of Any Need For Discovery.

It is axiomatic that a Court is empowered to adjudicate legal issues framed by undisputed facts where no material disputed facts exist.

In its countermotion, St. Paul seeks a ruling that Marquee owes a duty to indemnify St. Paul. Facts that bear on this issue are as follows:

- Cosmo is not a party to the Management Agreement
- Cosmo had no affirmative obligation to insure itself
- Marquee solely operated and managed the nightclub
- Cosmo had no active role in any aspect of the nightclub

Of significance, these facts are undisputed. See Appendix, Exs. A, N-R.

While Marquee argues that its prior admissions and court filings in the underlying matter are somehow neither admissible nor binding in this case, its explanation for this position is non-sensical, More importantly, Marquee fails to do the following in its Opposition:

- Offer any evidence to rebut its prior admissions that it solely operated and managed the nightclub and/or that Cosmo had no active role in any aspect of the nightclub
- Identify any discovery needed to rebut these prior admissions.

Marquee's failure to do either, while not unexpected given its familiarity with the nightclub and direct involvement in the underlying matter, is legally significant.

If controverting facts existed, Marquee (as the nightclub operator) could have raised them in its Opposition. It did not.

Meanwhile, if discovery was needed, Marquee (as direct party to the underlying matter) could have identified any discovery needed in its Opposition. It did not.

Marquee's argument that its prior admissions and court filings are not admissible and/or binding is non-sensical and patently wrong. Accordingly, in the absence of any controverting facts and/or need for discovery, this Court is empowered to adjudicate now the issue of whether Marquee owes a duty to indemnify Cosmo without the need for any further discovery.

E. The Countermotion Is Timely.

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

Regardless, based on arguments otherwise, St. Paul agreed (at Marquee's request) to extend all dates. See Exhibit W attached hereto. While an agreement was reached to extend the dates, Marquee reneged. In so doing, Marquee is precluded and barred from claiming any conceivable prejudice.

Conclusion

For the reasons set forth herein, it is respectfully submitted that Marquee's motion be denied,

that St. Paul's countermotion be granted and that this Court enter an Order holding that St. Paul is entitled to be indemnified by Marquee as a matter of law.

Dated: October 10, 2019

MORALES FIERRO & REEVES

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

Supporting Declaration

I, William Reeves, declare as follows:

1. I am an attorney for St. Paul in this matter.

2. Attached hereto as Exhibit W is a true and correct copy of my exchange with counsel for Marquee in this matter.

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

Dated: October 10, 2019

William C. Reeves

Exhibit W

William Reeves

From: Jeremy Stamelman <jstamelman@kelleranderle.com>
Sent: Monday, October 07, 2019 10:32 AM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com
Subject: RE: St. Paul

Bill,

After further reflection and work since raising this issue, our clients have decided to proceed on October 15 with the hearing of the National Union and Marquee motions and St. Paul's countermotion, along with the current filing deadlines associated with those motions leading up to the 10/15 hearing.

Regards,

Jeremy

-----Original Message-----
From: William Reeves <wreeves@mfrlegal.com>
Sent: Sunday, October 6, 2019 11:40 AM
To: Jeremy Stamelman <jstamelman@kelleranderle.com>
Cc: nsalerno@heroldsagerlaw.com
Subject: RE: St. Paul

Extension proposed below is acceptable.

Please circulate a draft stip.

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

-----Original Message-----
From: William Reeves [mailto:wreeves@mfrlegal.com]
Sent: Friday, October 04, 2019 4:25 PM
To: Jeremy Stamelman
Cc: nsalerno@heroldsagerlaw.com
Subject: RE: St. Paul

Got it. I will inquire on our end and advise.

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

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 4:19 PM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com

Subject: Re: St. Paul

The proposal is to move the hearing on your countermotion, Marquee's motion, and National Union's motion. Along with the other proposals below.

On Oct 4, 2019, at 4:14 PM, William Reeves <wreeves@mfrlegal.com> wrote:

Perhaps I was not clear. We are only interested if we move the hearing on the motions filed on behalf of AIG and Marquee.

Please confirm and we will inquire with our client.

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

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 4:08 PM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com
Subject: Re: St. Paul

Right. Move the hearing on our motion and your cross motion to November.

On Oct 4, 2019, at 3:51 PM, William Reeves <wreeves@mfrlegal.com> wrote:

No interest in splitting the hearing date on your motions. Move everything to November?

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

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 3:46 PM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com
Subject: Re: St. Paul

We move the hearing date to an workable date for the parties and the Court in November. Your reply is due on a November date of your choosing (or by five days before the new hearing date). Our opposition to your countermotion is due October 21. When you free up today, do you want to discuss?

Jeremy

On Oct 4, 2019, at 3:35 PM, William Reeves <wreeves@mfrlegal.com> wrote:

As stated, tied up.

What do you propose?

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280

Concord, CA 94520
(925) 288-1776

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 3:20 PM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com
Subject: Re: St. Paul

We would like to discuss a briefing schedule for your counter motion that would give you a reply and move the October 15 hearing.

Can we talk today for five minutes? Let me know what time works for you.

Thank you,

Jeremy

On Oct 4, 2019, at 3:14 PM, William Reeves <wreeves@mfrlegal.com> wrote:

Unfortunately tied up. What's up?

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

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 2:45 PM
To: wreeves@mfrlegal.com
Cc: nsalerno@heroldsagerlaw.com
Subject: St. Paul

Bill,

Are you free this afternoon for a very brief call? We have a quick question for you. You can reach me at 310.428.1867.

Thank you,

Jeremy

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:

REPLY TO OPPOSITION TO PLAINTIFF'S COUNTERMOTION

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:

Michael Edwards
Messner Reeves
8945 West Russell Road Ste. 300
Las Vegas, NV 89148

Nicholas Salerno
Herold & Sager
550 Second Street, Suite 200
Encinitas, CA 92024

Jeremy Stamelman
Keller Anderle
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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 10, 2019

William Reeves

Electronically Filed
10/24/2019 2:00 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE
TUESDAY, OCTOBER 15, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

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

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, October 15, 2019

[Case called at 10:05 a.m.]

MR. REEVES: Your Honor, William Reeves for Plaintiff. I have a -- I used the Court's application for some illustrative exhibits.

THE COURT: Okay.

THE CLERK: Mr. Reeves, your Bar number, please?

MR. REEVES: 8235.

THE CLERK: Thank you.

MR. REEVES: So I have it here on my phone. I don't know whether I did it correctly or not.

THE CLERK: Did you send exhibits by email?

MR. REEVES: No. I used the court's app. My partner did it last week, so there's --

THE COURT: Oh you mean to use the audio visual?

MR. REEVES: Yes.

THE COURT: So we'll just need to turn that on, Kerry.

MR. SALERNO: Is this something that we've seen? Are these existing exhibits?

MR. REEVES: Yeah.

MR. DEREWETZKY: Good morning, Your Honor. Mark Derewetzky, also appearing on behalf of Plaintiff, St. Paul. Bar number is 6619.

MS. KELLER: Good morning, Your Honor. Jennifer Keller, appearing on behalf of National Union and Marquee, and I'm appearing

pro hac vice.

THE COURT: Thank you.

MR. SALERNO: Good morning, Your Honor. Nick Salerno for National Union and Marquee, as well.

THE COURT: Thank you.

Okay. So at this point in time then -- so in just a minute here we're going to get the system up and running.

MR. LOOSVELT: Your Honor, Ryan Loosvelt for Aspen. I'm just observing today.

THE COURT: Understood. Thank you, sir.

Is the system booted up here? I guess not.

MR. REEVES: I did press play, and I did the code, 1004.

THE CLERK: Did you already hit play?

MR. REEVES: I did. And it's not that important. I mean --

THE CLERK: Let's see.

MR. REEVES: -- a couple choice pages.

[Pause]

THE COURT: But you said you have paper you could just put on the Elmo?

MR. REEVES: Yeah. There's no need to wait.

THE COURT: All right. Okay. All right. So if that's going to work then just to use the Elmo to do anything on display instead of the electronic -- okay, great.

So then we will proceed then. We have two motions on. We have Defendant Roof Deck's motion for summary judgment, and

Defendant National Fire Union's motion for summary judgment. Both have been exhaustively briefed. We have an opposition and counter motion on the duty to indemnify. Okay.

So at this point in time, I don't know which one it makes more sense to start with. As I said, they've both been thoroughly briefed and reviewed. So I don't know who wants to start.

MR. REEVES: Well, it doesn't much matter to us. I do think there's a clean separation between the AIG National Union piece, and then the Cosmo Marquee piece. And so I would defer to the Court in terms of how --

THE COURT: Yeah.

MR. REEVES: -- it wants to do that.

THE COURT: So I want to start with the Roof Deck.

MS. KELLER: Well, we -- yeah, sure. We could -- we're going to split the argument, Your Honor, if we can.

THE COURT: Oh okay.

MS. KELLER: So I'll do St. Paul, and my colleague will do Roof Deck.

THE COURT: Okay. Go ahead.

MR. SALERNO: Good morning, Your Honor. Given that this has been argued and briefed, Your Honor, a couple times now, this is the third time, I'll be brief on my opening points and reserve for reply, if I may. But the primary thing I'd like to point out here that I am seeing in the opposition that's been submitted is the faulty notion on the part of St. Paul that our argument is premised on the belief that Cosmo had to

be a signator or bound by the night club management agreement.

Our position is not based on that. We think that's true. Our position though is just based on the fact that that's the operative agreement that they're trying to subrogate under. They've now clarified it's under the tentative third-party beneficiary status, which actually puts them in the same place no matter how you look at it.

Nevada law is clear that as an intended third-party beneficiary, you don't get to pick and choose the parts of the contract that suit you and favor your position and discard the ones that you don't saying you're not bound by them. That's simply not how it works. There's two aspects of the nightclub management agreement. And that's the -- we cite those cases for Your Honor in our reply; the *Gibbs* case and the *Canfora* case. Pretty long established Nevada law that as an intended third-party beneficiary, you're strapped with the terms of the contract.

This contract has two provisions that are fatal to the claims against Marquee, which Your Honor is probably familiar with by now. There's the subrogation waiver provision, which is part of the insurance requirements on the part of both parties. And Cosmo tries to distinguish themselves by saying they're not bound by those. Even if that were true, which it's not because they're bound by the terms of the contract and the subrogation waiver requirements, which are found in its insurance policy, you have an express indemnity cause of action that they're trying to subrogate to. And by its very express terms, that express indemnity provision only applies to losses that are not covered by insurance.

The other aspect of Cosmo's opposition seems to be that it only thinks that that aspect of the express indemnity provision, which is found in provision 13.1, applies if it's insurance required to be maintained under the nightclub management agreement. We've gone through our papers, and I'll reserve on reply if necessary to clarify this. But why the St. Paul policy is insurance that was required to be maintained under this -- the nightclub management agreement. They took on the obligation to procure it. They're part of the definition of the owner policies. And in fact, that's the insurance that applied, and has the subrogation waiver provision that was required under the nightclub management agreement.

Just as importantly though, Your Honor, if you look at provision 13.1, the express indemnity provision that they're trying to subrogate under, it only applies to capital L losses. And losses is a defined term in the nightclub management agreement. If you look at the nightclub management agreement on page 9, which is Bates stamped page T-72, it defines losses as any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses, and disbursements of a person not reimbursed by insurance. So the term itself, "losses", under the expressed indemnity provision is a loss not paid by insurance, not reimbursed by insurance.

There's no dispute in this case that all the money at issue that was part of the settlement in the underlying case was funded by insurance. So no matter how you look at this equation, these claims -- the claims that they're trying to seek against Marquee are barred by the

subrogation waiver provisions of the nightclub management agreement, and under the expressed terms of the expressed indemnity provision that they're trying to subrogate under. That's the main point I would like to emphasize before my reply points. As to the contribution -- on the expressed indemnity cause of action.

As to the contribution cause of action, there seems to be another faulty notion on the part of St. Paul, that the contribution cause of action is permissible as an alternative cause of action in the event they don't prevail on the expressed indemnity cause of action. And that's also not how it works under the uniform contribution act, Your Honor, and under the *Calloway* case that we cite for Your Honor.

In the *Calloway* case, the court made very clear not only that common law causes of action like contribution, but also common law causes of action like equitable indemnity, cannot be pursued by a party who is contracted under express indemnity rights. And it's not if you win under your express indemnity rights; it's if there's the mere presence of an express indemnity arrangement that the party is contracted for. That's what governs.

You don't get your cake and eat it, too. And if you fail under what you've contracted and bargained for, you get an additional bite at it under a common law cause of action. The Calloway case makes that very clear. And I'll just reserve for a reply, Your Honor.

THE COURT: Okay. Thank you.

MR. SALERNO: Thank you.

MR. REEVES: Your Honor, when we were here with you

before, you -- and this is our third time around on this stuff. We pointed out, and Your Honor agreed, that Cosmo is not a party to the agreement; it's a party to portions of the agreement that it agreed to be a signatory to.

Let's just see if this works. Do I need to do something?

THE CLERK: Hit that little pod behind there -- that little square that has the blue light on the backside of the -- okay. Thank you.

MR. REEVES: All right.

THE COURT: And then you just need to focus.

THE CLERK: Yeah. Hit the auto focus button. I think that's what it's called.

MR. REEVES: Auto focus? Auto tune?

THE CLERK: Yes, auto tune.

MR. REEVES: There we go. All right. So in order to be assistive, I came up with titles for everybody. And so we've got the operator; that's Marquee. We've got the master tenant; and that's the LLC, and that's a signatory to the agreement. And then we've got Cosmo; and that's the property owner.

And so this Court was -- had pointed out previously and was intimately aware that the agreement first of all, is between Master tenant and Marquee, not Cosmo. And then relative to Cosmo, it was a signatory, but only as to limited provisions. And what you haven't heard from counsel is that any of those provisions bear upon anything that's going on today. So they haven't said that Cosmo by virtue of acknowledging and agreeing to any of these provisions bear on any of

this.

So I see repeated efforts to conflate Master tenant and Cosmo, and they're separated entities, and they're treated separately. And they're -- by virtue, that there are different obligations, duties, and remedies that flow from each.

Let's go first of all to the common law claim. We have pled in the disjunctive that Cosmo is entitled to indemnity pursuant to the expressed indemnity provision, not as a signatory, but as an intended beneficiary. But in the alternative, we've pled that Cosmo is entitled to indemnity by virtue of statute, and that's 17.225. And by virtue of that latter, we moved to file a counter-motion. And the counter-motion is premised on the concept that we have joint tortfeasors, at least the verdict form suggests that. And the verdict form is not crystal clear relative to what liability Cosmo faces. But the Court said it was non-delegable duty, and so it's vicarious.

And 17.225 says that where you have joint tortfeasors, then you can work out a portion between them, because that was never adjudicated in the underlying case. And we've pointed out that there's no facts that Cosmo had -- did anything in this. It was simply the owner of the real estate and wasn't -- had no active role out there.

And so what I hear counsel say is that well, you don't get the benefit of that because you're bound by the contract. And I'm not understanding that because if I'm -- if Cosmo is not a signatory to the contract -- and I'll put the first page up for you, if you'd like. And again, this is Exhibit A I'm pulling from. And again, we have owner and

operator. Owner and operator; that's Marquee and Master tenant. That's who the agreement is between. You have Cosmo mentioned as the project owner, but they're not a party to the agreement. The agreement is between Marquee and Master tenant.

And so by virtue of that, not being a party to the agreement, there's no -- we're not trying to do an end around here relative to any of this. Rather, we're trying to work within the law. And the law is that if you are a signatory and you're bound by expressed indemnity provision, then that's your exclusive remedy. But if you're not bound by it, but rather you're -- you get the benefit of it, but you're not bound by it, then you can pursue recovery in terms of the contribution -- the statutory act.

And in that regard, we move for summary judgment. And if this Court were to grant summary judgment as to the statutory claim, I'd abandon the expressed indemnity claim. It's superfluous. It simply adds on. I don't -- I'm going to address counsel's argument relative to the expressed indemnity claim, but let's be clear, Cosmo, because it's not a party to the agreement, has the right to seek recovery per statute. It is doing so in this case. It has made a prima facie showing that it did nothing out there; that all the conduct was by Marquee. And it's unrebutted. And there's not even a request for discovery on that point.

THE COURT: But isn't there a -- under gaming law, an obligation on the part of -- you called them project owner -- the licensee -- the gaming licensee to exercise a certain amount of control over their tenants?

MR. REEVES: Not to my knowledge, Your Honor. Certainly

not argued. But more importantly, where we're weighing the --

THE COURT: Well, there is. So I mean, as a matter -- and that's what I think was the issue for Judge Johnson, was under Nevada gaming law, the licensee of the casino -- the all-encompassing licensee has obligations to the public. And --

MR. REEVES: Fair enough.

THE COURT: -- their -- any of their tenants, they have a non-delegable duty over their tenants to make sure that the public is protected because they're the gaming licensee. And if they have a tenant who does something that be violative of Nevada gaming law that would get the licensee in trouble, then the licensee has an obligation to exercise control over that.

MR. REEVES: And relative -- understood and agreed. Relative to that obligation, is that a primary obligation, or is that a secondary obligation as it bears upon Marquee? Because in the underlying case where we're dealing with the public, and that which you are articulating, that which Judge Johnson held, is that you may have delegated operation of the club --

THE COURT: Right.

