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 XV of XVI

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CERTIFICATE OF SERVICE

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

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

Please take notice the on the 14th day of May, 2020, the Court entered Findings of Fact, Conclusions of Law and Order Granting National Union Fire Insurance Company of Pittsburgh PA's 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 21st day of May, 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S 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;

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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 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. Insurance Policies

1. The Cosmopolitan Insurance Tower

a. Cosmopolitan's Primary Policy with Zurich American Insurance Company

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. St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract

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. St. Paul's Eighth Cause of Action for Equitable Contribution

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. St. Paul's Seventh Cause of Action for Equitable Estoppel

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, 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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT**

Please take notice the on the 14th day of May, 2020, the Court entered Findings of Fact, Conclusions of Law and Order Granting Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment in the above-entitled action. A copy of said Order is attached hereto.

DATED this 27 day of May, 2020.

HUTCHISON & STEFFEN, PLLC

By /s/ Michael K. Wall
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Attorney for Plaintiff

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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S 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 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.)

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[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. Nightclub Management Agreement

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. Definitions

. . .

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

(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.

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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

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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 **DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT** **HEARING REQUESTED** **Date:** **Time:**

Defendant, ASPEN SPECIALTY INSURANCE COMPANY, by and through its counsel of record, the law firm MESSNER REEVES, LLP, files this Renewed Motion for Summary Judgment.

This Renewed Motion for Summary Judgment is based on the pleadings, exhibits, motions, orders, and other papers on file in this action, the attached declaration of counsel, the attached Memorandum of Points and Authorities, and any oral argument that may be permitted at the time of hearing on this matter.

DATED this 16th day of June, 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff ST. PAUL FIRE & MARINE INSURANCE COMPANY ("Plaintiff" or "St. Paul") previously filed a Motion for Partial Summary Judgment against Defendant ASPEN SPECIALTY INSURANCE COMPANY ("Defendant" or "Aspen") concerning whether Aspen's insurance policy limit for the underlying action was $1 million or $2 million; St. Paul argued the limit was $2 million. Aspen filed an Opposition and Countermotion for Summary Judgment. Aspen successfully argued its policy limit for the underlying action was $1 million.

Aspen additionally countermoved for summary judgment as to the viability of St. Paul's claims against Aspen. The Court ultimately declined to rule at the time on the viability of St. Paul's claims against Aspen, limiting its ruling to the $1 million policy limits issue. The Court deferred ruling on the issues concerning the viability of St. Paul's subrogation claims against Aspen until after the Court could hear the other defendants' Motions for Summary Judgment concerning similar issues that were being heard one week *after* the hearing on the St. Paul-Aspen Motions.

Among other things, Defendant NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA ("National Union") moved for summary judgment arguing St. Paul's subrogation claims were not viable as a matter of law. The Court granted National Union's Motion for Summary Judgment and recently entered its order on St. Paul's Motion for Partial Summary Judgment, Aspen's Countermotion, and National Union and Marquis' Motions for Summary Judgment.

Therefore, now that the Court has entered its order on the other parties' summary judgment motions, including the non-viability of St. Paul's subrogation claims against National Union which the Court held fail as a matter of law, Aspen hereby renews its Motion for Summary Judgment as to the non-viability of St. Paul's claims against it.

St. Paul asserts three (3) claim against Aspen: (1) Subrogation – breach of the duty to settle by failing to accept $1.5 million offer (because St. Paul contended it was within Aspen's alleged $2 million policy limit); (2) Subrogation – breach of the Aspen insurance contract for failing to provide a conflict free defense to Marquee and Cosmopolitan and failing to pay all available limits under

the Aspen policy; and, (3) Equitable Estoppel – that the defendants should be prevented from arguing National Union's policy was co-excess with St. Paul's policy. Aspen is entitled to summary judgment on all three claims as a matter of law.

Aspen is entitled to summary judgment on St. Paul's subrogation claims because the claims do not fit the circumstances here and Nevada has not recognized contractual or equitable subrogation in the insurance context here. This Court likewise and correctly declined to do so when granting National Union's Motion for Summary Judgment, and the Court should follow the law of the case and do so again here with respect to Aspen as well.

St. Paul's subrogation claim for failure to accept a $1.5 million settlement offer within policy limits also now inherently fails as a matter of law because this Court has now determined Aspen's policy limit is $1 million; thus, Aspen, as a matter of law, did not fail to accept a settlement within policy limits even if subrogation could be applied here.

St. Paul's subrogation claim for breach of contract fails because St. Paul is not a party to the Aspen contract, and because St. Paul's insured, in whose shoes it contends it stands, has not suffered any damages as this Court correctly held when granting National Union's Motion for Summary Judgment. Among other things, the insurers, including Aspen, paid their full policy limits, Aspen and National Union fully funded their defense, and the insureds did not contribute toward settlement. Consequently, there can be no contract damages as the law of the case holds here.

Finally, St. Paul's Estoppel 'claim' also fails as a matter of law. It is derivative of the other claims which all fail as well. In addition, it is based on estopping parties from arguing National Union is a co-excess carrier to St. Paul, and National Union has obtained summary judgment in this case, including on the Estoppel claim alleged against the carrier defendants.

Aspen is therefore entitled to summary judgment on the St. Paul's subrogation and estoppel claims.

II. STATEMENT OF FACTS

A. Procedural History.

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 on record, including St. Paul's policy which it refused to provide during the motion to dismiss stage:

> Similarly, both the National Union and Aspen Specialty Ins. Co. Motions [to dismiss] require the Court to go beyond the pleadings and ask this Court to analyze insurance policies without testing through discovery whether those policies are complete and that there are no missing amendments, exhibits, riders, or endorsements. … Further, both National Union and Aspen argue that the indemnity action must fail as a matter of law, but it seems that at least one piece of evidence necessary to evaluate these legal issues is missing from the record before the Court, I.e. the St Paul policy.

Court's 02/28/19 Minute Order.

The defendants filed answers, the parties' policies were served, and motions for summary judgment were then filed by all parties where all verified insurance policies were provided on record.[1]

Plaintiff moved for partial summary judgment 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 and Marquee then also moved for summary judgment as to the viability of Plaintiff's claims against them.

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[1] In addition to the Exhibits provided herewith, Aspen hereby incorporates by this reference in full, the following Appendix and Exhibits in support of this Motion:

- National Union's 09/13/2018 Appendix of Exhibits in support of Motion for Summary Judgment which includes:
  - Exhibit 1: National Union Policy No. 25414413
  - Exhibit 2: Zurich Policy No. PRA 9829242-01
  - Exhibit 3: St. Paul Policy No. QK 06503290
  - Exhibit 4: Aspen Policy No. CRAXYD11
  - Exhibit 5: Except of 3/24/2017 trial transcript in underlying proceeding.

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 only—ruling that the Aspen policy limit for the underlying action was $1 million. Attached as **Exhibit A** hereto is the Court's Order denying St. Paul's Motion for Partial Summary Judgment and granting in part Aspen's Countermotion holding the Aspen has a $1 million policy limit.

The Court limited its rulings on the St, Paul-Aspen Motions at the time to the policy limits issue, and deferred ruling on the viability of Plaintiff's claims against Aspen until it heard and ruled on the other defendants' Motions for Summary Judgment being heard one week later on similar issues. Attached as **Exhibit B** is a copy of the October 15, 2019 hearing transcript on National Union's and Marquee's Motions for Summary Judgment; attached as **Exhibit C** is a copy of the October 8, 2019 hearing transcript on the St. Paul-Aspen Motions.

One week after the hearing on the St. Paul-Aspen Motions, the Court then orally granted National Union's and Marquee's Motions for Summary Judgment as to the non-viability of Plaintiff's subrogation claims as a matter of law, and invited Aspen after the hearing concluded to submit a Renewed or "me too" Motion as to the viability of Plaintiff's claims, now that the Court had ruled against the viability of St. Paul's subrogation claims on the other defendants' Motions. Attached as **Exhibit D** is a copy of the Court's Order Granting National Union's Motion for Summary Judgment.