MR. REEVES: -- but you're still on the hook. But then you get over to the statute -- the contribution statute, and it says all right, now we're going to look at the relative fault of the parties. And again, this is an issue that was not tested in the underlying case. There was no cross-claim between Marquee and Cosmo. There was one lawyer that represented both.

THE COURT: Uh-huh.

MR. REEVES: And so that's what we're here doing. We are now going now to the next step. What is the relative fault between Cosmo and Marquee? We filed a counter-motion on the basis that the relative fault is -- it's all on Marquee because Cosmo didn't do anything.

So as it pertains to the general public, understood and agreed. And that's what the underlying case was about. But this is our round two litigation. This is now dealing with the fallout from an adverse result and a very substantial settlement. And relative to that, and relative to our counter-motion, we're pointing out to this Court that if you're weighing culpability, liability between Marquee and Cosmo, it all falls on Marquee. It doesn't fall on Cosmo whatsoever.

And again, I can't stress this enough. There's no contrary evidence. There's no request for discovery. It is a pure legal issue as framed by the undisputed facts that are before this Court. And so we would ask this Court to certainly rule on the motion, and relative to what's before it, grant the motion.

THE COURT: All right. So that's with respect to your counter-motion?

MR. REEVES: It certainly is.

THE COURT: Okay. So -- all right.

MR. REEVES: So relative to the thrust of their motion, which is that the -- first of all, I went to the contribution of the statute and I pointed out that it's in the disjunctive because we're not a signatory to the management agreement. When I say that, Cosmo is not a signatory

to the management agreement. And so it's not bound by the management agreement.

But even within the management agreement, expressed indemnity applies because the only carve out is insurance required under the agreement. And if Cosmo is not bound to obtain insurance, then it is not insurance required by the agreement. I could show you that provision, as well. And again, I'm pulling from Exhibit A. And it's -- the key point is here, "and not otherwise covered by the insurance required to be maintained hereunder".

THE COURT: Okay.

MR. REEVES: No obligation of Cosmo to get any insurance in this agreement. It didn't obligate itself to do so. It's not addressed in it. So by virtue of that, the indemnity -- and again, you haven't heard counsel say the indemnity doesn't apply. What you've heard is that the carveout, or the manner in which it's taken away applies. The indemnity applies. What we're quibbling over is is it taken away because it's covered by insurance. And the answer is no, because the St. Paul policy was not insurance required to be maintained hereunder. And so contractually, Marquee, master tenant didn't obligate Cosmo to get insurance. And because of that, it falls outside of it, and we get the expressed indemnity.

But again, it's -- we state in the disjunctive they're elected remedies. And you know, maybe the cleanest way is to deal with the statutory claim because again, the evidence before this Court is that Cosmo had no active role out there.

We'll submit, Your Honor.

THE COURT: Okay. Thank you very much.

MR. SALERNO: Your Honor, we've said repeatedly that the express indemnity provision doesn't apply by its terms. I'm looking at the same provision as I mentioned. The term "Losses" is capitalized with an L.

THE COURT: Uh-huh.

MR. SALERNO: Your Honor seems familiar with that. That's a defining term. I probably don't need to show you the definitions. So by its express terms, express indemnity does not apply. And whether they are a signatory to it or not doesn't matter. They are part of the owner indemnities defined in there. So that's the provision they're attempting to subrogate under, and that provision doesn't apply. The express indemnity claim fails because it only applies to losses that are not covered by insurance.

Further, the intent is clear where it has this additional language, otherwise covered by insurance required to be maintained here under it, that's an end. So we've gone through the analysis here with the lease agreement attached. I'll spare Your Honor pulling those out and showing them to you. I have the impression you've done that, but Cosmopolitan took on the obligation to procure the insurance required by the owner in the lease agreement attached to the nightclub management agreement.

So there's no question that that's the party's intent, and no question that that's the insurance required to be maintained hereunder,

and there's no legal dispute that the St. Paul policy has the subrogation waiver provision that further corroborates that intent by all the parties. In other words, Cosmopolitan complied. They obtained insurance with the subrogation waiver provision.

It sounds like St. Paul is now backing off that position and focused more on the contribution cause of action. That contribution claim fails because this is what the parties bargained for. They're included in the definition of owner indemnities. They've even tried to proceed under this provision, although now they're trying to back away from it.

And the law is clear in Nevada under *Calloway* and the Uniform Contribution Act that where there's an existing express indemnity arrangement -- not whether you prevail under it, but if it exists, that's what governs, and that's what we have here. Further, on top of that the law in the *Calloway*, expressed in the *Calloway* case, the contribution statutes provide that contribution is not available to a party who has been found liable for an intentional tort.

I don't think there's any dispute here either that the verdict -- this is what's been argued by St. Paul, it was issued jointly and severally against Cosmopolitan and Roof Deck, Marquee, that included intentional torts, like battery, assault, and false imprisonment. There's just no question here that contribution is not a viable cause of action, both because there's an express indemnity provision which governs, and therefore precludes that ability, which by the way, precludes the ability to proceed under equitable indemnity too, and under the statute because

of the intentional torts.

As far as this cross-motion, I've had trouble following today exactly what it is, as we did with the papers. They're mixed together. When counsel says there's no facts that have been raised, I don't know what facts they're relying on. I don't know what cause of action it's based on. They've talked about this active passive distinction. They nowhere frame in their motion -- and it's procedurally defective and fatally deficient in that regard -- they don't say what claim or defense it pertains to, and that's because it doesn't pertain to any claim or defense.

The active/passive distinction has been discussed in the long line of Nevada law in the equitable indemnity context. That's your Piedmont Equipment's, your Black & Decker's, your Medallions. When you look at those cases, they all talk about the importance of the active/passive distinction of being one element in the ability to pursue an equitable indemnity. For all the reasons we've discussed, they don't have the ability to pursue equitable indemnity because there's an express indemnity provision.

There's nothing in this express indemnity provision that mentions an active/passive distinction. They don't say why it matters. They've asked Your Honor to find that there's an obligation on the part of Marquee to indemnify Cosmo that St. Paul can subrogate into, but they don't say why. They're asking the Court to find, as a matter of law, a factual question that is disputed, that there's an active/passive distinction that was never determined or addressed in the underlying case by their own admission. They don't say what evidence supports that. It's

impossible for us to oppose that. There's no separate statement.

There's not even an indication of what evidence they're relying on, but the bottom line is that the active/passive distinction, Your Honor, is only relevant under Nevada law to equitable indemnity claims. It's not relevant to a contribution claim. Contribution claims involves comparative fault where it applies and where it's available.

You can pursue equitable indemnity and shift all of the fault in Nevada, which follows the distinction. Some jurisdictions have abandonment between equitable indemnity and contribution, but in Nevada, you can pursue equitable indemnity and shift all the fault, and sometimes a portion of fees and costs, if one party is only passively at fault.

Those issues have not been properly presented to you, Your Honor. It's not a cause of action they have. They don't have a cause of action for equitable indemnity. They have one for express. And they're not able to pursue a cause of action for equitable indemnity for all the same reasons they can't pursue contribution. The *Calloway* case actually dealt with that precise argument, and *Calloway* made it clear. In *Calloway*, the argument -- the decision in the District Court was that the express indemnity provision in the permit application was a contract of adhesion, so it didn't apply.

So it wasn't a situation in *Calloway* where they lost on express indemnity, so they were able to pursue equitable indemnity or contribution. The Court said no. You have -- this exists, you bargained for it. You don't get equitable indemnity, you don't get common law

remedies.

So I don't know what this counterclaim -- what this counter-motion even pertains to. It's not properly brought. What evidence are they relying on?

THE COURT: All right. So in looking at the complaint, since your point is what causes of action are -- and this is the amended complaint. Fourth cause of action subrogation against the AIG insurance contract only.

MR. SALERNO: That's AIG.

THE COURT: Statutory subrogation contribution against Marquee.

MR. SALERNO: Right.

THE COURT: Sixth cause of action, subrogation express indemnity against Marquee.

MR. SALERNO: Right. Those are the two.

THE COURT: And then equitable estoppel against the carriers.

MR. SALERNO: Correct.

THE COURT: Then let me see. What's our next cause of action? Oh, okay. Eighth is equitable contribution against, again, AIG only, and then we have the prayers for relief, so.

MR. SALERNO: And so the two causes of action --

THE COURT: Uh-huh.

MR. SALERNO: -- against Marquee -- and I'm only addressing those. My colleague will address the others.

THE COURT: Right. Uh-huh.

MR. SALERNO: Is the contribution and the express indemnity, which I have addressed. This active passing thing that they've sort of made up from what I -- the best I can tell, haven't fit to any cause of action, haven't said what evidence is undisputed that supports it, has no bearing on any of their causes of action. If they had a claim for equitable indemnity that was permissible, it would have a bearing on that, but they don't have a claim for equitable indemnity, nor can they for all the reasons we've discussed. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. REEVES: May I respond, Your Honor?

THE COURT: Yeah.

MR. REEVES: Thank you. *Calloway*, Your Honor, is a case where a party was bound by what it had agreed to. Cosmo is not a party to the management agreement. That is the core distinguishing factor, and the reason I separated out the causes of action is because counsel is continuously arguing that Cosmo is a party to the management agreement. I continuously hear that, and Cosmo is not. And so for purposes of everything that's going on here, let's assume -- you know, let's distance ourselves from the express indemnity and just focus on the contribution claim -- the statutory contribution claim. Cosmo is not a party to the agreement.

In terms of our counter-motion I just -- you know, we gave this Court a binder, and hopefully it received it.

THE COURT: Yeah.

MR. REEVES: I think we've got A through V in there. I'm looking at our paperwork here, and we have a fact section, background facts, it begins on page 3. We cite to portions of the appendix, declaration validating the exhibits. I'm not understanding, procedurally, what is amiss here, and I fear that's an effort to simply throw things against the wall, much like this active/passive. The thrust of our position is not active/passive.

THE COURT: Uh-huh.

MR. REEVES: It's no evidence of any conduct. Cosmo did nothing. And so by virtue of doing nothing, it made them liable because of non-delegable duty, but by doing nothing, it was entitled to contribution from Marquee. And again, you're not hearing contrary evidence. You're hearing what are the facts, what are the facts.

Well, what are the facts? The facts are that there are no facts that Cosmo did anything. I cite to the briefs filed in the underlying case, that Marquee filed, so Marquee says, Cosmo did nothing, Cosmo did nothing. And so then to come here and suddenly, there's no evidence, there's no evidence. Well, I've got your own admissions. I've got your own representations. I've got trial testimony from Marquee's representative. And so I'm at a loss to understand what it is procedurally that is missing. I'm asking for a ruling regarding duty. Motion for summary judgment, partial summary judgment, is appropriate as to duty.

So again, core points we wish to make. Cosmo is not a party to the management agreement. It is certainly an intended third-party

beneficiary, but it's not a party to it, and it's therefore not bound by it, and it is therefore not barred and solely seeking recourse through the contract. Contribution claim is based on undisputed evidence for which there's no request for discovery, and I -- counsel was just up here, and he didn't say he needed discovery on it. He raises procedural issues, which I don't understand, but there's nothing substantive. Cosmo did nothing. It is entitled to reimbursement for what it was saddled for by virtue of how this case played itself out. We'll submit, Your Honor.

THE COURT: Okay.

MR. SALERNO: Your Honor, counsel raised a new issue just now. May I address that?

THE COURT: Okay. And then certainly, if you have a response --

MR. REEVES: What new issue did I raise?

MR. SALERNO: That they're moving on duty.

MR. REEVES: Yes. It's in our paper.

MR. SALERNO: That's not in your papers.

MR. REEVES: Yes, it is.

MR. SALERNO: Show me where.

THE COURT: In the counter-motion?

MR. REEVES: St. Paul's counter-motion presents a pure legal issue, given that it's undisputed that Cosmo's liability in the underlying matter was derivative from Marquee's act of negligence.

MR. SALERNO: Where's the word "duty"?

MR. REEVES: Cosmo is entitled to be indemnified by

Marquee. Duty.

MR. SALERNO: Entitled is not duty.

MR. REEVES: Entitle is not duty?

THE COURT: Okay.

MR. SALERNO: Anyways, may I be heard --

THE COURT: Okay.

MR. SALERNO: -- on that, Your Honor?

THE COURT: So --

MR. REEVES: What? I didn't use the magic word?

THE COURT: Here we go. On 9/27, this is the Plaintiff's opposition to the motion for summary judgment by Marquee in counter-motion, duty to indemnify --

MR. REEVES: Thank you, Your Honor.

THE COURT: -- in the caption.

MR. SALERNO: May I address that?

THE COURT: Okay. Sure.

MR. SALERNO: We've had an opposition and a counter-motion that don't delineate anything from each other. We don't know what's an opposition point intended to be a materially disputed fact that goes to the opposition, and what goes to the counter -- there's no delineation. So it's impossible for us to know what they claim we need discovery on. We've submitted objections to every piece of their so-called evidence, their counsel's declarations, and some transcript testimony from the underlying case. I don't know if Your Honor wants to address those independently, but counsel still hasn't sat here before and

said what evidence they think supports this duty --

MR. REEVES: Happy to do --

MR. SALERNO: -- claim.

MR. REEVES: -- so, Your Honor.

MR. SALERNO: May I just complete?

THE COURT: Well, you'll have the final word.

MR. SALERNO: Yeah. And what does duty go to? What cause of action? It's not part of the express indemnity cause of action. It's not part of the contribution cause of action. So they're asking for relief that has no relevance and bearing to any claim or defense in this case. They don't outline for Your Honor -- setting aside all of these procedural problems, these evidentiary problems -- they don't outline how that goes to any claim or defense in any way.

THE COURT: So you would say that that's not relevant to the fifth cause of action, statutory subrogation contribution for NRS 17.225 against Marquee only?

MR. SALERNO: The element -- duty is not an element of contribution.

THE COURT: Duty can be --

MR. SALERNO: And contribution has many more elements than duty. And I don't know what facts they're even relying on to say that there was a duty and that we breached the duty. That's a negligence thing. It can come into play in other causes of action. It can be an element, but that's the problem with what they've done here with their opposition and counter-motion. I just -- we don't know what they're

moving on, and what facts it's based on, what elements, claims, and defenses.

MR. REEVES: All right.

THE COURT: Thank you.

MR. REEVES: Briefly?

MR. SALERNO: Thank you, Your Honor.

THE COURT: Yes. Uh-huh.

MR. REEVES: I'm reading from page four of our brief on the counter-motion.

MR. SALERNO: The opposition or the counter-motion?

MR. REEVES: Again, page four, line 22. "In joint filings made on behalf of Marquee of Cosmo, Marquee conceded that Cosmo had no express or implied authority to control the Marquee nightclub, such that Mauradi was not a business and invitee of Cosmo." It's appendix, Exhibit P, page 5, line 20, through page 6, line 4.

"Given this, Marquee conceded that Cosmo was, at most, an alleged passive tort fees with no active role in any aspect of the operations of the Marquee Nightclub." That's appendix, Exhibit O, page 4, line 27, through page 5, line three. See also Exhibit N. Page four, line 26. Page 5, line 1. "Trial testimony from the Marquee representative was in accord. In accord that Marquee alone, and not Cosmo, operated or managed the Marquee Nightclub." And I've got a cite there. And that's Exhibit O --

THE COURT: Uh-huh.

MR. REEVES: -- page 3, line 15 through page -- or through

line 24. So --

MR. SALERNO: May I address the objections to his evidence.

MR. REEVES: Stop. Stop. I'm still talking.

THE COURT: Please don't interrupt each other, counsel, please.

MR. SALERNO: I'm sorry, I thought you were done.

THE COURT: So, yeah.

MR. REEVES: I don't know what we're doing here, Your Honor.

THE COURT: All right. And perhaps you can clarify because with respect to -- if we're talking about Marquee, the fifth cause of action against Marquee is statutory subrogation for contribution pursuant to NRS 17.225, and then the sixth cause of action is subrogation for express indemnity against Marquee only.

MR. REEVES: Agreed.

THE COURT: So --

MR. REEVES: Within those two causes of action, there are duty --

THE COURT: Which are disjunctive.

MR. REEVES: -- yes, which are disjunctive.

THE COURT: Pled in the alternative. Okay. Right.

MR. REEVES: Yes.

THE COURT: Uh-huh.

MR. REEVES: And so we're seeking an adjudication as to duty under either.

THE COURT: And so when you say duty, because counsel pointed out, the duty is kind of like -- I'm not exactly sure it's an element of either contribution or subrogation. So duty -- but duty to indemnity.

MR. REEVES: Yes.

THE COURT: How does that relate to contribution? I understand your concept under express indemnity, but how does it relate to contribution?

MR. REEVES: My client paid a substantial amount of money on behalf of Cosmo. My client is entitled to be indemnified for that sum. It is entitled to be reimbursed. These are words that I'm using interchangeably relative to what we are seeking. We are seeking an award of money that was paid on behalf of Cosmo, and so the motion -- because the dollars are subject to protective order, and the dollars are not pled in the complaint.

THE COURT: Right.

MR. REEVES: We're moving for partial summary judgment that Marquee is under an obligation to reimburse St. Paul for the sums that it paid on behalf of Cosmo. I characterize that as a duty, duty to indemnity, but it could very well easily say entitled to reimbursement.

THE COURT: Okay.

MR. REEVES: A right to reimbursement.

THE COURT: Thank you.

MR. REEVES: A right to reimbursement.

THE COURT: Thank you. All right. Great. Thanks. All right. So yes, with respect to --

MS. KELLER: St. Paul, Your Honor.

THE COURT: -- St. Paul. Uh-huh.

MS. KELLER: So as the Court pointed out, there are four causes of action against National Union brought by St. Paul. The second cause of action for subrogation, three, bad faith, the fourth cause of action for subrogation re: breach of contract, the eighth for equitable contribution, which was pled in the alternative in the second and fourth. And the seventh cause of action for equitable estoppel, which can't and doesn't seek money damages.

So the key issue, I think, overall -- and we were talking about this when we were here way back toward the beginning of the year is can an excess insurer in one tower subrogate against an excess insurer in a different tower? And at the time, the Court didn't have the policy, the St. Paul policy in front it, but now it does. So it's very clear that as to Marquee, Aspen is primary and sitting on top of it is National Union. And as to Cosmo, Zurich is primary and sitting on top of it is St. Paul. They're on an equal level in different towers.

So, no Nevada State Court case has ever recognized this or even recognized subrogation between any two insurers. More importantly, no case in any jurisdiction has ever recognized subrogation between two excess carriers on the same level in different towers. So if the Court denies the motion for summary judgment, this Court, I guess would be the first in the nation to recognize such a possibility. And I think it's pretty clear what the policy reasons are against it and why we haven't even found a case nationwide where anyone has even asked for

that. We haven't found a case where an excess insurer in a different tower has even asked for subrogation against an excess in a different tower.

THE COURT: Well, it seems that the dispute here is you define your relationship as coequal excess carriers in separate towers and they don't view it that way. They define it differently. So is that issue a question of fact or a question of law?

MS. KELLER: It's a question for the Court. It's a question of law.

THE COURT: Okay.

MS. KELLER: And the Court has the policies. And I think the Court recognized that last time, Your Honor, in your order. You said based on the record before the Court at this time, there appear to be no material questions of fact and the only issues remaining are purely questions of law and that's why you denied without prejudi -- you denied the motion to dismiss without prejudice to raise these issues in a motion for summary judgment. That's what it said in the order.

So now, the Court has the relevant policies from both. They're properly before the Court. So there's no factual dispute about what they say. Therefore, it's a pure question of law. So there's no question by their terms as to what they are. You know, the -- our learned opponents can say whatever they want, but the law is the law. The policy is the policy. And one is primary, and one is excess in each tower. So it would be launching off in a new territory that from a policy point of view would be disastrous.

You really would never have finality of settlements anymore. You'd have carriers settling and then immediately attacking each other, much as happened here. If the Court -- if there's anything more sacrosanct than the public policy in favor of settlements, I'm not sure what it is. We do everything humanly possible to facilitate them and to promote them. And --

THE COURT: And so -- but isn't that their whole complaint is that there was an opportunity to settle this case and it was missed and therefore, a greater loss was suffered than the case could have settled for $1.5 million at one point in time. Instead, it -- the jury verdict was for $145 million. Settlement was for some dollar amount less, which we will not discuss in public.

MS. KELLER: And if they were excess coming after primary --

THE COURT: Uh-huh.

MS. KELLER: -- they'd be right. The Colony case that they cite, which is the only Nevada case. It's not really a Nevada State Court case, but a federal case, that was the case where a district court, for the first time that we could find in Nevada, did find the ability to subrogate between two insurance carriers, but one was primary, and one was excess. And it was sort of a classic subrogation in terms of the type we see in California, which is the primary, for lack of a more elegant term, screwed around.

THE COURT: Uh-huh.

MS. KELLER: There was clear liability. It was a driver of a

truck owned by a company that was insured by the primary and the excess. Clear liability. The person sustained really bad injuries and the primary carrier didn't bother to settle it. Just kind of screwed around and screwed around and screwed around. Several demands were made within policy limits and they said no. Finally, after the person had had three back surgeries and was in horrible, constant pain and the tab was escalating, finally the primary settled.

But by now, the demand was in excess the policy and the excess had to pick up that excess and they then turned around and said hey primary, you were driving this train and you refused to settle. You could have gotten rid of this a long time ago. Our loss is directly attributable to you. And had they been standing in the shoes of the insured, the insured would have faced that additional loss. So that's kind of classic, excess against primary. That's where you see these claims.

Or in one case that they cited from Illinois, you had a stack of excess carriers, but they were all in the same stack. That was four excess carriers and they were essentially seeking subrogation, because again, the primary carrier didn't settle within limits and they all ended up getting triggered. But it was a straight up stack. And I think the reason for that is because generally speaking, the lower carrier, the primary carrier, is the one so-called driving the train.

They're the one providing the defense. They're the one with the ability, if there is an ability to settle within policy limits early, they're the ones who have it. But you have never -- there isn't a single case in the whole country, where you have excess versus excess in two different

towers. And the only multiple excess in the same tower subrogation case they cited you was that one Illinois case I talked about. So this is -- these are uncharted waters.

And if something this dramatic is going to happen, where you're never going to have as among insurance carriers any sort of finality, where they can all come after each other and there's going to be a may lay, there will be endless litigation after the litigation that was supposedly settled, then that's something that should be done by the legislature or it should maybe be decided by the Nevada Supreme Court. But I don't think that a trial Court should be creating this new law, which is going to have such a potentially dramatic impact.

So back to the causes of action. The equitable contribution claim that St. Paul -- that's they're alternative theory. No Nevada State Court has recognized equitable contribution between two insurers. Equitable contribution doesn't allow for the recovery of damages beyond the limits of the insurer's policy and it's undisputed that National Union here paid the full policy limit. So that can't survive.

And what about causes of action two and four? St. Paul can't sue National Union for breach of contract. They didn't have a contract. National Union and St. Paul had no contract. So similarly, St. Paul can't sue National Union for bad faith, breach of the duty to settle. It owed no such duty. And that -- you know, when we're -- we can't really start using the term duty interchangeably with a whole bunch of other duties, when it's a term of -- a whole bunch of other terms, when it's a term of art. National Union did not owe St. Paul a duty to settle.

And so that's why St. Paul is attempting to shoehorn these unfounded subrogation theories into the so-called stepping into the shoes of Cosmo. But again, they have to invent subrogation claims that don't exist in Nevada. So -- and I think if you look at the St. Paul opposition to our motion, Your Honor, they cite Nevada State cases that have nothing to do with subrogation between insurers. Every one. Let alone between two excess insurers, let alone two excess in different towers.

The *Lafroncini* [phonetic] case they cite is subrogation between two mortgagees. *American Sterling Bank*. That was subrogation between mortgage lien holders. *AT&T Technologies* was employer verses employee. *Federal Insurance Company*, surety verses bank. *Globe*, surety versus contractor. *Fountainblow* was a mechanics lien case and *Lumberman's* was an insurer against a subcontractor.

St. Paul has got a duty to provide authority, if we're going to talk about duty.

THE COURT: Well, isn't it a well-established principal in Nevada that there's no third party bad faith, which is essentially what they're trying to create here?

MS. KELLER: Yes.

THE COURT: That if this were a car accident, you -- and you were injured in the car accident and I was the person who had the insurance company, you could not sue my insurance company for bad faith?

MS. KELLER: Correct.

THE COURT: It's not your insurance company.
MS. KELLER: Right.
THE COURT: Same thing they're trying to create here, is a right to sue somebody else's insurance company.
MS. KELLER: Under a different guise.
THE COURT: Yeah.
MS. KELLER: Yes.
THE COURT: Instead of bad faith, they're calling in indemnity or subrogation. But that's Nevada policy.
MS. KELLER: Yes.
THE COURT: Okay.
MS. KELLER: That's right.
THE COURT: Thanks. All right. Fine. Thanks.
MS. KELLER: And --
THE COURT: Anything else?
MS. KELLER: -- just very quickly, if I could have a second, Your Honor --
THE COURT: Sure.
MS. KELLER: -- to see if there's anything we have missed. Does the Court have any additional questions for me?
THE COURT: No. I think that that was the one I wanted answered. I think I had -- oh, that there's no -- that's why I asked about the question of fact. I think you answered that one, that we don't have a Choi affidavit, so we don't know what issues of fact there would be, but your position being there really aren't any issues of fact. This is purely a

question of law for the Court. So that was the one that I wanted to determine, that this whole question of equity -- this is all just questions of law. We don't have any fact questions here.

MS. KELLER: I think that's correct, Your Honor.

THE COURT: All right. Great.

MS. KELLER: If the Court has nothing further.

THE COURT: Yeah. And then there's just this distinction -- no. And I'll talk to counsel about -- because it's just this distinction between the two different parties as to how they distinguish or how they identify two equal but separate towers versus this -- but somehow they're in the same -- I'll ask counsel to explain that.

MS. KELLER: Well, they're trying to interpret the nightclub management agreement in such a way as to somehow implicate us.

THE COURT: Yeah.

MS. KELLER: And they can't do that, either. I mean, the -- it's pretty much blackletter law that the insurance policy governs. Two individuals can't make an a -- let's say that the agreement was what they said it was -- and it isn't. But let's say it were. The two individuals can't contract between themselves to create obligations for insurance carriers that don't exist in the polices.

THE COURT: Right. Thanks.

MS. KELLER: The insurance contract is paramount.

THE COURT: Got it. Thank you.

MS. KELLER: Thank you, Your Honor.

THE COURT: Counsel.

MR. DEREWETZKY: Good morning, Your Honor. Not exactly sure where to begin. On the issue of whether there's third party bad faith in Nevada --

THE COURT: Right.

MR. DEREWETZKY: -- this isn't a third party bad faith case, Your Honor.

THE COURT: Yeah, but that's what -- it's analogous. I -- it --

MR. DEREWETZKY: No, it's not actually analogous in any way.

THE COURT: Okay. All right.

MR. DEREWETZKY: Cosmopolitan is an insured under National Union's policy. It's Cosmopolitan's bad faith claim that we're seeking to subrogate to. It's a claim by the insured against its own carrier, not a third party claim at all. It seems that a key issue in his motion is going to be whether there are any factual questions or whether --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- everything can be resolved as a question of law. The -- National Union cited a case in its briefs called *Travelers Casualty and Surety v. American Equity Insurance Company,* 93 Cal App 4th 1142, and this is in the context of cases that are trying to determine the priority of coverage, Your Honor, the issue of which tower things go in and who goes first. And the case they cited says all courts will assess whether the factual circumstances create a relationship between the indemnity contract and insurance allocation issues. It is a

factual question and we raise at least three different factual issues that have to be decided by the Court.

Your Honor, in the management agreement, the management agreement itself provides that all insurance coverage maintained by Marquee will be primary to any insurance coverage maintained by any owner insured parties. There is an indemnity provision in the management agreement that flows from --

THE COURT: Okay. But owner. How are we defining owner? Because as it was pointed out, there is the project owner versus the owner that's defined in the management contract.

MR. DEREWETZKY: Well, it refers to owner insured parties, Your Honor --

THE COURT: Okay.

MR. DEREWETZKY: -- so parties that are insured by the owner.

THE COURT: Okay.

MR. DEREWETZKY: There's the indemnity provision in the management agreement. There's a dispute between National Union and St. Paul about whether the indemnity agreement has any effect on the relation between the parties. This is the area where National Union cited the *Travelers* decision. One of the key distinguishing factors -- well, there's -- I don't want to say there's a split of authority. They're actually cases that go make a variety of different conclusions about the priority of coverage under California law.

THE COURT: Uh-huh.

MR. DEREWETZKY: We cited the *Rossmore* decision and *Mt. Holly v. Hartford* and some other cases for the proposition that under certain circumstances, the Court should look to the indemnity provision, because otherwise what happens is the result is contrary to the intent of the parties with respect to who bears the responsibility for an incident or claim.

One of the things that is said in the *Travelers* policy that -- *Travelers* case that National Union relies on is there was language in the policy that says nothing here shall be construed to make this policy subject to the terms, conditions and limitations of other insurance, reinsurance or indemnity. That provision, which the Court in Travelers relied on heavily, is not in the National Union policy. So we can distinguish the *Travelers* case in many ways from the arguments that are being made.

One of the other key distinctions in the cases cited by National Union and the cases we cite, Your Honor, is that our case involves not only the insurance companies, but the insureds as well. We have a claim, subrogated claim by the insured, Cosmo, against the insured, Marquee, based on indemnity principals. And that is a key distinction in how you look at whether indemnity provisions will be considered in determining the priority of coverage. The -- our argument, Your Honor, is there's one tower of coverage for Cosmopolitan.

THE COURT: Uh-huh.

MR. DEREWETZKY: There can only be one tower of coverage. And the coverage goes Aspen, National Union and then the

St. Paul policy on top. The St. Paul policy is excess. And Your Honor, I was not here. I didn't have the benefit of being at the hearing last week, but it's my understanding that the Court denied Aspen's motion for summary judgment on the subrogation claims that were brought against it by St. Paul.

THE COURT: I just said I wasn't going to hear them.

MR. DEREWETZKY: I'm sorry?

THE COURT: I didn't deny them. I just said I wasn't going to hear them. We -- because we -- my concern here was were, they going to be seeking a 54(b) ruling on the decision, such that we would need to certify that and that would go up. So then I felt like we shouldn't get into the whole issue of their subrogation claim. That seemed premature to me, so I said I wasn't going to consider those -- that part of the motion.

MR. DEREWETZKY: The countermotion granted only as to coverage. I'm just reading from the --

THE COURT: Right. Uh-huh.

MR. DEREWETZKY: -- minute order. And what was the Court's decision with respect to the --

THE COURT: Because -- my question to them was are you going to be appealing this? Do you need a 54(b) certification?

MR. DEREWETZKY: Is Aspen going to apply? I thought you were asking --

THE COURT: No. Your client. Was your client going to be appealing it? So based on that, then it just seemed to me that going forward with this issue, this question on of the Aspen subrogation issue,

which is very different, seemed premature, if we -- if they were -- because they hadn't made a determination whether you were going to seek a 54(b) certification on that with respect to Aspen.

MR. REEVES: He had understood -- with the feedback we got, he had understood you were -- that question was posed as to number of limits and so your 54(b) question was directed to--

THE COURT: Right. Exactly.

MR. REEVES: But --

THE COURT: And so then that's why I said I just -- I wanted to know if that was going to be -- if they were going to seek 54(b) certification on the limits.

MR. REEVES: Yes.

THE COURT: If so, then it seemed like we needed to figure that out before we got into this whole issue of subrogation.

MR. REEVES: he had understood you found questions of fact otherwise, so this is new information to us.

THE COURT: No. I said -- I wanted to know what was going on with the 54(b) certification on this question of limits, because it seemed like we wouldn't want to get into the all the subrogation, if we first had to take the subroga --

MR. REEVES: I guess he wanted to get into --

THE COURT: -- take the 50 --

MR. REEVES: -- all the subrogation, so --

THE COURT: Yeah, well, I didn't, so.

MR. DEREWETZKY: Well, Your Honor, one of our additional

arguments in opposition to the National Union summary judgement motion on subrogation is that it was the intent of the parties, as evidenced by the conduct in the case --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- that the National Union policy would pay first, and the Cosmopolitan policy would pay second. And that's evidenced by all kinds of conduct, including the fact that AIG did not even provide notice to St. -- to St. Paul until February, when the case was set for trial in March that National Union didn't provide notice of opportunities to settle within the limits, not of our policy, but of the National Union policy. They wanted to control the defense. They wanted to control the case. And that is contrary to the idea that they thought that our policy was co-insurer with theirs. If it had been, they would have behaved differently any number of ways.

THE COURT: And so -- and so that's -- in talking to counsel, I think it was kind of like the key distinction between your analysis of the case, and their analysis of the case. Their analysis of the case is two very separate and distinct, separate towers. There's no right to sue across those towers, for any kind of contribution indemnity, anything, because they're separate towers. So your view, as to why this should be considered one tower is course of dealing?

MR. DEREWETZKY: Our view is that the -- it says so in the management agreement. It says so in the indemnity agreement. There's caselaw to the effect that the indemnity agreement should be enforced under the circumstances of this case, and that there's a course of

conduct, and course of dealing. And, Your Honor, Your Honor asked me a number of times when we were here previously for Rule 16 conferences, whether I thought there would be a necessity for discovery.

THE COURT: Uh-huh.

MR. DEREWETZKY: And I said I needed to see the papers. Now that we've seen the papers, there are three places in our opposition where I specifically asked for discovery on a number of issues. Counsel complains about my declaration, because it misstates facts, I don't have sufficient knowledge, et cetera and so forth, well, I've been prevented from doing any discovery whatsoever, Your Honor. It's as if we're still at the pleading stage. We haven't done any discovery at all. We haven't had the right to do anything.

So it's a little disingenuous for counsel to argue that I don't have sufficient knowledge to state facts, when I haven't had the opportunity to go get the people with sufficient knowledge to state those facts.