The parties all submitted competing orders to the Court. While the parties' summary judgment motions were still pending and before orally 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 where the court stayed discovery as to St. Paul-Aspen, the other defendants' motions for summary judgment were not on file yet.

However, expert deadlines began approaching while the parties' competing summary judgment orders were pending. Consequently, St. Paul and Aspen agreed to stay discovery, all

deadlines, and trial pending a determination on Aspen's to-be-filed Renewed Motion for Summary Judgment on the viability of Plaintiff's claims against Aspen—to be filed after notice of entry of the Court's pending orders on all the parties' summary judgment motions. Attached as **Exhibit E** is a copy of the Court's Order staying deadlines and trial pending Aspen's Renewed Motion for Summary Judgment.

St. Paul and Aspen agreed to stay discovery and deadlines because the Court still needed to rule on the viability of St. Paul's claims against Aspen as a matter of law based on the insurance policies, and the now controlling findings of fact and law in the parties' summary judgment orders.

B. Underlying Action and Post-Judgment Settlement.

This action relates to a post-judgment settlement agreed to by St. Paul, 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 ("Underlying Action"). Redacted Amended Complaint ("Amended Comp."), ¶ 6. Following the Moradi action, Aspen ($1 million policy limit) and National Union ($25 million policy limit) paid their policy limits as part of a global settlement, as did Zurich ($1 million limit as primary for Cosmopolitan) and St. Paul ($25 million limit as excess for Cosmopolitan). Due to the post-judgment settlement paid in full by the insurers, Cosmopolitan did not pay money in settlement of the action, nor is it alleged to have done so in the Amended Complaint either. Now, in this action, St. Paul seeks to recover the money that it contributed toward that settlement from the defendants.

In the Underlying 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. Amended Comp., ¶¶ 6-7. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a/ Marquee Nightclub ("Marquee") on April 4, 2014. Amended Comp., ¶¶ 8-10; *see also* Exhibit A to Amended Complaint. 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*. at ¶ 9.

During the course of the Underlying Action, Moradi made legal arguments 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. *Id*. at ¶ 13. The Court in the Underlying Action agreed with Moradi's position and imposed vicarious liability on Cosmopolitan for Marquee's actions. *Id*. The Court also ruled that Marquee and Cosmopolitan were jointly and severally liable for Moradi's damages claim. *Id*. at ¶ 14.

The Underlying Action went to trial and on April 28, 2017 and the jury returned a verdict in Moradi's favor and awarded compensatory damages in the amount of $160,500,000. Amended Comp, ¶ 60. During the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. *Id*. at ¶ 66. National Union, St. Paul, Aspen, and Zurich contributed towards the settlement demand. *Id*. at ¶¶ 67-69.

C. Insurance Policies.

Marquee is an insured under National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("National Union policy"). Amended Comp., ¶ 30; Declaration of Michael F. Muscarella ("Muscarella Decl."), ¶ 2 (attached to National Union's Initial Motion to Dismiss as Exhibit "A.") The National Union umbrella policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. Amended Comp. ¶ 31; Muscarella Decl., ¶ 2. Cosmopolitan is alleged to be an additional insured to the National Union umbrella policy with respect to the Underlying Action. Amended Comp., ¶ 33. Marquee and Cosmopolitan tendered the Underlying Action to National Union under the National Union policy. *Id*. at ¶ 34. National Union acknowledged a potential for coverage for Cosmopolitan and Marquee under the National Union umbrella policy and provided a joint defense to Cosmopolitan and Marquee in the Underlying Action. *Id*. at ¶ 35.

Marquee is an insured under Aspen primary commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("Aspen Policy"). Amended Comp., ¶ 15; *see also* Declaration of Marvin Robalino ("Robalino Decl."), attached as Exhibit A to Aspen's Opposition and Countermotion for Summary Judgment;

the Aspen policy and Declaration are again attached to this Motion for reference as **Exhibit F-F1**. The Aspen primary commercial general liability policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. *Id*. at ¶ 16; *see also* Exhibit F1 hereto (Aspen Policy) and Exhibit A, Court's Order granting in part Aspen's Countermotion for Summary Judgment.

Cosmopolitan is alleged to also be an additional insured to the Aspen primary commercial generally liability policy with respect to the Underlying Action. Amended Comp., ¶ 20. Cosmopolitan tendered the Underlying Action to Marquee for defense pursuant to a written agreement entered into between the Marquee and Cosmopolitan. *Id*. at ¶ 25. The Marquee accepted Cosmopolitan's tender. *Id*. Aspen is alleged to have acknowledged coverage for Cosmopolitan and Marquee under the Aspen primary commercial general liability policy and provided a joint defense to Cosmopolitan and Marquee in the Underlying Action. *Id*. at ¶ 27.

Cosmopolitan is an insured under St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 ("St. Paul policy"). Amended Comp., ¶ 40. Attached as Exhibit B to Aspen's Opposition and Countermotion for Summary Judgment is a Certified copy of the St. Paul policy as produced by St. Paul in this action; it is attached as **Exhibit G** for ease of reference to this Motion. The St. Paul umbrella policy provided for a limit of liability of $25,000,000 with respect to .the Underlying Action. See Exhibit H. Zurich was a primary insurer for Cosmopolitan.

D. <u>Law of The Case – The Summary Judgment Orders.</u>

1. Order Granting In Part Aspen's Countermotion for Summary Judgment Regarding A $1 Million Policy Limit for the *Moradi* Action.

The Court denied St. Paul's Motion for Partial Summary Judgment and granted in part Aspen's Motion for summary judgment. Exhibit A. The Court found that Aspen issued insurance policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, to the Restaurant Group, et. al. ("Aspen Policy") and that Defendant Roof Deck Entertainment, LLC (i.e, "Marquee) is a named insured in the Aspen Policy by endorsement. *Id*. at 2:25-27. The Court concluded and held that the plain language of the Aspen Policy operates to limit coverage for the Moradi action to $1 million. *Id*. at 8:15-20.

2. Order Granting National Union's Motion for Summary Judgment.

The Court also granted National Union's Motion for Summary Judgment making various findings and rulings. Exhibit D. In that Order, the Court made the following relevant and controlling findings of fact and conclusions of law:

I.

FINDINGS OF FACT

A. <u>The Underlying Action</u>

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.)

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 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.)[2]

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

B. Insurance Policies

1. The Cosmopolitan Insurance Tower

a. Cosmopolitan's Primary Policy with Zurich American Insurance Company

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.)

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

[2] The same is true for Aspen; Aspen exhausted its full policy limit as well given the Court's determination of the Aspen policy limit.

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.)

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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.)

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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 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.

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III.

CONCLUSIONS OF LAW

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3. As a threshold matter, the Second Cause of Action [Subrogation – Breach of the Duty to Settle] 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.

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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.

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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.[3]

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.

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16. The Fourth Cause of Action [Subrogation – breach of insurance contract] 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.[4]

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*

[3] Similarly, St. Paul asserts the same claim against Aspen but is likewise not a party to the Aspen insurance contract.

[4] For the same reasons, it cannot pursue such claims against Aspen either.

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 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.[5]

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

[5] Again, the same is true with respect to Aspen.

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.

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30. In the FAC, St. Paul asserts the Seventh Cause of Action for Equitable Estoppel ("Seventh Cause of Action"), seeking to preclude National Union [and Aspen] 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.)

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); *In 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.

Exhibit D.

III. ARGUMENT

A. Summary Judgment Standard.

"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. Aspen Is Entitled to Summary Judgment on St. Paul's Subrogation Claims.