THE COURT: Okay. So then looking at your declaration, starting at the bottom of page 5, which is the, in support of the request for relief under 56(d), the issues are the number of issues with respect to which discovery is requested, AIG's retention of a single set of lawyers to defend Marquee and Cosmo jointly without seeking a conflict waiver. Express and implied representation by AIG that its policy would respond prior to St. Paul's. So this makes it de facto excess. Whether St. Paul had a reasonable opportunity to settle the underlying action. I mean I don't know what discovery would be necessary on that one. AIG's

history of pursuing subrogation claims, where it has paid the loss on behalf of its insured.

So are you talking about other cases where AIG has pursued the same --

MR. DEREWETZKY: Oh, yes, Your Honor. They make -- they take the position that subrogation is this bizarre unicorn thing that nobody knows anything about it. I want to discover what they do with subrogation claims, and how many they've brought in Nevada.

THE COURT: And then concealment of the settlement offer, and then generally concealment of -- like just not disclosing this earlier to avoid interference in their defense? So those are --

MR. DEREWETZKY: Those are what I know based on no discovery to date. That's -- that's where we stand --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- at the moment. And, you know, there's a lot of case law also in this jurisdiction that where a summary judgment motion is brought early in the litigation, a Rule 56(d) motion for additional time should be granted, as a matter of course.

THE COURT: Okay. Anything else?

MR. DEREWETZKY: Just let me check my notes, Your Honor, if you don't mind. On the issue of contribution, Your Honor, we're sort of in the same boat as the other motion. They're pled really in the alternative. If there is a finding that we're co-insurers, co-insurers are entitled to equitable contribution between themselves. The fact that there's no case in Nevada that says that, so far, is probably attributable

to the fact that insurers don't really want to find out what the Nevada Supreme Court would say about it. But in my practice, everybody behaves as though contribution is the rule.

That's all I have, Your Honor.

THE COURT: Okay. Thanks.

MS. KELLER: Well, starting with last first, we did complain about counsel's declaration. We did think that it was full of things that had nothing to do with legal issues in this case. It is -- it's interesting that St. Paul seems to take the position that gosh, we're just this poor little company that was just relying on National Union to handle everything for us.

And yet they were co-equal excess carriers with the same amount of -- ultimately paid the same amount in settlement. We're not going to go into what that is, but it was identical. If they decided to at some point save money by sitting back and not paying sufficient attention, that's their problem. They were not primary.

And you notice that in discussing the tower, Your Honor, Zurich has disappeared. They said Aspen was primary and then -- you know, and then St. Paul, and then -- anyway, Aspen -- Zurich is gone. Zurich doesn't appear anywhere. The reason is because Zurich was primary for Cosmopolitan. And so they don't want to mention that, because they were excess to Zurich.

At any rate, we continue to object to the declaration. We think it's -- it is -- has zero to do with the legal issues that are before the Court, which have to do with those policies. Counsel mentioned contract

damages, and stepping into the shoes, and all that. There can't be any claim for a contract breach, without contract damages. Because this is an insurance case, damages for breach of a policy are limited to the policy benefits owed, Defense and indemnification costs.

St. Paul doesn't dispute Cosmo's lack of contract damages. Cosmo's defense was fully paid for. Cosmo's indemnification settlement was fully paid for. Cosmo contributed no money to the defense or the settlement. So St. Paul is seeking extracontractual damages for alleged bad faith duty to settle. Those tort damages are not recoverable under a breach of contract theory. And even if St. Paul could step into Cosmo's shoes, it would only get the remedies as Cosmo. Cosmo has no contract damages. If Cosmo were to sue National Union, it would get nothing. It couldn't get anything. How could it sue for bad faith, when everything was paid?

So no contract damages are available to St. Paul through subrogation. You can't -- it again is exactly what Your Honor pointed out earlier, it's a backdoor attempt to get bad faith damages on a third-party basis. That's all it is. Because Cosmo has no contract damages.

MS. KELLER: Thank you, Your Honor.

THE COURT: Okay. Thanks.

MR. DEREWETZKY: Yeah, very briefly, Your Honor.

THE COURT: Okay. I'm going to let counsel have the last word. It's your motion.

MR. DEREWETZKY: The whole idea of contact damages as framed by National Union is a complete red herring. We've now briefed

this issue for the Court any number of times. Subrogation is based on the fact that the insurance company pays on behalf of the insured, and then has the insured's rights to pursue somebody else. No insured ever has any damages in a subrogation cases. It's the way that subrogation operates that, you know, the insurance company pays, and then has -- assumes the rights to go over the liable third-party.

In this case, Your Honor, the liable third-party is the insurance company, National Union AIG, which failed to take its insured Cosmopolitan out of harm's way. One issue that sort of hasn't been explored completely, Your Honor, is the argument that we can't get contribution because the National Union policy is exhausted. Our position, and we can develop that in discovery, is that National Union improperly exhausted its limits because it failed to pay on behalf of Cosmopolitan.

It paid everything on behalf of Marquee. It had to have paid everything on behalf of Marquee, because St. Paul has no obligation to Marquee. And if anything was not paid as to Marquee, then it wouldn't have -- the case wouldn't have settled.

So the exhausting argument has no legs, and we can develop that further in discovery.

THE COURT: Thanks again. And the final word.

MS. KELLER: Exhaustion, Your Honor, being developed in discovery is that -- speaking of red herrings, that's another legal issue for the Court. The Court's got all the information before it. There isn't going to be a magical new witness popping up with any additional information.

MR. REEVES: We submit it.

THE COURT: Thank you. Okay.

On the surface this appears to be very complex. I don't think it is. I think it's actually a really simple question. Because Judge Johnson found a non-delegable duty on the part of Cosmo, which, you know, I believe, and although not articulated, that he's going back to gaming law. The obligation of a gaming licensee over their tenants. These nightclubs have been a particular problem in the state for gaming licensees for many years. That's a non-delegable duty. We know that.

So I believe that that really is the basis of how the rest of this falls out. Because Judge Johnson found that duty, I'm -- because I know I read these letters, and I saw where early on in the case, they're like oh, well, Cosmo didn't do anything, they're going to get out on summary judgment. No, they're not. No, they're not. You're wrong about that.

So maybe that set everything off on -- you know, maybe they were looking at it wrong from the beginning. But very clearly, Cosmo had its own obligations. I understand the argument that it boils down to this question of well, do we have two towers or one tower here. With all due respect, I believe we have two separate towers of insurance. These are totally separate towers, and I appreciate you don't like my analogy to third-party bad faith, but that's essentially what it is. You can't sue somebody else's insurance company. They don't owe you any duty. I get the point that what we have here is a problem in that National Union initially, or Aspen, whoever it was, took on the joint defense of Cosmo and -- when it was tendered and Marquee. And they only used one

attorney. I don't believe that creates a question of fact, with all due respect. I think they were obligated to -- you know, to take on that joint defense. But Aspen does have its own independent issues.

Should they have had a separate attorney? Well, maybe they should have. But I don't know that that necessarily gives rise to any kind of a cause of action to recover here. They could have demanded that, and they didn't. So that's how it proceeded, fine. It came out in a way that I don't think anybody anticipated. I think pretty much everybody -- everybody in this building was kind of shocked. It's a very large verdict. But I think that it just all starts with that simple question of who's being sued here.

And I understand that Cosmo was not being sued directly as, you know, Cosmo, but there is still an obligation. And it's a duty owed to the public, because they're a gaming licensee. So that's I think where Judge Johnson was coming from, and where he said he felt they just had a non-delegable duty and that even though early on they were -- it carries the registry, don't worry, they didn't do anything, that duty creates this problem for us, that then carries through that litigation and into this litigation. I think it's two completely separate towers of insurance. You cannot sue somebody else's insurance company.

And so for that reason I'm going to grant the motion with respect to National Union. I'm going to also grant the motion with respect to Marquee, because again -- and part of the problem we had early on is we didn't have complete agreements. And I do believe now that we have -- everything is complete. I didn't see anybody alleging that

you didn't really give us the full operating agreement. You didn't really give us your full insurance policy. That was our problem early on, is that we didn't have policy. We didn't have agreements. We've got it all now. It's really well documented, as I said. Exhaustively briefed, and fully -- every single potential exhibit is here.

I do not see that we have any questions of fact here. I think these are all issues of law in the end. And the duty, as I indicated, I believe that it could go all the way back to this operating agreement. There is -- they all had separate insurance. And that's what was intended. So I didn't see that they were acting as if they somehow had created an obligation through their actions, that one of the excess carriers was more excess than the other excess carrier.

You're going to say that. If I'm the first lawyer of excess, you're going to say that in your agreements. And there's nothing here that says -- as was pointed out, there was a primary and an excess for Cosmo, and a primary and excess for Marquee. It wasn't primary, excess one, excess two, excess three. It wasn't like that. It wasn't set up that way. It was set up as two completely separate towers.

So for that reason, I'm granting both the motions and denying the counter-motion. You finding -- and again, here's my -- my question. Now I think we're down to my question from last week, because we only had Aspen last week. Now my question is, do we have 54(b), because technically -- and that's the reason why I didn't want to get into this whole issue of their subrogation problems last week, because it was just them.

I'm assuming we're going to have an appeal. That's why I said everything is here. Everything is in this file. So that's my question. Is where are we on all that? Because --

MR. SALERNO: Your Honor, if I may clarify that question. And attempt to answer it.

THE COURT: Yeah.

MR. SALERNO: Did you view the ruling as to Aspen to be dispositive of the claims against Aspen?

THE COURT: That's why -- that was my question. Was like is it -- is this just a question of it's just -- they just want to know if they have a million dollar policy, or do they have this other issue. Since we hadn't looked at this yet, that -- it made me uncomfortable making a ruling in that -- in that case, totally in a vacuum --

MR. SALERNO: Yeah.

THE COURT: -- not having looked at this other part of the case.

MR. SALERNO: Because we would be a 54(b) is Aspen is not getting out completely. If they are, then it's just -- it's not.

THE COURT: And so that's, I guess the question. And that's why I asked. I just --

MR. SALERNO: We asked -- we asked them to address that.

THE COURT: I didn't know where we left them and we -- because they were done separately, it was a -- I just felt it was awkward at that point in time to get into all of these issues with Aspen when we hadn't looked at any of these issues for these other carriers. And

because they are primary.

MR. SALERNO: Are you going to -- maybe a related question. Are you going to ask us to prepare findings?

THE COURT: Yeah. Yes.

MR. SALERNO: So --

THE COURT: And that's why -- that was my question --

MR. SALERNO: -- and we're going to have to --

THE COURT: -- about 54(b).

MR. SALERNO: -- include a 54()b) in that event.

THE COURT: That was my question. Was, you know, where are we now with this, because I think you're going to -- you're going to need --

MR. SALERNO: I think it's our preference to do --

THE COURT: -- assuming you're going --

MR. SALERNO: -- a 54(b). We don't want to get locked up in whatever dispute remains with Aspen. And if it ends up being that that ruling carries over to be completely dispositive as to Aspen, then the whole case is over at that point.

I think that's the proper way to do it. Ours should be a 54(b). It can go immediately up for appeal if they still lock horns with Aspen, and they --

MR. DEREWETZKY: I think that's probably right, so that we should have the findings relative to what this Court is ruling today.

THE COURT: Uh-huh.

MR. DEREWETZKY: And then with those -- then extrapolate

from that. So as I understand you're granting their motion relative to Marquee, Cosmo vs. Marquee.

THE COURT: Correct.

MR. DEREWETZKY: So Cosmo vs. Marquee does not survive the motion?

THE COURT: Correct.

MR. DEREWETZKY: Okay.

THE COURT: I'm granting their motion for summary judgment. I'm -- with respect to the operating agreement. I'm also granting the motion for summary judgment on the insurance agreements.

MR. DEREWETZKY: Well, and I guess, just so we're clear, it's Cosmo vs. -- you're -- you're -- Cosmo vs. Marquee. Marquee filed a motion for summary judgment.

THE COURT: Correct.

MR. DEREWETZKY: So Cosmo may not bring a claim against us. And you're ruling in favor of --

THE COURT: Cosmo, correct.

MR. DEREWETZKY: -- Marquee relative to that.

THE COURT: Correct.

MR. REEVES: Both motions.

MR. DEREWETZY: Yes, and St. Paul.

THE COURT: Under that -- under the management agreement. And as I said, early on we did not have complete agreements. We didn't have complete insurance policies, we didn't have

complete operating agreement. It's -- I did not see anybody raise an issue. I know there's -- you objected to each other's questions of fact, and each other's representations in your motions. But I didn't see anybody say that's not the complete operating agreement, or that's not a complete insurance policy. My belief is the problem we had here is we didn't have complete record. I think we have it now.

MR. DEREWETZY: Your Honor.

MR. SALERNO: Oh, go ahead.

MR. DEREWETZY: We have a pending motion before the Discovery Commissioner. I think that your ruling would render that moot, but we're not going to get an order before the hearing, so --

THE COURT: You can --

MR. DEREWETZY: Can we take that off calendar?

MR. SALERNO: We'll go ahead and withdraw it. We have a record of today, so if that comes up for any reason, we'll have a record.

THE COURT: Okay. All right.

MR. SALERNO: We'll withdraw it without prejudice.

THE COURT: Okay. Thanks.

MR. SALERNO: Based on the ruling.

THE COURT: Thanks, yes. And so now we've done this one and that leaves us with Aspen. And as I said, I just was not comfortable last week, because I hadn't even looked at this, so --

MR. SALERNO: Sure. One other housekeeping matter, we had a motion to seal Exhibit 1, it as the micromanagement agreement, and I have an order on that.

THE COURT: Okay. Thank you, yes.

MR. SALERNO: So may I approach?

THE COURT: Yes.

MR. SALERNO: Do you need to see that?

THE COURT: And was that the only thing that we needed to seal, because one of the insurance policies was not redacted. I think it was --

MR. REEVES: I don't think -- I think this is it, Your Honor.

THE COURT: Okay.

MR. SALERNO: At least that's the only we filed.

THE COURT: Okay, because, yeah, I did see that we -- I just want to make sure that we're not -- see, it's sealed for purposes of anybody viewing it publicly, but, of course, it would be --

MR. SALERNO: Yeah.

THE COURT: -- it's available in the record.

MR. SALERNO: In the record. Yes.

THE COURT: And so I want to be really clear. We've got a complete record because this one -- this is --

MR. SALERNO: Yes.

THE COURT: -- really sure that we've got everything clear in the record.

MR. SALERNO: Yeah, so I would think the transcript today, to the extent it refers to any aspects should be sealed. I don't know if it's easier just to seal the whole transcript.

THE COURT: Nobody --

MR. REEVES: No, the transcript shouldn't be sealed.
THE COURT: We were pretty careful.
MR. REEVES: Yeah. Agreed.
THE COURT: I don't think anybody mentioned anything about policy limits.
MR. REEVES: I don't think there's anything to be sealed.
THE COURT: I think the only time it was mentioned was that they were equal policy limits, and they paid equally. But nobody mentioned --
MR. REEVES: No, counsel --
THE COURT: I think we're -- I'm pretty sure we were careful. If you get the transcript and you have a concern about it, and you want to seal it, you can certainly ask after the fact. I don't think we need to seal it. I think that everybody was really careful.
MR. SALERNO: And, Your Honor, I want to clarify, too, that our motion included request for attorney's fees, on behalf of Marquee, the prevailing party under the Nightclub Management Agreement.
THE COURT: That would be a separate -- I would have to look at that as a separate motion.
MR. SALERNO: It's part of our motion. Do you --
THE COURT: Right, but because we need all the documentation on that --
MR. SALERNO: So right now I have a motion for fees and costs.
THE COURT: They have the right then to oppose it.

MR. SALERNO: Very good.

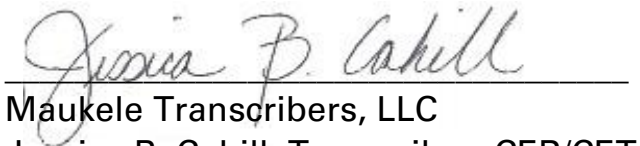
MR. REEVES: Thank you, Your Honor.

MR. SALERNO: Thank you, Your Honor.

THE COURT: Okay.

[Proceedings concluded at 11:27 a.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.



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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1-25; inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT. NO.: XXVI **STIPULATION AND ORDER TO STAY DISCOVERY AND STAY OR VACATE TRIAL** **(First Stipulated Request for Stay of Discovery Deadlines)**

IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY ("Plaintiff" or "St. Paul"), and Defendant, ASPEN SPECIALTY INSURANCE COMPANY ("Defendant" or "Aspen"), by and through the undersigned attorneys of record, to stay discovery and trial pending resolution of Aspen's Renewed Motion for Summary Judgment Regarding the Viability of Plaintiff's Claims. This is the first

stipulated request for a stay. Discovery between Plaintiff and Aspen was previously stayed until two weeks after the notice of entry of the order on Plaintiff's Motion for Partial Summary Judgment against Aspen and Aspen's Countermotion for Summary Judgment. The order on those Motions is still pending.

I. GOOD CAUSE FOR A STAY

The defendants initially filed motions to dismiss Plaintiff's Complaint. The motions were granted, and Plaintiff filed an Amended Complaint. The defendants again filed motions to dismiss the first amended complaint, and the Court denied them without prejudice ruling among other things that it wanted to make sure the full verified policies were submitted. The defendants filed answers, the parties' policies were served, and motions for summary judgment were filed.

Plaintiff moved for partial summary judgement against Aspen to determine the policy limits of the Aspen insurance policy concerning the underlying Moradi lawsuit. Aspen countermoved for summary judgment on the same issue, as well as countermoving for summary judgment as to the viability of Plaintiff's claims as a matter of law.

Defendants NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA ("National Union") and ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB ("Marquee") then also moved for summary judgment as to the viability of Plaintiff's claims against them.

Plaintiff's Partial Motion against Aspen, and Aspen's Countermotion, were scheduled for hearing and heard one week prior to the hearing on the other defendants' Motions for Summary Judgment. At the hearing on Plaintiff's Partial Motion against Aspen, and Aspen's Countermotion against Plaintiff, the Court determined and ruled on the policy limit issue amongst them, but deferred ruling on the viability of Plaintiff's claims until it heard and ruled on the other defendants' Motions for Summary Judgment being heard on week later.

One week after the hearing on the Plaintiff-Aspen Motions, the Court then granted National Union's and Marquee's Motions for Summary Judgment as to the viability of Plaintiff's claims, and invited Aspen to submit a renewed Motion as to the viability of Plaintiff's claims, now that it had ruled on the other defendants' Motions.

Aspen and Plaintiff submitted competing orders to the judge for signature for their respective motions, and National Union/Marquee and Plaintiff submitted competing orders to the judge for signature for their respective motions. To date, no summary judgment orders have yet been entered by the court, and expert deadlines are approaching though little to no discovery has been conducted.

While the parties' summary judgment motions were pending and before ruling thereon, the Court stayed discovery between St. Paul and Aspen until two weeks after the summary judgment order was entered. The other defendants filed motions to stay with the discovery commissioner because at the time of the court's status hearing, their motions for summary judgment were not on file yet.

Expert deadlines are approaching though discovery has not been conducted in light of the dispositive motions. The expert deadline per the Scheduling Order was April 1, 2020. However, the Court's administrative order dated March 20, 2020 due to the Coronavirus COVID-19 emergency, stayed all deadlines 30 days. The new expert deadline is therefor currently May 1, 2020.

The Court will still have to rule on the viability of the claims against Aspen which could obviate the need for any discovery, experts, and related discovery considerations. Aspen intends to, and also stipulates hereby, to file its Renewed Motion for Summary Judgment on the viability of Plaintiff's claims within two weeks of the entry of both pending orders on the defendants' motions for summary judgment (i.e, two weeks from notice of entry of the latter order to be filed), since the renewed motion concerns the rulings in both orders.

Consequently, Plaintiff and Aspen agree to stay discovery, deadlines, and trial pending notice of entry of the Court's order on Aspen's Renewed Motion for Summary Judgment as to the viability of Plaintiff's claims. Should there be claims remaining after such order, Plaintiff and Aspen will submit a new proposed discovery schedule and deadlines to the Court.

The parties submit there is good cause under EDCR 2.35(a) for a stay of deadlines because Aspen's Renewed Motion is potentially dispositive of the remaining claims in this action which may obviate the need for any discovery.

II. EDRR 2.35(b) CONSIDERATIONS

(1) A statement specifying the discovery completed;

No discovery has been conducted by Aspen or the other defendants. The Court stayed discovery between Plaintiff and Aspen pending the ruling on their competing summary judgment motions, which is still pending but expected to be entered anytime. Aspen will be filing a Renewed Motion concerning the viability of Plaintiff's claims.

Plaintiff served written discovery against Aspen which became the subject of the above-referenced stay while pending, and thus responses have not yet been submitted given the stay. Plaintiff also served two subpoena duces tecum before the stay was entered and have subsequently disclosed the responsive documents.

No other discovery has been conducted.

(2) A specific description of the discovery that remains to be completed;

If Aspen's Renewed Motion for Summary Judgment on the viability of Plaintiff's claims is granted in full, no discovery will be necessary as there will be no remaining claims in this action. If Aspen's Renewed Motion is not granted in full, then full discovery will have to be undertaken including written discovery, subpoenas, depositions, and expert disclosures.

(3) The reasons why the discovery remaining was not completed within the time limits set by the discovery order;

St. Paul and Aspen filed dispositive motions and discovery was stayed pending resolution of those motions. The orders on those motions are still pending.

(4) A proposed schedule for completing all remaining discovery;

	Scheduling Order Deadlines	30-Day Admin. Stay Deadlines	Proposed Deadlines
Expert Disclosure	04/01/2020	05/01/2020	STAYED
Rebuttal Disclosure	05/05/2020	06/05/2020	STAYED
Discovery Cutoff	08/01/2020	09/01/2020	STAYED
Dispositive Motions	09/05/2020	10/05/2020	STAYED

(5) The current trial date;

Trial Date:	Proposed Trial Date:
February 15, 2021	STAYED / VACATED

IT IS SO STIPULATED.

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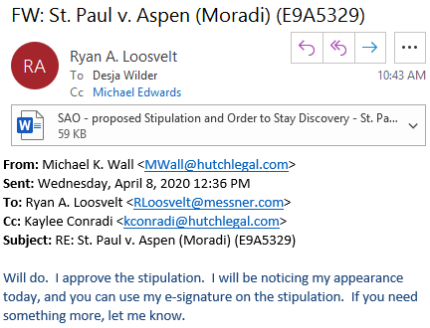
FW: St. Paul v. Aspen (Moradi) (E9A5329)

RA Ryan A. Loosvelt
To Desja Wilder
Cc Michael Edwards
10:43 AM

SAO - proposed Stipulation and Order to Stay Discovery - St. Pa...
59 KB

From: Michael K. Wall <MWall@hutchlegal.com>
Sent: Wednesday, April 8, 2020 12:36 PM
To: Ryan A. Loosvelt <RLoosvelt@messner.com>
Cc: Kaylee Conradi <kconradi@hutchlegal.com>
Subject: RE: St. Paul v. Aspen (Moradi) (E9A5329)

Will do. I approve the stipulation. I will be noticing my appearance today, and you can use my e-signature on the stipulation. If you need something more, let me know.

ORDER

Based upon the stipulation of the parties and good cause appearing therefore,

IT IS HEREBY ORDERED that the discovery deadlines shall be STAYED pending notice of entry of the Court's Order on Aspen's Renewed Motion for Summary Judgment concerning the viability of Plaintiff's claims.

IT IS FURTHER ORDERED that Aspen shall file its Renewed Motion for Summary Judgment concerning the viability of Plaintiff's claims with two (2) weeks after notice of entry of the orders on the parties' pending motions for summary judgment. The Renewed Motion shall be filed within two (2) weeks of notice of entry of the latter of the two such orders being entered and noticed.

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IT IS FURTHER ORDERED that if Aspen's Renewed Motion does not dispense or resolve all remaining claims in this action, the parties shall submit a stipulation with new proposed discovery deadlines.

IT IS FURTHER ORDERED that trial of this matter is STAYED / VACATED and will be reset, if necessary, after the parties submit the stipulation with new proposed discovery deadlines, if necessary, and resolution of Aspen's Renewed Motion.

IT IS SO ORDERED.

DATED this 13th day of April, 2020.

DISTRICT COURT JUDGE

Respectfully Submitted by:
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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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT

Defendant National Union Fire Insurance Company of Pittsburgh PA's ("National Union") Motion for Summary Judgment ("MSJ") came on for hearing on October 15, 2019 in Department XXVI of this Court, the Honorable Gloria Sturman presiding. Nicholas B. Salerno of Herold & Sager and Jennifer L. Keller of Keller/Anderle LLP appeared for Defendant National Union, William Reeves and Marc J. Derewetzky of Morales Fierro & Reeves appeared for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and Ryan A. Loosvelt of Messner Reeves LLP appeared for Defendant Aspen Specialty Insurance Company ("Aspen").

The Court, having reviewed and considered the pleadings and papers on file,[1] having heard and considered argument of counsel, and good cause appearing, hereby GRANTS National Union's Motion for Summary Judgment.

On October 15, 2019, the Court issued a minute order granting National Union's Motion for Summary Judgment. However, the Court's decision set out herein is not based solely on the contents of the minute order but includes the entire record on file herein. The Court hereby issues the following Findings of Facts, Conclusions of Law and Order.

I.

FINDINGS OF FACT

A. The Underlying Action

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

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[1] The pleadings and papers reviewed and considered by the Court include, among other things, National Union's Motion for Summary Judgment, National Union's Request for Judicial Notice in Support of Motion for Summary Judgment, National Union's Appendix of Exhibits in Support of Motion for Summary Judgment, Declaration of Nicholas B. Salerno in Support of Motion for Summary Judgment, Declaration of Richard C. Perkins in Support of Motion for Summary Judgment, St. Paul's Opposition to Motion for Summary Judgment and Request for Discovery Per NRCP 56(d), St. Paul's Response to Statement of Undisputed Facts, St. Paul's Consolidated Appendix of Exhibits in Support of Opposition to Motions for Summary Judgment, Declaration of Marc J. Derewetzky in Support of Opposition to Motion for Summary Judgment, Declaration of William Reeves in Support of Opposition to Motion for Summary Judgment, National Union's Reply in Support of Motion for Summary Judgment, and National Union's Objections to Facts Not Supported by Admissible Evidence Filed in Support of Opposition to Motion for Summary Judgment and Request for Discovery Per NRCP 56(d).

2. 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. (FAC ¶¶ 6-7.)

3. 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.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id*. ¶ 9, Exhibit A.)

5. Aspen, who issued a primary insurance policy to Marquee, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union, who issued an excess policy to Marquee, subsequently appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

6. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for the conduct of Marquee by breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

7. The Court held in the Underlying Action that that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers." and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (*See* Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.)

8. 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 and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the

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judgment would have been joint and several against Marquee and Cosmopolitan. *See* NRS 41.141(5)(b). (FAC, Ex. C.)

9. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

10. Aspen and National Union as the primary and excess insurers of Marquee, and Zurich American Insurance Company and St. Paul as the primary and excess insurers of Cosmopolitan, 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.)

11. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money out-of-pocket towards the settlement. National Union on behalf of Marquee and St. Paul on behalf of Cosmopolitan contributed the same amount towards the settlement of the Underlying Action. (FAC ¶ 67-70.)

12. National Union contends its contribution towards the settlement of the Underlying Action on behalf of Marquee resulted in the exhaustion of the National Union Excess Policy. (MSJ p. 10, Undisputed Fact No. ("UF") 17.)

13. The combined defense of Cosmopolitan and Marquee was funded entirely by Aspen and National Union. (FAC ¶ ¶ 27-28, 35-36.)

B. <u>Insurance Policies</u>

1. The Cosmopolitan Insurance Tower

a. <u>Cosmopolitan's Primary Policy with Zurich American Insurance Company</u>

14. Zurich American Insurance Company ("Zurich") issued commercial general liability policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012 to Nevada Property 1 LLC (the "Zurich Primary Policy"). (FAC ¶ 69; National Union's Appendix of Exhibits in Support of MSJ ("NU Appx."), Ex. 2, W005478.)

15. Cosmopolitan is a named insured under the Zurich Primary Policy. (FAC ¶ 69.) Marquee is not an insured under the Zurich Primary Policy. (*Id.*)

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16. The Zurich Primary Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶ 69; NU Appx., Ex. 2, W005508.)

17. The Zurich Primary Policy provides that Zurich will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 2, W005497 – W005498.)

18. The Zurich Primary Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (*Id.*)

b. Cosmopolitan's Excess Policy with St. Paul

19. St. Paul issued commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013, to Premier Hotel Insurance Group (the "St. Paul Excess Policy"). (FAC ¶ 40; MSJ p. 11, UF 20.)

20. Cosmopolitan is a named insured under the St. Paul Excess Policy. (FAC ¶ 40.) Marquee is not an insured under the St. Paul Excess Policy. (FAC ¶ 41.)

21. The St. Paul Excess Policy contains liability limits of $25,000,000 with each occurrence and $25,000,000 general aggregate. (MSJ p. 11, UF 22.)

22. The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained Limit" that the named insured becomes legally obligated to pay as damages assumed by the named insured under an "Insured Contract." (MSJ p. 11, UF 23.)

23. The St. Paul Excess Policy contains an Other Insurance provision, which provides:

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

(MSJ p. 11. UF 24.)

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2. The Marquee Insurance Tower

a. Marquee's Primary Policy with Aspen Specialty Insurance Company

24. Aspen issued a commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 to The Restaurant Group et. al. (the "Aspen Primary Policy"). (FAC ¶ 15; NU Appx., Ex. 4, ASPEN000032.)

25. Marquee is a named insured under the Aspen Primary Policy. (FAC ¶ 15.)

26. Cosmopolitan qualified as an additional insured to the Aspen Primary Policy with respect to the Underlying Action. (FAC ¶ 24.)

27. The Aspen Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶¶ 17, 23; NU Appx., Ex. 4, ASPEN000033.)

28. The Aspen Policy provides that Aspen will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 4, ASPEN000042.)

29. The Aspen Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (*Id.*)

b. Marquee's Excess Policy with National Union

30. National Union issued commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. (the "National Union Excess Policy") (MSJ p. 10, UF 11.)

31. Marquee is a named insured under the National Union Excess Policy. (FAC ¶ 30.)

32. Cosmopolitan qualified as an additional insured to the National Union Excess Policy with respect to the Underlying Action. (FAC ¶ 33; MSJ p. 11, UF 18.)

33. The National Union Excess Policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. (MSJ p. 10, UF 13.)

34. The National Union Excess Policy provides that National Union will pay on behalf of the insured "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and Advertising Injury to which this insurance applies or because of

Bodily Injury or Property Damage to which this insurance applies assumed by the Insured under an Insured Contract." (MSJ p. 10, UF 14.)

35. The National Union Excess Policy defines Retained Limit, in pertinent part, as the total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance providing coverage to the Insured. (NU Appx., Ex. 1, p. 30.)

36. The policy defines Scheduled Underlying Insurance as the policy or policies of insurance and limits of insurance shown in the Schedule of Underlying Insurance forming a part of the National Union Excess Policy. (*Id.*)

37. Other Insurance is defined in the National Union Excess Policy as a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy. (NU Appx., Ex. 1, p. 29.)

38. The National Union Excess Policy contains an Other Insurance provision, which provides:

> If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the Other Insurance. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

(MSJ p. 10, UF 15.)

39. The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy. (MSJ p. 10, UF 16.)

40. National Union received notice of the Underlying Action against Marquee and Cosmopolitan and provided coverage to Cosmopolitan and Marquee in the Underlying Action under a reservation of rights. (FAC ¶ 35.)

41. Cosmopolitan and Marquee were insured under separate towers of insurance. Cosmopolitan was insured under one of the towers of insurance where it was a named insured under the Zurich Primary Policy and the St. Paul Excess Policy, and under the other tower of insurance

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where Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy that were issued to Marquee as the named insured.

C. St. Paul's Claims Against National Union

42. St. Paul's FAC asserts the following four causes of action against National Union:

1) Second Cause of Action for Subrogation – Breach of the Duty to Settle;

2) Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract;[2]

3) Seventh Cause of Action for Equitable Estoppel; and

4) Eighth Cause of Action for Equitable Contribution.

43. In the Second Cause of Action of the FAC for Subrogation – Breach of the Duty to Settle, St. Paul asserts that National Union breached a duty owed to Cosmopolitan to settle by refusing to settle the Underlying Action in response to pre-trial settlement demands within its applicable policy limits and by failing to initiate and/or attempt settlement prior to or during trial for an amount within the applicable policy limits. (FAC ¶¶ 88-89.) St. Paul further asserts that it is subrogated under its policy and principles of equity to the rights Cosmopolitan possesses directly against its insurers Aspen and National Union for breach of the duty to settle and seeks reimbursement for the amount St. Paul paid towards the settlement of the Underlying Action. (*Id*. at ¶¶ 93-95.)

44. In the Fourth Cause of Action of the FAC for Subrogation – Breach of the AIG Insurance Contract, St. Paul makes similar allegations to those raised in the cause of action for breach of the duty to settle. St. Paul asserts that National Union breached its obligations to Cosmopolitan by failing to provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan, failing to pay all available limits under the National Union Excess Policy to resolve Cosmopolitan's liability, and failing to pay any amount on Cosmopolitan's behalf towards the settlement of the Underlying Action. (FAC ¶ 105.) St. Paul asserts that, unlike National Union, St.

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[2] St. Paul's FAC refers to the National Union Excess Policy as the AIG Insurance Contract.

Paul did not breach its obligations to Cosmopolitan under the St. Paul Excess Policy in connection to the Underlying Action because Cosmopolitan's coverage under the St. Paul Excess Policy did not apply until the Aspen Primary Policy and National Union Excess Policy exhausted. St. Paul claims it was damaged because it was required to contribute to the settlement of the Underlying Action as a result of National Union's breach of its obligations to Cosmopolitan. (*Id*. ¶¶ 108, 111.) St. Paul alleges that pursuant to the express terms of the St. Paul Excess Policy and principles of subrogation, it is entitled to step into Cosmopolitan's shoes and pursue its rights of recovery against National Union for such breach. (*Id*. ¶ 110.)