St. Paul's Amended Complaint was drafted vaguely so as to be undiscernible which form of subrogation it was actually asserting, equitable or conventional. The omission of the word "equitable" from its Amended Complaint, which formerly appeared in the initial Complaint, naturally suggests the Amended Complaint at best seeks to state a claim for contractual subrogation only. Plaintiff's prior Motion for Partial Summary Judgment, however, argued that it is entitled to both contractual and equitable subrogation. The Court may make a determination of the viability of St. Paul's claims as a matter of law, and in fact did so on National Union's Motion.

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1. St. Paul Is Not Entitled To Contractual Subrogation.

St. Paul has not alleged that it had any right to subrogation against Aspen based on any contract *with Aspen*. St. Paul is a stranger to the Aspen contract. In determining whether a party can maintain an action for breach of the implied covenant of good faith and fair dealing, the prerequisite for maintaining any such action is the existence of a contractual relationship between the parties.

This is because the covenant of good faith and fair dealing is an implied term in the contract. *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 (citing *Love v. Fire Ins. Exchange* , (1990) 221 Cal.App.3d 1136, 1153, 271 Cal.Rptr. 246 (1990) (implied covenant is auxiliary and supplementary to express contractual obligations; it has no existence separate from the contractual obligations). Further, the California Supreme Court has held that nonparties to the insurance contract are not subject to a suit for breach of the implied covenant. *Id*. (*citing Gruenberg v. Aetna Ins. Co*., Cal.3d 566, 576, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973)).

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 whether the excess insurer could be considered a third party beneficiary to the primary insurance company's policy such that that the excess carrier could maintain its action for breach of an implied covenant. *Id*. The Court ruled that under California law, 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, and looks to the terms of the contract as a whole in determining whether an entity or individual is an intended beneficiary and in doing so has applied

California law. *Canfora v. Coast Hotels and Casinos, Inc*., 121 Nev. 771, 779, 121 P.3d 599, 604-605 (2005) (*citing 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). *California courts* recognizing that an excess insurer has a right to sue a primary insurer have concluded that such right arises by *equitable* subrogation (discussed below) and not by reason of an independent duty arising under breach of contract such as breach of the duty of good faith and fair dealing. *Fireman's Fund Ins. Co. v. Maryland Casualty Co*., 21 Cal. App. 4th at 1600.

Here, in Plaintiff's First Cause of Action for Subrogation- Breach of the Duty to Settle, St. Paul alleges that Aspen breached its duty by refusing to settle the Underlying Action after receiving a pre-trial settlement demand that was within applicable policy limits. Specifically, St. Paul alleges that Aspen breached the duty to settle by refusing to settle the Underlying Action despite receiving a reasonable $1,500,000.00 pre-trial Offer of Judgement by Moradi, which St. Paul alleges was within Aspen's policy limits. Amended Comp., ¶ 76.

In the second cause of action against Aspen, Subrogation- Breach of The Aspen Insurance Contract, St. Paul alleges that Aspen breached its obligations under the Aspen Policy by failing to provide a conflict-free defense and failing to pay any amount on Cosmopolitan's behalf toward the settlement, and by failing to pay all limits under the Aspen policy to resolve Cosmopolitan's liability when it had the opportunity. Amended Comp., pp. 17-18.

However, both causes of action require the existence of a contract between Aspen and St. Paul, which lacks as a matter of law. Here, like in *Fireman's Fund Ins. Co. v. Maryland Casualty Co*., separate contracts exist -- the Aspen policy, the National Union policy, and the St. Paul policy which is an umbrella policy that insures the Cosmopolitan. No direct contractual relationship exists between Aspen and St. Paul such that St. Paul can maintain its subrogation claims.

Further, St. Paul is not an express beneficiary under the Aspen contract either such that it can maintain an action stemming from breach of contract and breach of an implied duty of good faith and fair dealing. Under Nevada law, the insurance policy must have been expressly made for

the benefit of St. Paul, and it is not enough that St. Paul *incidentally* benefits from the Cosmopolitan's insurance policy with Aspen.

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

Contractual subrogation in this context is thus not a viable cause of action. St. Paul cannot dispute there is no contractual privity here. And, in the *California Capital* case, the facts were similar as here, where the Court found, and correctly so, that the insured had no assignable cause of action because, among other things, the insured had not suffered any damages since, regardless of a judgment in excess of insurance limits, the **post judgment settlement** and defense expenses were fully paid by insurers—just as here. *California Capital Ins. Co. v. Scottsdale Indem. Ins. C*o., 2018 WL 2276815, *4 (Cal. Ct. App. May 18, 2018 (unpublished).

This Court has also already determined in this case that contractual subrogation is not viable here. Accordingly, Aspen is entitled summary judgment on the subrogation claims to the extent they are contractually based.

2. St. Paul Is Not Entitled To Equitable Subrogation Either.

To the extent the court entertains St. Paul's claims as equitable claims for subrogation, they still fail however, because once again, Nevada state court has not recognized such a cause of action, as even the unpublished federal *Colony* decision recognized: "[T]he question of equitable subrogation's application in the current context—between insurance carriers and excess carriers—has not yet been addressed by the Nevada Supreme Court." *Colony*, 2016 WL 33609413 at *4. .

Nevada state court has not recognized that an excess insurer can pursue a claim against another insurer for equitable subrogation. This Court should not create new law here.

Equitable subrogation is an equitable remedy that has not been extended to the context here by the Nevada Supreme Court. The circumstances present do not implicate equity "to accomplish what is just and fair to the parties," because, among other things, St. Paul's $25 million excess coverage was not the obligation here of Aspen, the primary insurer with $1 million of coverage; shifting that obligation to Aspen here is not equitable, but rather a windfall for St. Paul, who is in a different tower of coverage among other things.

Essentially, St. Paul is arguing that it is just for this Court to recognize equitable subrogation in Nevada for the first time, across towers of coverage, but has not alleged any corresponding injustice for this court to do so. This is even more particularly true because the Court has construed the Aspen policy as a $1 million limit. The subrogation claims are based on the alleged failure to settle within policy limits and alleged failure to pay all amounts owed under the Aspen policy, neither of which is present here. Equity does not require the Court to recognize a new cause of action in Nevada for the first, and Plaintiff is not in a superior equitable, position. The circumstances and equities in this case simply do not call for this Court to recognize a new claim for relief in Nevada which has not previously been recognized in this context.

St. Paul in its Motion for Partial Summary Judgment cited the *Colony* case, an outlier, unpublished federal case which has never been cited by any other courts, in an effort to have this Court recognize equitable subrogation in Nevada state court for the first time. *Colony* cited California law and discussed the *essential* elements of such a claim, where it is recognized in that state (but not here). Specifically, in *Colony*, the United States District Court relied upon the California case of *Fireman's Fund Ins. Co. v. Maryland Cas. Co*., 65 Cal. App. 4th 1279, 1292, 77 Cal. Rptr. 2d 296, 303 (1998) to identify eight essential elements of an excess insurer's cause of action for equitable subrogation against a primary insurer. The eight elements identified were:

(1) the insured (Cosmopolitan) suffered a loss for which the defendant insurer (Aspen) is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer;

(2) the claimed loss was one for which the insurer (Excess) was not primarily liable;

(3) the insurer (Excess) has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable;

(4) the insurer (Excess) has paid the claim of its insured (Cosmopolitan) to protect its own interest and not as a volunteer;

(5) the insured (Cosmopolitan) has an existing, assignable cause of action against the defendant (Aspen) that the insured (Cosmopolitan) could have asserted for its own benefit had it not been compensated for its loss by the insurer (Excess);

(6) the insurer (Excess) has suffered damages caused by the act or omission upon which the liability of the defendant (Aspen) depends;

(7) justice requires that the loss be entirely shifted from the insurer (Excess) to the defendant (Aspen), whose equitable position is inferior to that of the insurer (Excess); and

(8) the insurer's (Excess) damages are in a liquidated sum, generally the amount paid to the insured (Cosmopolitan).