45. In the Seventh Cause of Action of the FAC for Equitable Estoppel, St. Paul asserts that both National Union and Aspen asserted throughout the Underlying Action "through both words and actions" that their coverage to Cosmopolitan was primary to Cosmopolitan's direct coverage under Cosmopolitan's own policies, including the St. Paul Excess Policy. (FAC ¶ 132.) St. Paul alleges that it and Cosmopolitan's other direct carriers did not participate in the defense or settlement negotiations on behalf of Cosmopolitan based on these representations. (*Id*. ¶ 134.) St. Paul alleges that equity requires that National Union be precluded from claiming that St. Paul and National Union were excess carriers and that St. Paul had the same obligation to resolve the Underlying Action.

46. In the Eighth Cause of Action of the FAC for Equitable Contribution, St. Paul asserts that in contributing to the settlement of the Underlying Action, it incurred amounts in excess of its equitable share and that National Union failed to contribute its fair and equitable share towards the settlement of the Underlying Action on behalf of Cosmopolitan (St. Paul's insured). (FAC ¶¶ 138-139.) St. Paul asserts that National Union is obligated under principles of equity to reimburse St. Paul for the amounts St. Paul contributed towards settlement of the Underlying Action that Aspen and National Union should have otherwise paid. (*Id*. ¶ 141.)

II.

NATIONAL UNION'S MOTION FOR SUMMARY JUDGMENT

47. On September 13, 2019, National Union's filed Defendant National Union Fire Insurance Company of Pittsburgh PA's MSJ. National Union's MSJ asserts that the Second and

Fourth Causes of Action for subrogation fail as a matter of law because the St. Paul Excess Policy is not excess to the National Union Excess Policy, rather St. Paul and National Union are both excess insurers at the same level of coverage in separate towers of coverage with equal obligations to their insured(s).

48. National Union's MSJ further asserts as a separate and independent ground to grant summary judgment that the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract fails as a matter of law because St. Paul has no legal basis or standing to step into the shoes of Cosmopolitan to pursue subrogation for breach of contract against National Union when Cosmopolitan was fully defended and indemnified by the insurers in the Underlying Action and, thus, has suffered no damages under the insurance contract. Additionally, National Union argues that the damages sought by St. Paul are extra-contractual damages that are not available under a breach of contract cause of action.

49. National Union's MSJ further asserts as a separate and independent ground to grant summary judgment that the Eighth Cause of Action for Equitable Contribution fails as a matter of law because National Union exhausted its policy limit in settlement of the Underlying Action and a claim for contribution does not apply to seek extra-contractual damages that fall outside of policy limits.

50. National Union's MSJ further asserts that the Seventh Cause of Action for Equitable Estoppel fails as a matter of law because such a claim is dependent on the legal viability of the other causes of action against National Union, which all fail for the reasons each cause of action against National Union fails as a matter of law.

III.

CONCLUSIONS OF LAW

A. Standard of Review

1. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some

metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. St. Paul's Second Cause of Action For Subrogation – Breach of The Duty To Settle

2. In the Second Cause of Action of the FAC for Subrogation – Breach of the Duty to Settle ("Second Cause of Action"), St. Paul asserts a right of subrogation against National Union on the premise the St. Paul Excess Policy is excess to the National Union Excess Policy. (*see, e.g.,* FAC ¶ 44.)

3. As a threshold matter, the Second Cause of Action fails as a matter of law because the Nevada Supreme Court has never recognized an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

4. The Second Cause of Action also fails as a matter of law for the separate and independent reason that no jurisdiction, let alone Nevada, recognizes an equitable subrogation claim between excess carriers in separate towers of coverage. And this Court is unwilling to be the first to do so.

5. General insurance principles and the subject policies outlined above demonstrate that Cosmopolitan and Marquee are named insureds in separate towers of coverage. Cosmopolitan is a named insured under a separate tower of insurance that includes the Zurich Primary Policy and the St. Paul Excess Policy. Marquee is a named insured under a separate tower of insurance that includes the Aspen Primary Policy and the National Union Excess Policy. Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy issued to Marquee as the named insured.

6. It is well-established that "[p]rimary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability," and that "[e]xcess or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted." *Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co.*, 113 Cal. Rptr. 2d 613, 618 (Cal. Ct. App. 2001) (citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 178 Cal. Rptr. 908 (Cal. Ct. App. 1981); *Carmel Dev. Co. v. RLI Ins. Co.*, 24 Cal. Rptr. 3d 588, 595 (2005) ("[U]mbrella coverage is generally regarded as true excess over and above any type of primary coverage, excess provisions arising in any manner, or escape clauses." (internal quotation marks omitted)).

7. St. Paul issued an umbrella policy to Cosmopolitan while National Union issued an umbrella policy to Marquee. Thus, St. Paul's and National Union's respective umbrella policies remain in separate towers of coverage and, as such, St. Paul and National Union are co-excess insurers that provided coverage to Cosmopolitan at equal levels of coverage under two separate and distinct coverage towers.

8. The St. Paul Excess Policy is a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured, Cosmopolitan. The scheduled underlying insurance to the St. Paul Excess Policy is the Zurich Primary Policy.

9. The National Union Excess Policy is also a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured Cosmopolitan. The scheduled underlying insurance to the National Union Excess Policy is the Aspen Primary Policy.

10. Based on the aforementioned discussions herein, the St. Paul Excess Policy and the National Union Excess Policy contain nearly identical "other insurance" provisions. When two policies contain such language, neither policy shall be excess to the other. *See Everest Nat. Ins. Co. v. Evanston Ins. Co.*, No. 2:09-cv-2077-RLH-PAL, 2011 WL 534007 at *3 (D. Nev. Feb. 8, 2011) (ruling that judgment and defense costs were to be shared equally between insurers that contained the same amounts of limits and both contained Other Insurance clauses providing they were excess

to other available insurance); *CSE Ins. Group v. Northbrook Property & Cas. Co.*, 29 Cal. Rptr. 2d 120, 121-23 (Cal. Ct. App. 1994); *Century Surety Co. v. United Pac. Ins. Co.*, 135 Cal. Rptr. 2d 879, 884-85 (Cal. Ct. App. 2003).

11. The St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. Both St. Paul and National Union had independent obligations to Cosmopolitan, both discharged those obligations by settlement of the Underlying Action, both had the same limits of insurance, and neither is in an equitably superior position to the other.

12. Accordingly, St. Paul's Second Cause of Action For Subrogation – Breach of the Duty to Settle fails as a matter of law.

B. <u>St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract</u>

13. Although St. Paul is not a party to the National Union Excess Policy, in the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract ("Fourth Cause of Action"), St. Paul is pursuing a claim against National Union for an alleged breach of National Union's insurance contract as an alleged subrogee of Cosmopolitan.

14. However, for the same reasons proffered above in concluding that the Second Cause of Action fails as a matter of law, the Fourth Cause of Action must also fail as a matter of law. Specifically, the Nevada Supreme Court has never recognized the viability of an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

15. And even if equitable subrogation claims among carriers were viable in Nevada, for the reasons explained above, the St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. As such, St. Paul cannot pursue any claims against National Union based on an equitable subrogation theory of recovery.

16. The Fourth Cause of Action also fails as a matter of law because Nevada courts have expressly rejected contractual subrogation claims between insurers. In the insurance context, contractual subrogation generally is not applied by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No.

2:12-cv-01727-RFB-NJK, 2016 WL 3360943 at *6 (D. Nev. June 9, 2016). As noted by the *Colony* court, the Nevada Supreme Court has held that contractual subrogation in the context of insurers and insureds may contravene public policy and contractual subrogation may provide for windfalls in the insurance context. *Id.* (citing *Maxwell v. Allstate Ins. Cos.*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986)). As such, St. Paul cannot pursue claims against National Union based on a contractual subrogation theory of recovery.

17. The Second Cause of Action also fails as a matter of law for the separate and independent reason that Cosmopolitan has suffered no contractual damages.

18. General principles of subrogation allow an insurer to step into the shoes of its insured, but the insurer has no greater rights than the insured and is subject to all of the same defenses that can be asserted against the insured. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*, 49 Cal. Rptr. 3d 785, 790-91 (Cal. Ct. App. 2006).

19. A breach of contract claim requires (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *See Contreras v. American Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1224 (D. Nev. 2015) (*citing Richardson v. Jones*, 1 Nev. 405, 409 (1865)).

20. A claim for breach of contract is not actionable without damage. *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished) ("It is beyond cavil that a party must suffer actual loss before it is entitled to damages." (quoting *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1153 (1st Cir. 1992)); *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815, at *4 (Cal.Ct.App. May 18, 2018) (unpublished); *Bramalea California, Inc. v. Reliable Interiors, Inc.*, 14 Cal. Rptr. 3d 302, 306 (Cal. Ct. App. 2004). In the insurance context, damages for breach of an insurance policy are based on the failure to provide benefits owed under the policy. *Morris v. Paul Revere Life Ins. Co.*, 135 Cal. Rptr. 2d 718, 726 (Cal. Ct. App. 2003); *Avila v. Century Nat'l Ins. Co.*, No. 2:09-cv-00682-RCJ-GWF, 2010 WL 11579031 (D. Nev. Feb. 10, 2010). If the insured does not suffer "actual loss" from the insurer's breach of a duty under the policy, there can be no claim for

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damages. *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished).

21. Here, St. Paul alleges that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy and seeks extra-contractual damages for such breach. However, it is undisputed that Cosmopolitan's defense and indemnity in the Underlying Action were fully paid for by insurers. The damages sought by St. Paul are not contract damages suffered by Cosmopolitan due to any failure to provide policy benefits, but are instead an attempt to recoup extra-contractual damages to reimburse St. Paul for the money it was required to pay under its policy in discharge of its separate obligation to Cosmopolitan.

22. It is undisputed that Cosmopolitan was indemnified by National Union when it exhausted its policy limit by participating in the settlement of the Underlying Action. Cosmopolitan's defense in the Underlying Action was funded entirely by insurers. Accordingly, Cosmopolitan suffered no contract damages as a matter of law and, as such, has no viable claim for breach of contract against National Union. As Cosmopolitan has no viable claim for breach of contract against National Union, neither does St. Paul under subrogation principles as it holds no greater rights than Cosmopolitan.

23. The facts of this case are similar to *California Capital*, in which an insurer sued another insurer to recover amounts it paid in settlement (and defense) of its named insureds in an underlying bodily injury action. Like St. Paul, California Capital asserted causes of action against a co-carrier for breach of contract and breach of the covenant of good faith and fair dealing, among others, alleging its named insureds were additional insureds under the defendant insurer's policy and that its named insureds had expressly assigned all of their rights under the defendant insurer's policy to California Capital. 2018 WL 2276815, at *2-4. California Capital alleged the defendant insurer breached its policy by refusing to provide the additional insureds the benefits due under the policy and also alleged defendant insurer breached its obligations of good faith by failing to defend and indemnify the insureds when it knew they were entitled to overage under the policy, withholding payments under the policy when defendant insurer knew plaintiff's claim was valid, failing to properly investigate the insureds' request for policy benefits, and failing to provide a

reasonable explanation of the factual basis for denial of the insureds' claim for benefits under the policy. *Id.* at *4. The trial court held that California Capital had no cause of action for breach of contract or breach of the covenant of good faith and fair dealing because the insureds had sustained no damage as a result of defendant insurer's alleged failure to defend and indemnify them or its failure to settle the claim within its policy limit. *Id.* Given the insureds' defense and post-judgment settlement had been fully paid by California Capital, the trial court found the essential element of contract damages was absent from the breach of contract cause of action such that the insureds had no viable claims to assign to California Capital. *Id.* The trial court further found that California Capital had no direct cause of action against the defendant insurer because it was not a party to defendant insurer's policy. *Id.* at *6. The trial court in *California Capital* found that both insurers provided primary coverage for the loss. *Id.* at *8. The Court of Appeal affirmed the foregoing findings by the trial court and held that California Capital could not pursue assigned claims for breach of contract or breach of the covenant of good faith and fair dealing against the defendant insurer. *Id.* at *1, *30.

24. Like the plaintiff insurer in *California Capital*, St. Paul is not a party to the National Union Excess Policy and has no direct cause of action against National Union for breach of contract or breach of the covenant of good faith and fair dealing. Both St. Paul and National Union had independent obligations to Cosmopolitan, and both insurers discharged those obligations by settlement of the Underlying Action. As such, neither insurer is in an equitably superior position as to the other. Further, given the cost of Cosmopolitan's defense and the post-verdict settlement was fully funded by insurers in the Underlying Action, Cosmopolitan has no contract damages for policy benefits against National Union. Therefore, Cosmopolitan has no viable breach-of-contract claim for St. Paul to step into its shoes to pursue against National Union. Accordingly, St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract fails as a matter of law.

C. <u>St. Paul's Eighth Cause of Action for Equitable Contribution</u>

25. The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of

insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy.

26. The National Union Excess Policy further provides the most National Union will pay for damages on behalf of any person or organization to whom the named insured is obligated to provide insurance is the lesser of the limits shown in the declarations or the minimum limits of insurance the named insured agrees to procure in a written insured contract.

27. Here, National Union exhausted its policy limit in contributing towards the settlement of the Underlying Action.

28. Given the National Union Excess Policy is exhausted, National Union has no further obligation under the policy. *See Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, No. 2:09-cv-01672-RCJ-RJJ, 2012 WL 870289 at *3 (D. Nev. Mar. 14, 2012) (concluding that "once the [limits are] reached, the insurer's duties under the policy are extinguished"); *Deere & Co. v. Allstate Ins. Co.*, 244 Cal. Rptr. 3d 100, 112 (Cal. Ct. App. 2019) (holding that "[a] 'policy limit' or 'limit of liability' is the maximum amount the insurer is obligated to pay in contract benefits on a covered loss." (internal quotation marks omitted)).

29. St. Paul seeks to step into Cosmopolitan's shoes to pursue extra-contractual damages outside National Union's policy benefits based a claim for equitable contribution. However, a claim for contribution is not available to pursue damages from a carrier that is in excess of the carrier's policy limit. Accordingly, St. Paul's Eighth Cause of Action for Equitable Contribution against National Union fails as a matter of law.

D. <u>St. Paul's Seventh Cause of Action for Equitable Estoppel</u>

30. In the FAC, St. Paul asserts the Seventh Cause of Action for Equitable Estoppel ("Seventh Cause of Action"), seeking to preclude National Union from asserting that: (1) National Union's policies were not primarily responsible for the defense and resolution of the Underlying Action; and (2) St. Paul, a non-defending carrier, had the same obligation to resolve the Underlying Action as Aspen and National Union. (FAC ¶ 135.)

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31. Typically, equitable estoppel is raised as an affirmative defense. However, under Nevada Law, equitable estoppel can be treated as an affirmative claim under the appropriate circumstances.

32. To establish equitable estoppel, the plaintiff must prove the following: (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; and (4) he must have relied to his detriment on the conduct of the party to be estopped. *See Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.,* 98 Nev. 609, 614, 655 P.2d 996, 999 (1982); I*n re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-1062 (2005).

33. Because the Second, Fourth, and Eighth Causes of Action fail as a matter of law, including for reasons that are unaffected by National Union's assertions that St. Paul seeks to estop, this Seventh Cause of Action must also fail.

E. St. Paul's Request for Discovery Per NRCP 56(d)

34. True and correct copies of the Nightclub Management Agreement ("NMA") and the St. Paul Excess Policy at issue in this matter have been provided as part of National Union's MSJ. As such, all necessary and potentially relevant exhibits to properly consider and determine National Union's MSJ are included in the moving papers and the record is complete.

35. There remains no genuine dispute of material facts with respect to National Union's MSJ that require further discovery.

36. Accordingly, St. Paul's Request for Discovery per NRCP 56(d) is denied.

F. Certification under NRCP 54(b)

37. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

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38. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting National Union's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of National Union's Motion for Summary Judgment, and the arguments of the parties and good cause existing, National Union's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2019.

Honorable Gloria Sturman
District Judge, Department XXVI

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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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT

Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's ("Marquee") Motion for Summary Judgment ("MSJ") came on for hearing on October 15, 2019 in Department XXVI of this Court, the Honorable Gloria Sturman presiding. Nicholas A. Salerno of Herold & Sager and Jennifer L. Keller of Keller/Anderle LLP appeared for Defendant Marquee, William Reeves and Marc J. Derewetzky of Morales Fierro & Reeves appeared for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and Ryan A. Loosvelt of Messner Reeves LLP appeared for Defendant Aspen Specialty Insurance Company ("Aspen").

The Court, having reviewed and considered the voluminous pleadings and papers on file,[1] having heard and considered argument of counsel, and good cause appearing, hereby GRANTS Marquee's Motion for Summary Judgment.

On October 15, 2019, the Court issued a minute order granting Marquee's Motion for Summary Judgment. However, the Court's decision set out herein is not based solely on the contents of the minute order, but is also based on the record on file herein. The Court hereby issues the following Findings of Facts and Conclusions of Law.

I.

FINDINGS OF FACT

A. The Underlying Action

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

[1] Marquee's Motion for Summary Judgment, Marquee's Request for Judicial Notice in Support of Motion for Summary Judgment, Marquee's Appendix of Exhibits in Support of Motion for Summary Judgment, Declaration of Nicholas B. Salerno in Support of Motion for Summary Judgment, Declaration of Bill Bonbrest in Support of Motion for Summary Judgment, St. Paul's Opposition to Motion for Summary Judgment and Countermotion re: Duty to Indemnify, St. Paul's Response to Statement of Undisputed Facts, St. Paul's Consolidated Appendix of Exhibits in Support of Opposition to Motions for Summary Judgment, Declaration of Marc J. Derewetzky in Support of Opposition to Motion for Summary Judgment, Declaration of William Reeves in Support of Opposition to Motion for Summary Judgment, National Union's (defined below) Opposition to St. Paul's Countermotion for Summary Judgment, Marquee's Reply in Support of Motion for Summary Judgment, and Marquee's Objections to Facts Not Supported by Admissible Evidence Filed in Support of Opposition to Motion for Summary Judgment and Countermotion re: Duty to Indemnify.