See Colony at *5.

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

Two of the essential elements include (1) that the insured (Cosmopolitan) have suffered a "loss," as that is construed by states who recognize equitable subrogation amongst insurers, and (5) the insured (Cosmopolitan) had an existing, assignable cause of action, again, as construed by states who recognize equitable subrogation amongst insurers. Both such essential elements are lacking as matter of law, under the law of California, should this Court seek to adopt that law to create a new cause of action in Nevada. *See Fireman's Fund Ins. Co.*, 65 Cal. App. 4th at 1292. However, there

is no "loss" to Cosmopolitan here as the courts that allow equitable subrogation construe "loss," and this Court ruled on summary judgment for National Union that there are no such damages because the insurers fully defended and paid the settlement.

In *California Capital Ins. Co. v. Scottsdale Indemnity Ins*., 2018 WL 2276815 (Cal.Ct.App. 2018), California Capital Insurance Company ("California Capital") defended its insureds in a personal injury action filed against them. *Id*. at *1. It rejected the personal injury plaintiff's settlement demands. *Id*. The judgment entered against the insureds far exceeded policy limits. *Id*. California Capital then entered into a post-judgment settlement with the claimant and made the agreed payment to satisfy the judgment against the insureds. *Id*. This is precisely what is alleged to have happened in Moradi as well.

California Capital then sued Scottsdale Indemnity Company ("Scottsdale"), alleging Scottsdale's insurance policy, issued to another defendant in the underlying personal injury action, also covered California Capital's insureds as additional insureds (just like St. Paul contends here). *Id*. California Capital's complaint included causes of action for breach of contract and breach of the covenant of good faith and fair dealing. *Id*. at *4. California Capital sought to recover all or a portion of the amounts it paid to defend and indemnify its insureds in the underlying action. *Id*. at *1.

"The trial court found California Capital could not pursue the causes of action for breach of contract and breach of the covenant of good faith and fair dealing that had been assigned to it by the insureds, because the insureds sustained no damage as a result of those alleged breaches." *Id*. California Capital appealed challenging the rejection of the assigned contractual claims. *Id*. The appellate court "conclude[d] the trial court correctly determined California Capital could not pursue the assigned causes of action because the insureds suffered no actionable damages." *Id*. This Court has similarly found the same with respect to St. Paul's insured here too.

The California appellate court held "[t]he insured's damage claim against the insurer is assignable, although some damages potentially recoverable in a bad faith action, including damages for emotional distress and punitive damages, are not assignable." *Id*. at *4. "The assignment merely transfers the interest of the assignor." *Id*. "The assignee 'stands in the shoes' of the assignor, taking

his rights and remedies, subject to any defenses which the obligor has against the assignor prior to notice of the assignment.'" *Id*. The Court then held:

> The trial court concluded 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 from whom it obtained its assignment of rights sustained no damage as a result of Scottsdale's failure to defend and indemnify them, or to settle the claim within Scottsdale's policy limits. The [] **defendants' defense costs and the post-judgment settlement were fully paid by California Capital. Therefore, an essential element of California Capital's causes of action was missing**. Case law supports the trial court's conclusion.

Id. The Court then went through California caselaw supporting upholding of the ruling on appeal. *Id*. at *5-6. The Court then held:

> Here, California Capital had no direct cause of action for breach of contract or breach of the covenant of good faith and fair dealing against Scottsdale. California Capital was not a party to the Scottsdale insurance policy issued to Joe's Trucking. California Capital pursued its causes of action for breach of contract and breach of the covenant of good faith and fair dealing as assignee of the Wend defendants' claims against Scottsdale under the Scottsdale policy issued to Joe's Trucking. It was undisputed that California Capital paid all of the costs of the Wend defendants' defense and satisfied the judgment against them through a postjudgment settlement. Consequently, because their causes of action for breach of contract and breach of the covenant of good faith and fair dealing lacked the essential element of damages, the Wend defendants had no viable claim under those theories to assign to California Capital.

Id. at *6. Similar here, the insured, Cosmopolitan, suffered no loss and had no assignable cause of action to assign to St. Paul. Because Cosmopolitan did not have a loss or assignable cause of action, as those are *essential* elements required in a *California* equitable subrogation claim, essential elements of a claim for equitable subrogation, if the Court were to recognize it here, are lacking as a matter of law anyways. Aspen is therefore entitled to summary judgment on the claim as a matter of law even were the Court to newly recognize the claim in Nevada.

Similarly, in *National Union v. Tokio Marine*, the California court of appeals upheld dismissal of an equitable subrogation claim because the insured suffered no loss. 233 Cal. App.4th 1348, 1362 (Cal.Ct.App. 2015). National Union pled a cause of action against Tokio Marine for

equitable subrogation of Costco's bad faith claim, based on its status as an additional insured under the Insurance Policy. *National Union*, 233 Cal.App. 4th at 1360.

National Union alleged that Tokio Marine breached the duty of good faith and fair dealing it owed to Costco by, among other things, refusing Costco's tenders of defense and indemnity, failing to conduct its own investigation of the claimant's claims against Costco, and failing and refusing to give Costco's interests as much consideration as the other insureds and/or their own. *Id*. at 1360-1361. National Union sought to recover $187,000 in settlement monies Costco paid towards the settlement, approximately $4.3 million that National Union paid to settle the case, and National Union's fees. *Id*. at 1361

The trial court dismissed the equitable subrogation claim agreeing that "National Union did not present any 'allegation that Costco suffered identifiable damages due to the bad faith conduct upon which [National Union] has paid money and for which equitable subrogation is now sought.'" *Id*. National Union challenged the ruling on appeal. *Id*. The Court, on appeal when reviewing a dismissal, treated it as admitting all facts true, considered all matters judicially noticed, determined whether the facts constitute a claim for relief, and whether a defect could be cured by amendment. *Id*. The Court still upheld dismissal of the equitable subrogation claim because there was no loss to Costco, the insured, under the law construing equitable subrogation:

> 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.

Id. at 1362.

In addition to the other elements, for an equitable subrogation claim to be recognized, "justice [must] require[] that the loss be entirely shifted from the insurer to the defendant, whose equitable position is deemed inferior to that of the insurer." *Fireman's Fund*, 65 Cal. App. 4th at 1292. Here, Plaintiff was not in a superior position of equity and justice does not require the shifting of St. Paul's $25 million excess obligation to a $1 million primary insurer like Aspen.

Nevada does not recognize contractual or equitable subrogation. This Court declined to recognize it for the first time in Nevada when ruling on National Union's Motion for Summary Judgment, and should do so here as well.

Even were the Court to consider recognizing subrogation here, St. Paul's claims would still fail. St. Paul's subrogation claim for failure to settle within policy limits (i.e., failure to accept a $1.5 million offer of judgment) fails as a matter of law now in light of the Court's determination that Aspen only had a $1 million policy limit. And St. Paul's subrogation for breach of contract likewise fails because St. Paul is not a party the Aspen insurance contract, Cosmopolitan has not suffered cognizable damages because the insurers fully paid for the defense and settlement, Cosmopolitan thus had no assignable cause of action to St Paul, and exhausted its policy limits.

C. Aspen Is Entitled to Summary Judgment on St. Paul's Equitable Estoppel Claim Because It Is Not Directed at Aspen, and National Union, To Whom It Is Directed, Obtained Summary Judgment On The Claim As Well.

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

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

Here, St. Paul asserts the claim with respect to a defense raised by National Union to prevent National Union from asserting it is co-excess concerning the claim for damages by St. Paul against National Union for subrogation. In other words, there is no basis for the claim as against Aspen, particularly since Aspen is entitled to summary judgment on the subrogation claims. The issue, claims, and estoppel were between St. Paul and National Union, who disputed whether they were co-excess insurers. Estoppel was Plaintiff's defense to National Union's defense that St. Paul is not excess to National Union. Aspen should therefore receive judgment in its favor.