2. 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. (FAC ¶¶ 6-7.)

3. 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.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id*. ¶ 9, Exhibit A.)

5. Roof Deck Entertainment, LLC owns and operates the Marquee Nightclub. (FAC ¶ 4.)

6. Nevada Property 1, LLC owns and operates The Cosmopolitan of Las Vegas. (*Id.* ¶ 10.)

7. 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.)

8. NRV1 entered into a written agreement (discussed *infra* Section I.D) with Marquee to manage the nightclub. (FAC ¶ 10.)

9. Marquee is a named insured under the National Union Excess Policy defined below. (FAC ¶ 30.)

10. Cosmopolitan is a named insured under the St. Paul Excess Policy defined below. Cosmopolitan is also an additional insured to the National Union Excess Policy defined below. (FAC ¶¶ 40 and 44.)

11. Marquee is not an insured to the St. Paul Excess Policy defined below. (FAC ¶ 41.)

12. Aspen Insurance Company, which issued a primary insurance policy, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union subsequently

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appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

13. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

14. The Court held in the Underlying Action that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (*See* Request for Judicial Notice in Support of Marquee's Motion for Summary Judgment, Ex. 3.)

15. 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 jointly and severally against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the judgment would have been joint and several against Marquee and Cosmopolitan. *See* NRS 41.141(5)(b). (FAC, Ex. C.)

16. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

17. Aspen and National Union Fire Insurance Company of Pittsburgh PA ("National Union") as the primary and excess insurers of Marquee, and Zurich American Insurance Company ("Zurich") and St. Paul as the primary and excess insurers of Cosmopolitan, 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.)

18. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money toward the settlement. (FAC ¶¶ 67-70.)

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B. Insurance Policies and Insured Parties

19. Cosmopolitan is a named insured to a primary policy issued by Zurich American Insurance Company to Nevada Property 1 LLC, under policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012, with limits of $1,000,000 per occurrence and $2 million general aggregate (the "Zurich Primary Policy"). (FAC ¶ 69; MSJ p. 14, Undisputed Fact No. ("UF") 25.)

20. Cosmopolitan is also a named insured to the St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group (the "St. Paul Excess Policy"), which is excess to the Zurich Primary Policy. (FAC ¶ 40; MSJ pp. 13-14, UF 24 and 25.)

21. Marquee is a named insured to a primary policy issued by Aspen Specialty Insurance Company to The Restaurant Group et al., under policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 (the "Aspen Primary Policy"). (FAC ¶ 15.)

22. Marquee is also a named insured to the National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. (the "National Union Excess Policy"), which is excess to the Aspen Primary Policy (FAC ¶ 30; MSJ p. 13, UF 23.) Cosmopolitan was an additional insured under the Aspen Primary Policy and the National Union Excess Policy. (FAC ¶¶ 24 and 30; MSJ p. 14, UF 26.)

23. The St. Paul Excess Policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery of such payment. (MSJ p. 14, UF 27.)

C. St. Paul's Claims Against Marquee

24. In the Fifth Cause of Action of the FAC for Statutory Subrogation – Contribution Per NRS 17.225 ("Fifth Cause of Action"), 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 asserts 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 NRS 17.275 for all sums paid by St. Paul as part of the settlement of the Underlying Action. (FAC ¶¶ 119-120.)

25. In the Sixth Cause of Action of the FAC for Subrogation – Express Indemnity ("Sixth Cause of Action"), 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 further 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.)

D. <u>Nightclub Management Agreement</u>

26. Marquee and NRV1 entered the Nightclub Management Agreement ("NMA"), dated April 21, 2010, with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (MSJ p. 8, UF 17.) In the NMA, Marquee agreed to manage and operate the Marquee nightclub in The Cosmopolitan Hotel & Casino.

27. 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 Cosmopolitan is the Managing Member. (MSJ p. 8, UF 13.)

28. The NMA provides in pertinent part:

1. <u>Definitions</u>

. . .

> **"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.

(MSJ p. 9, UF 18.)

29. Section 12 of the NMA sets out the insurance requirements among the parties, and provides, in pertinent, part as follows:

> **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.

(MSJ pp. 9-11, UF 19.)

30. Section 12.2.6 of the NMA includes the following provision requiring that any insurance required under the NMA by both NRV1 and Marquee include a waiver of subrogation:

> **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.

(MSJ p. 11, UF 19.) (emphasis added).

31. Section 13 of the NMA includes the following express indemnity provision:

> **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.

(MSJ pp. 11-12, UF 20.)

32. Section 13 of the NMA expressly provides that any express indemnity obligation owed by Marquee to Cosmopolitan applies only to the extent any and all Losses (as defined above) are not reimbursed by insurance.

33. Section 17.2 of the Lease attached as Exhibit D to the NMA provides, in relevant part, that Cosmopolitan shall procure "all insurance required to be obtained by" NRV1 under Section 12.1 of the NMA. (Ex. 1 to MSJ, at T000183.)

34. Section 20 of the NMA provides as follows:

> **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.

(MSJ pp. 12-13, UF 21.)

II.

MARQUEE'S MOTION FOR SUMMARY JUDGMENT

1. On September 13, 2019, Marquee filed Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment. Marquee's MSJ asserts that the NMA entered between Marquee and NRV1 contains a waiver of subrogation provision that prevents Cosmopolitan from pursuing any claims against Marquee. As such, St. Paul cannot not step into

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Cosmopolitan's shoes to pursue the subrogation claims against Marquee set forth in the Fifth and Sixth Causes of Action of the FAC as a matter of law.

2. Marquee's MSJ further asserts as a separate and independent ground to grant summary judgment that the Sixth Cause of Action in the FAC for express indemnity fails because the express indemnity provisions set out in Section 13 of the NMA applies by its express terms only to losses not reimbursed by insurance. As such, Marquee contends the Sixth Cause of Action fails as a matter of law because the damages sought by St. Paul under the Sixth Cause of Action pertain to a loss that was reimbursed by insurance.

3. Marquee's MSJ also asserts as a separate and independent ground to grant summary judgment that that the Fifth Cause of Action fails as a matter of law because Cosmopolitan was found jointly and severally liable with Marquee in the Underlying Action for the intentional torts of assault, battery, and false imprisonment, and NRS 17.255 provides "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury." Marquee further asserts as a separate and independent ground to grant summary judgment that that the Fifth Cause of Action fails as a matter of law because Nevada common law and NRS 17.265 provide that "[w]here one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation." As such, Marquee contends the Fifth Cause of Action in the FAC for Statutory Subrogation – Contribution Per NRS 17.225 fails as a matter of law based on the application of NRS 17.255 and NRS 17.265.

III.

CONCLUSIONS OF LAW

A. Standard of Review

1. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in

the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. St. Paul's Fifth And Sixth Causes of Action For Subrogation Are Barred By The Subrogation Waiver Provisions Contained In The Nightclub Management Agreement And The St. Paul Excess Policy

2. St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated to the rights of Cosmopolitan for contribution and express indemnity against Marquee. (FAC ¶¶ 116 and 126.)

3. Pursuant to Section 12.2.6 of the NMA, however, the insurance policies required under the NMA must "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" as defined in the NMA.

4. Section 12.2.3 of the NMA defines "Owner Insured Parties" to include the Owner (NRV1), the Project Owner (Cosmopolitan), the landlord and tenant under the Lease (also Cosmopolitan and NRV1), their respective parents, subsidiaries, affiliates, and other related persons and entities.

5. Section 12.2.6 of the NMA also provides that the waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies."

6. "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance maintained by any "Owner Insured Parties."

7. In accordance with the requirement under Section 12.2.6 of the NMA, the St. Paul Excess Policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if the Named Insured has agreed in a written contract to waive its rights to

recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery for such payment. (Ex. 2 to MSJ, at T000038.)

8. Cosmopolitan is a Named Insured under the St. Paul Excess Policy pursuant to the Designated Premises Limitation endorsement. (Ex. 2 to MSJ, at T000057.)

9. Waiver of subrogation provisions are universally enforced. *See Davlar Corp. v. Superior Court*, 62 Cal. Rptr. 2d 199, 201-02 (Cal. Ct. App. 1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 32 Cal. Rptr. 2d 144, 146-49 (Cal. Ct. App. 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.*, 86 Cal. Rptr. 3d 715, 718-20 (Cal. Ct App. 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*, 458 P.2d 926, 929 (Or. 1969) (holding insurer waived its subrogation rights against various contractors); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 831 P.2d 724, 728 (Wash. 1992) (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, No. 14-cv-890 GBW/CG, 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" (internal quotation marks omitted)).

10. The intent of the parties to the NMA to waive subrogation rights for losses paid by insurance proceeds is clear and unambiguous as expressed in Section 12.2.6 of the NMA. To find otherwise would be inconsistent with the terms of the NMA and the Waiver of Rights of Recovery Endorsement contained within the St. Paul Excess Policy.

11. In opposition to Marquee's MSJ, St. Paul asserts that the subrogation waiver requirements of the NMA and the St. Paul Excess Policy do not apply because Cosmopolitan, as the Project Owner, only agreed to be bound with respect to certain provision of the NMA, which did not include the subrogation waiver provision contained in 12.2.6 of the NMA. This argument fails because it 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 Section 12.1 of the NMA. (*See* National Union's Appendix of Exhibits in Support of MSJ, Ex. 1, T000172, T000183.) Thus, Cosmopolitan assumed NRV1's obligation to provide the insurance as required by Section 12.1 of the NMA. Accordingly, 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. Regardless of whether Cosmopolitan agreed to be bound by the subrogation waiver provision contained in 12.2.6 of the NMA or assumed NRV1's insurance obligations under the NMA, the clear intent of the parties to the NMA was to waive any claims for losses against each other that were paid by insurance proceeds including claims against the Owner Insured Parties (as defined in NMA), which includes Cosmopolitan.

12. St. Paul nonetheless contends that Cosmopolitan is not a party to the NMA. Even if St. Paul's subrogation rights under the NMA are not based on Cosmopolitan's status as a party to the NMA, Cosmopolitan is still a third-party beneficiary of the NMA and is bound by its terms. (*See* NMA, Section 20); *See also Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005) (recognizing that "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, 607 P.2d 118, 120 (1980) (recognizing that "a third-party beneficiary takes subject to any defense arising from the contract that is ascertainable against the promisee"). St. Paul is pursuing subrogation claims by attempting to step into Cosmopolitan's shoes as a third-party beneficiary of the NMA and the intent of the parties to the NMA was to waive such subrogation rights.

13. Accordingly, St. Paul's subrogation claims set forth in the Fifth and Sixth Causes of Action of the FAC fail as a matter of law.

C. <u>St. Paul's Sixth Cause of Action For Subrogation – Express Indemnity Also Fails Because Cosmopolitan Did Not Sustain Any Uninsured Losses</u>

14. The Sixth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that Cosmopolitan did not sustain any uninsured losses.

/ / /

15. 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 (as defined in the NMA) 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 NMA. (Emphasis added.)

16. The NMA 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.)

17. 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. 666, 673, 289 P.3d 221, 226 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 339-40, 255 P.3d 268, 274 (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.").

18. As explained by the Nevada Supreme Court in *United Rentals Highway Technologies*:

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

128 Nev. at 677, 289 P.3d at 229 (internal quotation marks and citations omitted).

19. The exclusion of insurance payments from the definition of "Losses" in Section 1 of the NMA and the indemnity provision set out in Section 13.1 expressly limits any purported indemnity obligation by Marquee to Cosmopolitan to uninsured losses. (UF 18, 20.)

20. Cosmopolitan's defense in the underlying action and its joint-and-several liability for the verdict and resulting settlement were paid for by insurance. Thus, there is no uninsured loss for which Cosmopolitan could pursue indemnity against Marquee.

21. Accordingly, St. Paul has no valid subrogation claim for express indemnity, and thus, the Sixth Cause of Action against Marquee fails as a matter of law.

D. St. Paul's Fifth Cause of Action For Statutory Subrogation For Contribution Pursuant To NRS 17.225 Also Fails Pursuant to NRS 17.255 Because Cosmopolitan Was Found Liable In The Underlying Action For Intentional Torts

22. The Fifth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that Cosmopolitan was found jointly and severally liable in the underlying action for intentional torts.

23. NRS 17.255 provides, in relevant part, that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death."

24. In the trial of the Underlying Action, Cosmopolitan was found liable with Marquee on all of Moradi's asserted claims, including the intentional tort claims for assault, battery, and false imprisonment, which made Cosmopolitan jointly and severally liable with Marquee. *See* NRS 41.141(5)(b). Prior to trial, the Court held that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan can be jointly and severally liable for Moradi's injuries. (*See* Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.) Cosmopolitan had its own obligation pursuant to the nondelegable duty to keep patrons of The Cosmopolitan Hotel & Casino safe. *Rockwell v. Sun Harbor Budget Suites,* 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) ("[I]n 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.")

25. Given that the jury in the Underlying Action found Cosmopolitan liable with Marquee for the intentional tort claims of assault, battery, and false imprisonment that contributed to Moradi's injury, Cosmopolitan is precluded from pursuing a contribution from Marquee pursuant to the application of NRS 17.255. As such, St. Paul's subrogation claim for contribution set out in the Fifth Cause of Action premised on stepping into the shoes of Cosmopolitan is also precluded as a matter of law.

E. St. Paul's Fifth Cause of Action For Statutory Subrogation For Contribution Pursuant To NRS 17.225 Also Fails Pursuant to NRS 17.265 Because A Claim For Contribution Is Not Available When The Parties Have Contracted For Express Indemnity

26. The Fifth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that the parties have contracted for express indemnity.

27. When a tortfeasor has a right to indemnity from another tortfeasor, there is no right to contribution under the Uniform Contribution Act. NRS 17.265 (Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation."); *Calloway v. City of Reno*, 113 Nev. 564, 578, 939 P.2d 1020, 1029 (1997) ("[I]mplied indemnity theories are not viable when an express indemnity agreement exists between the parties.")

28. Section 13 of the NMA contains an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was paid by insurance.

29. Given the existence of the contractually bargained for right to indemnity set out in Section 13 of the NMA, Cosmopolitan has no statutory or equitable right to contribution under Nevada common law or the Uniform Contribution Act pursuant to NRS 17.265. St. Paul asserts the contribution claim is permitted because it is an alternative theory of recovery in the event the express indemnity claim does not prevail. However, a contribution theory of recovery is not permitted when a contract for express indemnity exists to govern the obligations of the respective parties. Accordingly, St. Paul cannot pursue a contribution claim against Marquee based on the alleged subrogation principles as a matter of law.

F. Certification under NRCP 54(b)

30. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

31. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting Marquee's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of Marquee's Motion for Summary Judgment, and the arguments of the parties and good cause existing, Marquee's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2020.

Honorable Gloria Sturman
District Judge, Department XXVI

ORDR

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT.: XXVI ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT

Plaintiff St. Paul Fire & Marine Insurance Company's ("Plaintiff" or "St. Paul") Motion for Partial Summary Judgment against Defendant Aspen Specialty Insurance Company ("Defendant" or "Aspen"), and Aspen's Countermotion for Summary Judgment, having come on for hearing on October 8, 2019 before the Honorable District Court Judge Gloria Sturman in Department XXVI of the Eighth Judicial District Court, Clark County, Nevada. Ryan A. Loosvelt, Esq. of Messner Reeves, LLP appeared on behalf of the Defendant, and Ramiro Morales, Esq. of Morales Fierro Reeves appeared on behalf of the Plaintiff. The Court, having reviewed the papers and exhibits submitted by the parties, rules as follows:

I.

FINDINGS OF FACT

This action relates to a post-judgment settlement by St. Paul, Defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union"), Zurich Insurance, and Aspen following a jury trial in the personal injury case of *Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("*Moradi* Action"). St. Paul seeks to recover money it paid toward that settlement from the defendants in this action including Aspen.

In the *Moradi* Action, Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. 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.

Among other pre-trial settlement offers, Moradi issued a $1.5 million Offer of Judgment that lapsed.

The *Moradi* Action went to trial and resulted in a judgment against Marquee and Cosmopolitan, and there was a post-judgment settlement funded by St. Paul, National Union, Zurich, and Aspen. St. Paul contends Aspen has a $2 million policy limit for the *Moradi* Action because the Aspen Policy provides $1 million in applicable limits for damages because of bodily injury and $1 million in applicable limits for personal and advertising Injury, which St. Paul contends were both implicated by the *Moradi* Action, whereas Aspen contends its policy operates to limit coverage for the *Moradi* Action to a $1 million.

Aspen issued insurance policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, to the Restaurant Group, et. al. ("Aspen Policy"). Defendant Roof Deck Entertainment, LLC (i.e, "Marquee) is a named insured in the Aspen Policy by endorsement.

The Aspen Policy contains a $1 million each occurrence limit for damages because of

bodily injury and property damage, a $1 million per person limit for damages because of personal and advertising injury, and a $2 million general aggregate limit. The Aspen Policy contains a "Commercial General Liability Coverage Form" and a "Liquor Liability Coverage Form." The "Commercial General Liability Coverage Form" contains Section I, Coverages, which contains "Coverage A Bodily Injury and Property Damage", "Coverage B Personal and Advertising Injury Liability", and "Coverage C Medical Payments."

The "Commercial General Liability Coverage Form" of the Aspen Policy, Section I, "Coverage A Bodily Injury and Property Damage Liability" provides:

> SECTION I – COVERAGES
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

Section I, "Coverage A Bodily Injury and Property Damage Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **2.Exclusions**
>
> This insurance does not apply to:
>
> **a. Expected Or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
>
> ***
>
> **o. Personal And Advertising Injury**
>
> "Bodily injury" arising out of "personal and advertising injury".

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial

General Liability Coverage Form" of the Aspen Policy provides:

> **COVERAGE B PERSONAL AND ADVERTISING**
>
> **INJURY LIABILITY**
>
> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result.

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> **a. Knowing Violation Of Rights Of Another**
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".
>
> ***
>
> **d. Criminal Acts**
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

Section V in the "Commercial General Liability Coverage Form" of the Aspen Policy includes the following definitions:

> **SECTION V – DEFINITIONS**
>
> ***
>
> 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
>
> ***
>
> 13."Occurrence" means an accident, including continuous or

repeated exposure to substantially the same general harmful conditions.

14."Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

The Aspen Policy also contains the following Amendment by Endorsement (the "Other Insurance Endorsement"):

The Common Policy Conditions (IL 00 17 11 /98) are amended by the addition of the following:

G. Other Insurance with This Company

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.

If this policy and any other policy issued to you by us apply to the same "occurrence," "accident," "cause of loss," "injury," "loss" or offence, the maximum limit of insurance under all of the policies shall not exceed the highest limit of insurance under any one policy. This condition does not apply to any policy issued by us which specifically provides that the policy is to apply as excess insurance over this policy.

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II.

CONCLUSIONS OF LAW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Nev. R. Civ. P. ("NRCP") 56(c). On a summary judgment motion it is the moving party's obligation to show that there is "no genuine issues of material fact." NRCP 56(c). The party moving for summary judgment bears the initial burden of production to show the absence of material fact. Cuzze v. Univ. & Cmty. College Sys., 123 Nev. 598, 602, 172 P.3d 131 (2007). If such a showing is made, the party opposing summary judgment assumes the burden of production to show the existence of material fact. Id. A party opposing summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Wood v. Safeway, Inc., 121 Nev. 732, 121 P.3d 1026 (2005).

An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion. EDCR 2.20(f). A counter-motion will be heard and decided at the same time set for the hearing of the original motion and no separate notice of motion is required. *Id.*

Plaintiff's motion for summary judgment and Aspen's Countermotion both seek a legal determination concerning the interpretation of the Aspen Policy's policy limits for the *Moradi* Action. Plaintiff contends that Aspen's policy limit for the *Moradi* Action was $2 million and Aspen's opposition and countermotion opposes such relief and countermoves for a determination that it's policy limit was $1 million for the *Moradi* Action. Aspen's Countermotion also seeks summary judgment on Plaintiff's claims arguing they are not viable and/or fail as a matter of law.

Regarding Aspen's Countermotion to the extent it seeks a ruling on the viability of Plaintiff's claims and/or whether they fail as a matter of law, the Court views these other issues as questions of fact.

This Court therefore focuses its ruling here on the interpretation of the Aspen Policy's policy limits as it applies to the *Moradi* Action. Interpretation of a contract is a question of law.

Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties. *Farmers Ins. Exch.*, 119 Nev. at 64. The interpretation of an insurance policy presents a legal question. *Las Vegas Metropolitan Police Dept. v. Cregis Ins. Co.*, 127 Nev. 548, 553, 256 P.3d 958, 961 (2011).

In determining the meaning of an insurance policy, the language should be examined from the viewpoint of one not trained in law or in the insurance business; the terms should be understood in their plain, ordinary and popular sense. *National Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 364, 682 P.2d 1380, 1382 (1984). Where the language of the policy is not ambiguous, it should be given its plain meaning and construed as written. *Farmers Ins. Exchange v. Young*, 108 Nev. 328, 332, 832 P.2d 376, 378 (1992). Courts interpret the policy language according to its plain and ordinary meaning and will not rewrite contract provisions that are otherwise unambiguous or increase an obligation to the insured that was intentionally and unambiguously limited by the parties. *Vitale v. Jefferson Ins. Co. of NY*, 116 Nev. 590, 595, 5 P.3d 1054, 1057-1058 (2000).

Where an ambiguity in the language of the policy exists, the contract will be given a construction which will fairly achieve its object of providing indemnity for the loss to which the insurance relates. *Reno's Executive Air, Inc.*, 100 Nev. at 365. If policy language is ambiguous, an interpretation in favor of coverage is reasonable only if it is consistent with the objectively reasonable expectations of the insured. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1265, 833 P.2d 545 (1992).

A policy must be read as a whole in order to give a reasonable and harmonious meaning and effect to all its provisions. *Reno's Executive Air, Inc.*, 100 Nev. at 364. A court must look to the entire contract of insurance for a true understanding of what risks are assumed by the insurer and what risks are excluded. Id.

Nevada has adopted the "causal" approach to determining whether "a particular situation constitutes a single occurrence or multiple occurrences for the purposes of insurance liability." *Bish v. Guaranty Nat'l Ins. Co.*, 109 Nev. 133, 135, 848 P.2d 1057, 1058 (1993). The focus of the

inquiry is not on the number, magnitude or time of the injuries, but rather on the cause or causes of the injury; as long as the injuries stem from one proximate cause there is a single occurrence. *Bish*, 109 Nev. at 135; see also *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.*, 178 Cal.App.4th 620, 633-634, 55 Ca.Rptr.3d 844 (2007). Policy limits are determined by the cause of the damage. See *Century Sur. Co. v. Casino West, Inc.*, 99 F.Supp.3d 1262, 1264 (D. Nev. Mar. 27, 2015), citing *Bish*, 109 Nev. at 137; *Safeco Ins. Co. of America*, 178 Cal.App.4th at 634.

Plaintiff and Aspen do not dispute there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy. This Court also finds that all of Moradi's injuries are attributable to one proximate, uninterrupted and continuing cause and concludes there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy implicated by the *Moradi* Action.

To the extent Moradi also sought damages because of personal injury under Coverage Part B of the Aspen Policy, the Court finds that the Other Insurance Endorsement to the Aspen Policy operates in a manner of anti-stacking of the Coverage Part A and Coverage Part B limits. See e.g., *Farmers Ins. Group v. Stonik By and Through Stonik*, 110 Nev. 64, 867 P.2d 389 (1994). Considering the Aspen Policy as a whole, the Court therefore concludes that the plain language of the Aspen Policy operates to limit coverage for the *Moradi* action to $1 million.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment is DENIED and Aspen's Countermotion for Summary Judgment is GRANTED IN PART in that the Court concludes the Aspen Policy's policy limit for the *Moradi* Action is a $1 million policy limit. Aspen's Countermotion on other issues presented is denied.

IT IS SO ORDERED this 14th day of May, 2020.

DISTRICT COURT JUDGE

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APPROVED AS TO FORM AND CONTENT:

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, v. ASPEN SPECIALITY INSRUANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA.; ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	Case No: A-17-758902-C Dept. No: XXVI **NOTICE OF ENTRY OF ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT**

Please take notice the on the 14th day of May, 2020, the Court entered an Order Denying St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment, and Order Granting in Part Defendant Aspen Specialty Insurance Company's Counter-Motion for Summary Judgment in the above-entitled action. A copy of said Order is attached hereto.

DATED this 27 day of May, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 27th day of May, 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[ ] to be sent **via facsimile;** and/or

[X] to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

[ ] to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT.: XXVI ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT

Plaintiff St. Paul Fire & Marine Insurance Company's ("Plaintiff" or "St. Paul") Motion for Partial Summary Judgment against Defendant Aspen Specialty Insurance Company ("Defendant" or "Aspen"), and Aspen's Countermotion for Summary Judgment, having come on for hearing on October 8, 2019 before the Honorable District Court Judge Gloria Sturman in Department XXVI of the Eighth Judicial District Court, Clark County, Nevada. Ryan A. Loosvelt, Esq. of Messner Reeves, LLP appeared on behalf of the Defendant, and Ramiro Morales, Esq. of Morales Fierro Reeves appeared on behalf of the Plaintiff. The Court, having reviewed the papers and exhibits submitted by the parties, rules as follows:

I.

FINDINGS OF FACT

This action relates to a post-judgment settlement by St. Paul, Defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union"), Zurich Insurance, and Aspen following a jury trial in the personal injury case of *Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("*Moradi* Action"). St. Paul seeks to recover money it paid toward that settlement from the defendants in this action including Aspen.

In the *Moradi* Action, Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. 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.

Among other pre-trial settlement offers, Moradi issued a $1.5 million Offer of Judgment that lapsed.

The *Moradi* Action went to trial and resulted in a judgment against Marquee and Cosmopolitan, and there was a post-judgment settlement funded by St. Paul, National Union, Zurich, and Aspen. St. Paul contends Aspen has a $2 million policy limit for the *Moradi* Action because the Aspen Policy provides $1 million in applicable limits for damages because of bodily injury and $1 million in applicable limits for personal and advertising Injury, which St. Paul contends were both implicated by the *Moradi* Action, whereas Aspen contends its policy operates to limit coverage for the *Moradi* Action to a $1 million.

Aspen issued insurance policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, to the Restaurant Group, et. al. ("Aspen Policy"). Defendant Roof Deck Entertainment, LLC (i.e, "Marquee) is a named insured in the Aspen Policy by endorsement.

The Aspen Policy contains a $1 million each occurrence limit for damages because of

bodily injury and property damage, a $1 million per person limit for damages because of personal and advertising injury, and a $2 million general aggregate limit. The Aspen Policy contains a "Commercial General Liability Coverage Form" and a "Liquor Liability Coverage Form." The "Commercial General Liability Coverage Form" contains Section I, Coverages, which contains "Coverage A Bodily Injury and Property Damage", "Coverage B Personal and Advertising Injury Liability", and "Coverage C Medical Payments."

The "Commercial General Liability Coverage Form" of the Aspen Policy, Section I, "Coverage A Bodily Injury and Property Damage Liability" provides:

> SECTION I – COVERAGES
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

Section I, "Coverage A Bodily Injury and Property Damage Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **2.Exclusions**
>
> This insurance does not apply to:
>
> **a. Expected Or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
>
> ***
>
> **o. Personal And Advertising Injury**
>
> "Bodily injury" arising out of "personal and advertising injury".

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial

General Liability Coverage Form" of the Aspen Policy provides:

> **COVERAGE B PERSONAL AND ADVERTISING**
>
> **INJURY LIABILITY**
>
> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result.

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> **a. Knowing Violation Of Rights Of Another**
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".
>
> ***
>
> **d. Criminal Acts**
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

Section V in the "Commercial General Liability Coverage Form" of the Aspen Policy includes the following definitions:

> **SECTION V – DEFINITIONS**
>
> ***
>
> 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
>
> ***
>
> 13."Occurrence" means an accident, including continuous or

repeated exposure to substantially the same general harmful conditions.

14."Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

The Aspen Policy also contains the following Amendment by Endorsement (the "Other Insurance Endorsement"):

The Common Policy Conditions (IL 00 17 11 /98) are amended by the addition of the following:

G. Other Insurance with This Company

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.

If this policy and any other policy issued to you by us apply to the same "occurrence," "accident," "cause of loss," "injury," "loss" or offence, the maximum limit of insurance under all of the policies shall not exceed the highest limit of insurance under any one policy. This condition does not apply to any policy issued by us which specifically provides that the policy is to apply as excess insurance over this policy.

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II.

CONCLUSIONS OF LAW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Nev. R. Civ. P. ("NRCP") 56(c). On a summary judgment motion it is the moving party's obligation to show that there is "no genuine issues of material fact." NRCP 56(c). The party moving for summary judgment bears the initial burden of production to show the absence of material fact. Cuzze v. Univ. & Cmty. College Sys., 123 Nev. 598, 602, 172 P.3d 131 (2007). If such a showing is made, the party opposing summary judgment assumes the burden of production to show the existence of material fact. Id. A party opposing summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Wood v. Safeway, Inc., 121 Nev. 732, 121 P.3d 1026 (2005).

An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion. EDCR 2.20(f). A counter-motion will be heard and decided at the same time set for the hearing of the original motion and no separate notice of motion is required. *Id.*

Plaintiff's motion for summary judgment and Aspen's Countermotion both seek a legal determination concerning the interpretation of the Aspen Policy's policy limits for the *Moradi* Action. Plaintiff contends that Aspen's policy limit for the *Moradi* Action was $2 million and Aspen's opposition and countermotion opposes such relief and countermoves for a determination that it's policy limit was $1 million for the *Moradi* Action. Aspen's Countermotion also seeks summary judgment on Plaintiff's claims arguing they are not viable and/or fail as a matter of law.

Regarding Aspen's Countermotion to the extent it seeks a ruling on the viability of Plaintiff's claims and/or whether they fail as a matter of law, the Court views these other issues as questions of fact.

This Court therefore focuses its ruling here on the interpretation of the Aspen Policy's policy limits as it applies to the *Moradi* Action. Interpretation of a contract is a question of law.

Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties. *Farmers Ins. Exch.*, 119 Nev. at 64. The interpretation of an insurance policy presents a legal question. *Las Vegas Metropolitan Police Dept. v. Cregis Ins. Co.*, 127 Nev. 548, 553, 256 P.3d 958, 961 (2011).

In determining the meaning of an insurance policy, the language should be examined from the viewpoint of one not trained in law or in the insurance business; the terms should be understood in their plain, ordinary and popular sense. *National Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 364, 682 P.2d 1380, 1382 (1984). Where the language of the policy is not ambiguous, it should be given its plain meaning and construed as written. *Farmers Ins. Exchange v. Young*, 108 Nev. 328, 332, 832 P.2d 376, 378 (1992). Courts interpret the policy language according to its plain and ordinary meaning and will not rewrite contract provisions that are otherwise unambiguous or increase an obligation to the insured that was intentionally and unambiguously limited by the parties. *Vitale v. Jefferson Ins. Co. of NY*, 116 Nev. 590, 595, 5 P.3d 1054, 1057-1058 (2000).

Where an ambiguity in the language of the policy exists, the contract will be given a construction which will fairly achieve its object of providing indemnity for the loss to which the insurance relates. *Reno's Executive Air, Inc.*, 100 Nev. at 365. If policy language is ambiguous, an interpretation in favor of coverage is reasonable only if it is consistent with the objectively reasonable expectations of the insured. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1265, 833 P.2d 545 (1992).

A policy must be read as a whole in order to give a reasonable and harmonious meaning and effect to all its provisions. *Reno's Executive Air, Inc.*, 100 Nev. at 364. A court must look to the entire contract of insurance for a true understanding of what risks are assumed by the insurer and what risks are excluded. Id.

Nevada has adopted the "causal" approach to determining whether "a particular situation constitutes a single occurrence or multiple occurrences for the purposes of insurance liability." *Bish v. Guaranty Nat'l Ins. Co.*, 109 Nev. 133, 135, 848 P.2d 1057, 1058 (1993). The focus of the

inquiry is not on the number, magnitude or time of the injuries, but rather on the cause or causes of the injury; as long as the injuries stem from one proximate cause there is a single occurrence. *Bish,* 109 Nev. at 135; see also *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.*, 178 Cal.App.4th 620, 633-634, 55 Ca.Rptr.3d 844 (2007). Policy limits are determined by the cause of the damage. See *Century Sur. Co. v. Casino West, Inc.*, 99 F.Supp.3d 1262, 1264 (D. Nev. Mar. 27, 2015), citing *Bish,* 109 Nev. at 137; *Safeco Ins. Co. of America*, 178 Cal.App.4th at 634.

Plaintiff and Aspen do not dispute there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy. This Court also finds that all of Moradi's injuries are attributable to one proximate, uninterrupted and continuing cause and concludes there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy implicated by the *Moradi* Action.

To the extent Moradi also sought damages because of personal injury under Coverage Part B of the Aspen Policy, the Court finds that the Other Insurance Endorsement to the Aspen Policy operates in a manner of anti-stacking of the Coverage Part A and Coverage Part B limits. See e.g., *Farmers Ins. Group v. Stonik By and Through Stonik*, 110 Nev. 64, 867 P.2d 389 (1994). Considering the Aspen Policy as a whole, the Court therefore concludes that the plain language of the Aspen Policy operates to limit coverage for the *Moradi* action to $1 million.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment is DENIED and Aspen's Countermotion for Summary Judgment is GRANTED IN PART in that the Court concludes the Aspen Policy's policy limit for the *Moradi* Action is a $1 million policy limit. Aspen's Countermotion on other issues presented is denied.

IT IS SO ORDERED this 14th day of May, 2020.

DISTRICT COURT JUDGE

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APPROVED AS TO FORM AND CONTENT:

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