In addition, the Court has granted summary judgment on the Estoppel claim to National Union, who is no longer a party to this case. The Estoppel claim therefore no longer has any place here, and the Court has ruled National Union is an excess insurer just in a different tower of coverage. Therefore, Aspen is entitled to summary judgment on the Estoppel claim on these bases as well.

IV. CONCLUSION

For the foregoing reasons and arguments, Aspen is entitled to summary judgment on St. Paul's claims including on, but not limited to, the following grounds:

1. Nevada has not recognized the subrogation claims in the context here and this Court should decline to do so as well;
2. St. Paul's subrogation claims fail because St. Paul is not a party to the Aspen contract;
3. St. Paul's subrogation claims fail because its insured has not suffered damages since the insurers fully paid for the defense and settlement;
4. St. Paul's subrogation claims fail because Aspen did not fail to accept a settlement offer within its $1 million policy limit;
5. St. Paul's subrogation claims fail because Aspen exhausted policy limits;
6. Equity does not require recognizing St. Paul's claims here for the first time in Nevada;

///

///

///

7. St. Paul's Estoppel claim fails because it is not directed against Aspen, National Union obtained summary judgment on the Estoppel claim and is no longer a party, and the Court has determined National Union is an excess insurer just in a different tower of coverage than St. Paul.

DATED this 11th day of June, 2020

MESSNER REEVES LLP

/s/ Ryan A. Loosvelt

MICHAEL M. EDWARDS
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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 11th day of June, 2020, I served the following document(s):

DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT

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

Michael K. Wall
HUTCHINSON & STEFFIN
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
T: (702) 385-2500
mwall@hutchlegal.com
Attorneys for Plaintiff, St. Paul Fire & Marine Insurance Company

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.

/s/ Desja Wilder
An employee of Messner Reeves LLP

APEN
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Attorneys for Defendant
Aspen Specialty Insurance Company

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, 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 **APPENDIX TO EXHIBITS TO DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant Aspen Specialty Insurance Company ("Defendant"), by and through its counsel, Michael M. Edwards, Esq., and Ryan L. Loosvelt, Esq., of MESSNER REEVES LLP, hereby submits Appendix to Exhibits to Defendant Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment as follows:

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APPENDIX TO EXHIBITS TO DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT

Exhibit	Description	Amount of Pages
A	05/27/2020 Notice of Entry and Order Denying Plaintiff's Motion for Partial Summary Judgment And Order Granting In Part Aspen's Countermotion for Summary Judgment	1-11
B	10/15/2019 Hearing Transcript on National Union's Motion for Summary Judgment	1-55
C	10/08/2019 Hearing Transcript on Plaintiff's Motion for Partial Summary Judgment and Aspen's Countermotion for Summary Judgment.	1-24
D	05/27/2020 Notice of Entry and Order Granting National Union's Motion for Summary Judgment.	1-21
E	04/27/2020 Notice of Entry of Order on Plaintiff and Aspen's Stipulation and Order to Stay Discovery and Stay or Vacate Trial	1-9
F	Declaration of Marvin Robalino (this was attached as Exhibit A to Aspen's Opposition to Plaintiff's Motion for Partial Summary Judgment and Countermotion for Summary Judgment)	1
F1	Aspen insurance policy (this was also attached as Exhibit A1 to Aspen's Opposition to Plaintiff's Motion for Partial Summary Judgment and Countermotion for Summary Judgment)	1-118
G	Certified copy of the St. Paul insurance policy (this was attached as Exhibit B to Aspen's Opposition to Plaintiff's Motion for Partial Summary Judgment and Countermotion for Summary Judgment)	1-62
H	Declaration of Ryan A. Loosvelt in Support of Defendant Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment	1-3

DATED this 11th day of June, 2020.

MESSNER REEVES LLP

/s/ Ryan A. Loosvelt

Ryan A. Loosvelt, Esq.
Nevada Bar No. 8550
8945 West Russell Road, Suite 300
Las Vegas, Nevada 89148
Attorneys for Defendant Aspen Specialty Ins. Co.

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 June 11, 2020, I served the following document(s):

APPENDIX TO EXHIBITS TO DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT

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

Michael K. Wall
HUTCHINSON & STEFFIN
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
T: (702) 385-2500
mwall@hutchlegal.com
Attorneys for Plaintiff St. Paul Fire & Marine Insurance Company

By Mail. By placing said document(s) in an envelope or package for collection and mailing, addressed to the person(s) at the address(es) listed above, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing of mail. Under that practice, on the same day that mail is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

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

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

/s/ Desja Wilder
An employee of Messner Reeves LLP

EXHIBIT A

NEOJ
Michael K. Wall (2098)
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St. Paul Fire & Marine Ins. Co.

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.

HUTCHISON & STEFFEN, PLLC

By /s/ Michael K. Wall
Michael K. Wall (2098)
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
mwall@hutchlegal.com

Attorney for Plaintiff

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

MESSNER REEVES, LLP

_____

MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT
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EXHIBIT B

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.

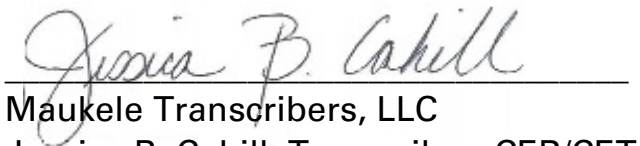

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EXHIBIT C

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.

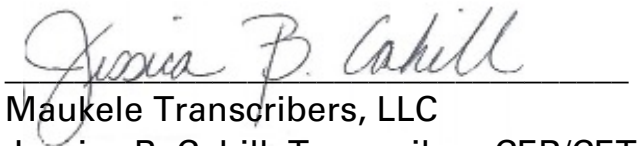
Okay. Thank you.

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.



Maukele Transcribers, LLC
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EXHIBIT D

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

Please take notice the on the 14th day of May, 2020, the Court entered Findings of Fact, Conclusions of Law and Order Granting National Union Fire Insurance Company of Pittsburgh PA's 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 21st day of May, 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S 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;

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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 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. Insurance Policies

1. The Cosmopolitan Insurance Tower

a. Cosmopolitan's Primary Policy with Zurich American Insurance Company

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. St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract

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. St. Paul's Seventh Cause of Action for Equitable Estoppel

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

EXHIBIT E

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

PLEASE TAKE NOTICE that on the 27th day of April, 2020, the Stipulation and Order to Stay Discovery and Stay or Vacate Trial was entered on the Court's docket.

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A copy of said Stipulation and Order is attached hereto and incorporated herein.

DATED this 27th day of April, 2020.

MESSNER REEVES, LLP

By */s/ Ryan A. Loosvelt*
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PROOF OF SERVICE

LV-St. Paul Fire and Marine Insurance v. Aspen Specialty Insurance

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 April 27, 2020, I served the following document(s):

NOTICE OF ENTRY OF STIPULATION AND ORDER TO STAY DISCOVERY AND STAY OR VACATE TRIAL

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, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

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

/s/ Desja Wilder
An employee of Messner Reeves LLP

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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

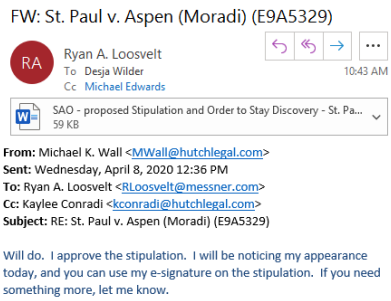
IT IS SO STIPULATED.

MESSNER REEVES, LLP

/s/ Ryan A. Loosvelt
MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT
Nevada Bar No. 8550
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
Attorneys for Defendant Aspen Specialty Insurance Company

HUTCHINSON & STEFFIN

/s/ Michael K. Wall
MICHAEL K. WALL
Nevada Bar No. 2098
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
T: (702) 385-2500
mwall@hutchlegal.com
Attorneys for Plaintiff St. Paul Fire & Marine Insurance Company


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.

/ / /

/ / /

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:
MESSNER REEVES LLP

/s/ Ryan A. Loosvelt
MICHAEL M. EDWARDS
Nevada Bar No. 6281
RYAN A. LOOSVELT
Nevada Bar No. 8550
8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148

EXHIBIT F

I, Marvin Robalino, do hereby declare under penalty of perjury as follows:

1. I am a Vice President at Aspen Specialty Insurance Company. I am authorized to make this declaration on its behalf. I am over the age of 18, competent to testify to the matters herein, and file this declaration in support of Aspen's Opposition to Plaintiff's motion for Partial Summary Judgment and Countermotion for Summary Judgment.

2. Attached as Exhibit 1 is a true and correct copy of Aspen Specialty Insurance Company policy number CRASXYD11, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et. Al., with premium information redacted.

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

Dated this 19 day of September, 2019

Marvin Robalino
Aspen Insurance
Vice President – Casualty Claims

EXECUTED this 19 day of September, 2019

EXHIBIT F1

ASPEN SPECIALTY INSURANCE COMPANY
POLICY NUMBER:CRA8XYD11
RENEWAL OF: NEW

ASPEN

COMMON POLICY DECLARATIONS

ASPEN SPECIALTY INSURANCE COMPANY c/o Aspen Specialty Insurance Management, Inc. 590 Madison Avenue, 7th Floor New York, NY 10022	AMWINS INSURANCE BROKERAGE OF CA 601 S. FIGUEROA STREET LOS ANGELES, CA 90017

NAMED INSURED: THE RESTAURANT GROUP ETAL

MAILING ADDRESS: 888 7TH AVENUE, 34TH FLOOR
NEW YORK, NY 10106

POLICY PERIOD: FROM 10/06/2011 TO 10/06/2012 AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

BUSINESS DESCRIPTION

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

	PREMIUM
COMMERCIAL GENERAL LIABILITY COVERAGE PART	$[redacted]
COMMERCIAL PROPERTY COVERAGE PART	$[redacted]
LIQUOR LIABILITY COVERAGE PART	$[redacted]
TERRORISM PREMIUM	$[redacted]
TOTAL ADVANCE PREMIUM DUE AND PAYABLE AT INCEPTION	$[redacted]
Minimum retained audit prem: $100% Minimum retained premium:	$[redacted]

FORMS APPLICABLE TO ALL COVERAGE PARTS:
AS PER SCHEDULE OF APPLICABLE FORMS

NEW YORK: The insurer(s) named herein is (are) not licensed by the state of New York, not subject to its supervision, and in the event of the insolvency of the insurer(s), not protected by the New York State Security Funds. The policy may not be subject to all the regulations of the insurance department pertaining to policy forms.

Surplus Lines Broker Name: AMWINS INSURANCE BROKERAGE OF CA
Surplus Lines Broker Address: 601 S. FIGUEROA STREET
LOS ANGELES, CA 90017
Surplus Lines Broker License No.: EX-1053628-R

Jaime E. DeCantillon
Authorized Representative

ASPGL074 DEC 0511

ASPEN SPECIALTY INSURANCE COMPANY
POLICY NUMBER:CRA8XYD11
RENEWAL OF: NEW

ASPEN

COMMERCIAL GENERAL LIABILITY DECLARATIONS

ASPEN SPECIALTY INSURANCE COMPANY c/o Aspen Specialty Insurance Management, Inc. 590 Madison Avenue, 7th Floor New York, NY 10022	AMWINS INSURANCE BROKERAGE OF CA 601 S. FIGUEROA STREET LOS ANGELES, CA 90017

NAMED INSURED: THE RESTAURANT GROUP ETAL

MAILING ADDRESS: 888 7TH AVENUE, 34TH FLOOR
NEW YORK, NY 10106

POLICY PERIOD: FROM 10/06/2011 TO 10/06/2012 AT 12:01 A.M. TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE		
EACH OCCURRENCE LIMIT	$ 1,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	$ 100,000	Any one premises
MEDICAL EXPENSE LIMIT	$ N/A	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	$ 1,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT		$ 2,000,000
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT		$ 2,000,000

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:

☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ TRUST

☐ LIMITED LIABILITY COMPANY ☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY)

☐ OTHER

BUSINESS DESCRIPTION:

ALL PREMISES YOU OWN, RENT OR OCCUPY

LOCATION NUMBER	
	SEE FORM #CG2144

CLASSIFICATION AND PREMIUM							
LOCATION NUMBER	CLASSIFICATION	BASE	EXPOSURE	RATE/1000		ADVANCE PREMIUM	
				Prem/ Ops	Prod Comp Ops	Prem/ Ops	Prod Comp Ops
	COMPOSITE RATE ALL OPERATIONS	GROSS SALES	$175,000,000	$3.00	INCL.	$[redacted]	INCL.

ADVANCE PREMIUM DUE AND PAYABLE AT INCEPTION (SUBJECT TO AUDIT) $[redacted]
MINIMUM RETAINED AUDIT PREMIUM $[redacted]
MINIMUM RETAINED PREMIUM $[redacted]

AUDIT PERIOD (IF APPLICABLE)	☒ ANNUALLY	☐ SEMI-ANNUALLY	☐ QUARTERLY	☐ MONTHLY

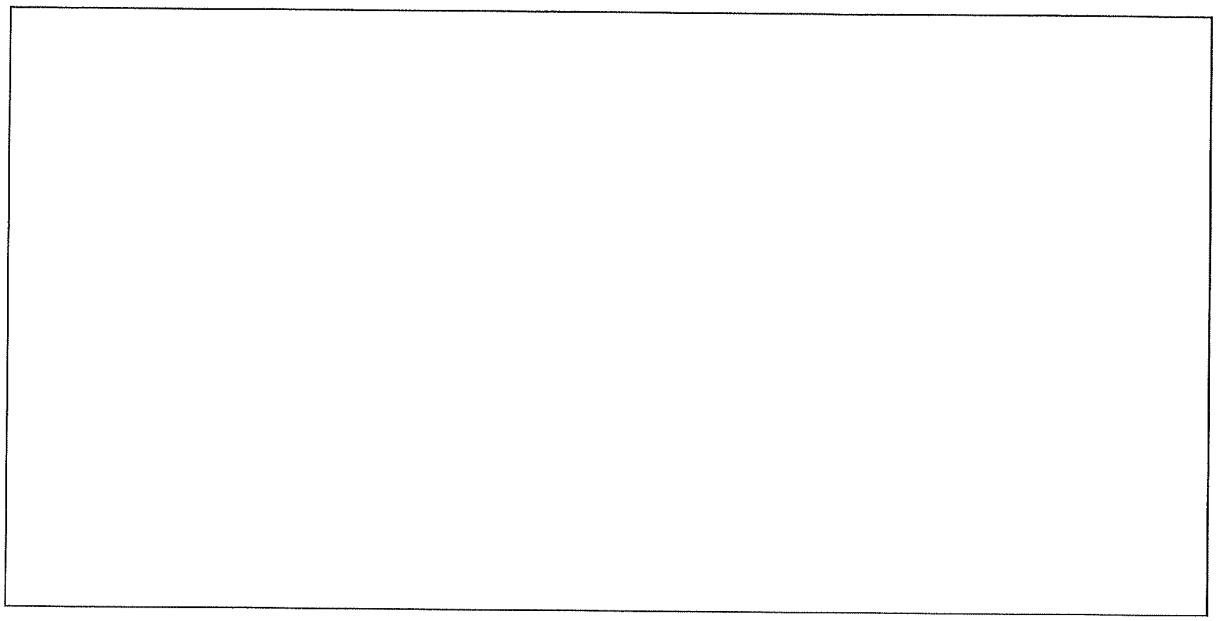
ENDORSEMENTS

ENDORSEMENTS ATTACHED TO THIS POLICY:

SEE SCHEDULE OF APPLICABLE FORMS

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Jaime E. DeCantillon
Authorized Representative



ASPEN SPECIALTY INSURANCE COMPANY
POLICY NUMBER: CRA8XYD11
RENEWAL OF: NEW

ASPEN

LIQUOR LIABILITY DECLARATIONS

COMMERCIAL GENERAL LIABILITY

ASPEN SPECIALTY INSURANCE COMPANY c/o Aspen Specialty Insurance Management, Inc. 590 Madison Avenue, 7th Floor New York, NY 10022	AMWINS INSURANCE BROKERAGE OF CA 601 S. FIGUEROA STREET LOS ANGELES, CA 90017

NAMED INSURED: THE RESTAURANT GROUP ETAL

MAILING ADDRESS: 888 7TH AVENUE, 34TH FLOOR
NEW YORK, NY 10106

POLICY PERIOD: FROM 10/06/2011 TO 10/06/2012 AT 12:01 A.M. TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE		
EACH COMMON CAUSE LIMIT	$ 1,000,000	
AGGREGATE LIMIT		$ 2,000,000

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:

☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE

☐ LIMITED LIABILITY COMPANY ☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY)

☐ OTHER

BUSINESS DESCRIPTION:

ALL PREMISES YOU OWN, RENT OR OCCUPY

LOCATION NUMBER	ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY
	SEE FORM # CG2144

NEW YORK: The insurer(s) named herein is (are) not licensed by the state of New York, not subject to its supervision, and in the event of the insolvency of the insurer(s), not protected by the New York State Security Funds. The policy may not be subject to all the regulations of the insurance department pertaining to policy forms.

Surplus Lines Broker Name: AMWINS INSURANCE BROKERAGE OF CA
Surplus Lines Broker Address: 601 S. FIGUEROA STREET
LOS ANGELES, CA 90017
Surplus Lines Broker License No.: EX-1053628-R
Surplus Lines State Taxes were filed: New York

CLASSIFICATION AND PREMIUM				
CLASSIFICATION	**CODE NO.**	**PREMIUM BASE**	**RATE**	**ADVANCE PREMIUM**
COMPOSITE RATE ALL OPERATIONS	FLAT	$ FLAT	$ FLAT	$ INCL.
ADVANCE PREMIUM DUE AND PAYABLE AT INCEPTION (SUBJECT TO AUDIT) $ [redacted] MINIMUM RETAINED AUDIT PREMIUM $ [redacted] MINIMUM RETAINED PREMIUM $ [redacted] (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)				
AUDIT PERIOD (IF APPLICABLE)	☐ ANNUALLY	☐ SEMI-ANNUALLY	☐ QUARTERLY	☐ MONTHLY

ENDORSEMENTS
ENDORSEMENTS ATTACHED TO THIS POLICY:
SEE SCHEDULE OF APPLICABLE FORMS

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBEREDPOLICY.

Jaime E. DeCantillon
Authorized Representative

ASPLL007 DEC 0511

IN WITNESS WHEREOF, the Insurer has caused this Policy to be signed by its President and Secretary and countersigned where required by law on the Declarations page by it's duly Authorized representative.

Secretary

President

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
   a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
   b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections And Surveys

1. We have the right to:
   a. Make inspections and surveys at any time;
   b. Give you reports on the conditions we find; and
   c. Recommend changes.
2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
   a. Are safe or healthful; or
   b. Comply with laws, regulations, codes or standards.
3. Paragraphs **1.** and **2.** of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.
4. Paragraph **2.** of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CALCULATION OF PREMIUM

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

BOILER AND MACHINERY COVERAGE PART
CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
CRIME AND FIDELITY COVERAGE PART
EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
PROFESSIONAL LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART

The following is added:

The premium shown in the Declarations was computed based on rates in effect at the time the policy was issued. On each renewal, continuation, or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.

SCHEDULE OF APPLICABLE FORMS

COMMERCIAL GENERAL LIABILITY

NAMED INSURED: THE RESTAURANT GROUP ETAL

POLICY NUMBER: CRA8XYD11

FORMS AND ENDORSEMENTS MADE PART OF THIS POLICY AT TIME OF ISSUE:

FORM NUMBER AND TITLE:

ASPGL074 DEC 0511	Common Policy Declarations
ASPGL075 DEC 0511	Commercial General Liability Declarations
ASPLL007 DEC 0511	Liquor Liability Declarations
ASPCO020 0511	Signature Page
IL 00 17 11 98	Common Policy Conditions
IL 00 03 07 02	Calculation of Premium
ASPGL006 0104	Schedule of Applicable Forms
CG 00 01 12 07	Commercial General Liability Coverage Form Occurrence
CG 00 33 12 04	Liquor Liability Coverage Form
ASPGL001 0104	Asbestos Exclusion Endorsement
ASPGL003 0104	Total Lead Exclusion
ASPGL004 0104	Additional Named Insured
ASPGL007 0104	Silica Exclusion Endorsement
ASPGL019 0404	Contractual Liability - Amendments
ASPGL035 0504	Hired Auto and Non-Owned Auto Liability
ASPGL044 0504	Amendment - Common Policy Conditions
ASPGL050 0604	Electromagnetic Fields {EMF's} Exclusion
ASPGL057 1004	Garagekeepers Coverage
ASPGL071 0305	Bodily Injury Property Damage Personal and Advertisting Injury Liability Deductible Per Occurrence
ASPGL098 0406	Discrimination Exclusion
ASPGL133 0807	Amendment - Cross Suits
ASPCO001 0204	Common Policy Conditions Amendment Minimum Retained Premium
ASPCO002 0110	General Service of Suit Endorsement
ASPLL002 0304	Liquor Liability Minimum Retained Audit Premium
CG 00 62 12 02	War Liability Exclusion
CG 00 68 05 09	Recording and Distribution of Material or Information in Violation of Law Exclusion
CG 04 35 02 02	Employee Benefits Liability Coverage
CG 20 11 01 96	Additional Insured - Managers Or Lessors Of Premises
CG 20 18 11 85	Additional Insured - Mortgagee Assignee Or Receiver
CG 20 28 07 04	Additional Insured - Lessor Of Leased Equipment
CG 21 16 07 98	Exclusion - Designated Professional Services
CG 21 35 10 01	Exclusion - Coverage C - Medical Payments
CG 21 44 07 98	Limitation Of Coverage To Designated Premises Or Project
CG 21 47 07 98	Employment - Related Practices Exclusion
CG 21 54 01 96	Exclusion - Designated Operations Covered By A Consolidated Wrap-Up Insurance Program
CG 21 65 12 04	Total Pollution Exclusion With A Building Heating Equipment Exception And A Hostile Fire Exception
CG 21 67 04 02	Fungi Or Bacteria Exclusion
CG 21 75 12 02	Exclusion Of Certified Acts Of Terrorism And Other Acts Of Terrorism
CG 22 43 07 98	Exclusion - Engineers Architects or Surveyors Professional Liability
CG 24 07 01 96	Products/Completed Operations Hazard Redefined
CG 25 04 03 97	Designated Locations General Aggregate Limit
IL 00 21 07 02	Nuclear Energy Liability Exclusion Endorsement
IL 12 01 11 85	Policy Changes
IL 12 01 11 85\2	Policy Changes
ASPGL139 0811	Policyholder's Guide to Reporting a Casualty Claim

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** –Definitions.

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. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

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.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to

the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or

(b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3)**, **(4)**, **(5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

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

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

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

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Distribution Of Material In Violation Of Statutes

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act

(TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** – Limits Of Insurance.

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. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

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".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods – Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web-sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b.** and **c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-Related

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Distribution Of Material In Violation Of Statutes

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

COVERAGE C MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage **A.**

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
   a. All expenses we incur.
   b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
   c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
   d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.
   e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
   f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
   g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

   These payments will not reduce the limits of insurance.
2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:
   a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
   b. This insurance applies to such liability assumed by the insured;
   c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
   d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
   e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
   f. The indemnitee:
      (1) Agrees in writing to:
         (a) Cooperate with us in the investigation, settlement or defense of the "suit";
         (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
         (c) Notify any other insurer whose coverage is available to the indemnitee; and
         (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
      (2) Provides us with written authorization to:
         (a) Obtain records and other information related to the "suit"; and
         (b) Conduct and control the defense of the indemnitee in such "suit".

   So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

   Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:
   a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
   b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the con-

duct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs **(1)(a)** or **(b)** above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by,

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

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

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage **C;**

b. Damages under Coverage **A,** except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages under Coverage **B.**

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage"

included in the "products-completed operations hazard".

4. Subject to Paragraph **2.** above, the Personal and Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to Paragraph **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
   a. Damages under Coverage **A;** and
   b. Medical expenses under Coverage **C**

   because of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to Paragraph **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. **Bankruptcy**

   Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. **Duties In The Event Of Occurrence, Offense, Claim Or Suit**
   a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
      (1) How, when and where the "occurrence" or offense took place;
      (2) The names and addresses of any injured persons and witnesses; and
      (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
   b. If a claim is made or "suit" is brought against any insured, you must:
      (1) Immediately record the specifics of the claim or "suit" and the date received; and
      (2) Notify us as soon as practicable.

      You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
   c. You and any other involved insured must:
      (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
      (2) Authorize us to obtain records and other information;
      (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
      (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
   d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. **Legal Action Against Us**

   No person or organization has a right under this Coverage Part:
   a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
   b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

   A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. **Other Insurance**

   If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
   a. **Primary Insurance**

      This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.
   b. **Excess Insurance**
      (1) This insurance is excess over:
         (a) Any of the other insurance, whether primary, excess, contingent or on any other

basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the

purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or

c. All other parts of the world if the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph **a.** above;

(2) The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph **f.** does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you

and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

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

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, c. or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

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".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any per-

son or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

LIQUOR LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

SECTION I – LIQUOR LIABILITY COVERAGE

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "injury" to which this insurance applies if liability for such "injury" is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage. 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 "injury" to which this insurance does not apply. We may, at our discretion, investigate any "injury" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

b. This insurance applies to "injury" only if:

(1) The "injury" occurs during the policy period in the "coverage territory"; and

(2) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "injury" or claim, knew that the "injury" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "injury" occurred, then any continuation, change or resumption of such "injury" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Injury" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "injury" or claim, includes any continuation, change or resumption of that "injury" after the end of the policy period.

d. "Injury" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "injury" or claim:

(1) Reports all, or any part, of the "injury" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "injury"; or

(3) Becomes aware by any other means that "injury" has occurred or has begun to occur.

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Injury" 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.

b. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

c. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the "injury".

d. Liquor License Not In Effect

"Injury" arising out of any alcoholic beverage sold, served or furnished while any required license is not in effect.

e. Your Product

"Injury" arising out of "your product". This exclusion does not apply to "injury" for which the insured or the insured's indemnitees may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

f. Other Insurance

Any "injury" with respect to which other insurance is afforded, or would be afforded but for the exhaustion of the limits of insurance.

This exclusion does not apply if the other insurance responds to liability for "injury" imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage.

g. War

"Injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

SUPPLEMENTARY PAYMENTS

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1. All expenses we incur.

2. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

3. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

4. All costs taxed against the insured in the "suit".

5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

7. Expenses incurred by the insured for first aid administered to others at the time of an event to which this insurance applies.

These payments will not reduce the limits of insurance.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

2. Each of the following is also an insured:

   a. Your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" is an insured for:

      (1) "Injury":

         (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while that co-"employee" is either in the course of his or her employment or performing duties related to the conduct of your business;

         (b) To the spouse, child, parent, brother or sister of that co-"employee" as a consequence of Paragraph **(1)(a)** above; or

         (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs **(1)(a)** or **(b)** above.

      (2) "Property damage" to property:

         (a) Owned or occupied by, or

         (b) Rented or loaned

         to that "employee", any of your other "employees", by any of your partners or members (if you are a partnership or joint venture), or by any of your members (if you are a limited liability company).

   b. Any person or organization having proper temporary custody of your property if you die, but only:

      (1) With respect to liability arising out of the maintenance or use of that property; and

      (2) Until your legal representative has been appointed.

   c. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

   a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier; and

   b. Coverage does not apply to "injury" that occurred before you acquired or formed the organization.

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

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

   a. Insureds;

   b. Claims made or "suits" brought; or

   c. Persons or organizations making claims or bringing "suits".

2. The Aggregate Limit is the most we will pay for all "injury" as the result of the selling, serving or furnishing of alcoholic beverages.

3. Subject to the Aggregate Limit, the Each Common Cause Limit is the most we will pay for all "injury" sustained by one or more persons or organizations as the result of the selling, serving or furnishing of any alcoholic beverage to any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – LIQUOR LIABILITY CONDITIONS

1. **Bankruptcy**

   Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. **Duties In The Event Of Injury, Claim Or Suit**

   a. You must see to it that we are notified as soon as practicable of an "injury" which may result in a claim. To the extent possible, notice should include:

      (1) How, when and where the "injury" took place;

      (2) The names and addresses of any injured persons and witnesses; and

      (3) The nature and location of any "injury".

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of "injury" to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary. Our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **b.** below.

b. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
2. "Coverage territory" means:
   a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
   b. International waters or airspace, but only if the "injury" occurs in the course of travel or transportation between any places included in **a.** above; or
   c. All other parts of the world if the "injury" arises out of:
      (1) Goods or products made or sold by you in the territory described in **a.** above; or
      (2) The activities of a person whose home is in the territory described in **a.** above, but is away for a short time on your business

   provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in **a.** above or in a settlement we agree to.
3. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
4. "Executive Officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
5. "Injury" means all damages, including damages because of "bodily injury" and "property damage", and including damages for care, loss of services or loss of support.
6. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
7. "Property damage" means:
   a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
   b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.
8. "Suit" means a civil proceeding in which damages because of "injury" to which this insurance applies are alleged. "Suit" includes:
   a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
   b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
9. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
10. "Your product":
    a. Means:
       (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
          (a) You;
          (b) Others trading under your name; or
          (c) A person or organization whose business or assets you have acquired; and
       (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product", and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ASBESTOS EXCLUSION ENDORSEMENT

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

1. The following Exclusion is added to SECTION I – COVERAGES, COVERAGE A. - BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. – EXCLUSIONS and SECTION I – COVERAGES, COVERAGE B. – PERSONAL AND ADVERTISING INJURY LIABILITY, 2. – EXCLUSIONS:

    1. Any liability for "bodily injury", "property damage", "personal injury", "advertising injury", occupational disease, disability, shock, mental anguish or mental injury, at any time arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos, asbestos products, asbestos fibers or asbestos dust; or

    2. Any obligation of the "insured" to indemnify any party because of damages arising out of "bodily injury", "property damage", "personal injury", "advertising injury", occupational disease, disability, shock, mental anguish or mental injury, at any time as a result of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos, asbestos products, asbestos fibers or asbestos dust; or

    3. Any obligation to defend any "suit" or claim against the "insured" alleging bodily injury, "property damage", "personal injury", "advertising injury", occupational disease, disability, shock, mental anguish or mental injury, resulting from or contributed to, by the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos, asbestos products, asbestos fibers or asbestos dust.