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

MOTION TO STRIKE

Appellant St. Paul Fire & Marine Insurance Company ("St. Paul") moves to strike the answering brief and appendix filed by non-party Aspen Specialty Company.

This is an appeal from two separate orders of the district court, both entered on May 27, 2020, granting defendant National Union Fire Insurance Company's ("National Union") and Roof Deck Entertainment, LLC, dba the Marquee Nightclub's ("Marquee") separate motions for summary judgment. Aspen Specialty Company ("Aspen") is not a party to this appeal.

St. Paul sued National Union, Marquee and Aspen based on subrogation claims arising from an underlying personal injury action. In separate orders, the

district court granted summary judgment in favor of National Union and Marquee, and both orders were certified as final pursuant to NRCP 54(b). Exhibits A & B. Those two orders resulted in this appeal.

In separate orders, Aspen's motion for summary judgment was granted in part and denied as to liability. Exhibits C & D. Those orders are neither appealable nor certifiable pursuant to NRCP 54(b). The action against Aspen is proceeding in district court.

Aspen is therefore not a party to this appeal.

Nevertheless, on May 6, 2021, apparently but incorrectly believing that Aspen is a party to this appeal, this Court ordered Aspen to file an answering brief. Exhibit E. Rather than simply informing this Court by appropriate notice or other filing that it is not a party, Aspen, repeatedly referring to itself as "currently a Non-Party to this Appeal," took this opportunity to submit an answering brief and an appendix, attempting improperly to make representations, assert issues, and argue legal positions not properly a part of this appeal, and not presently before this Court. The errant brief and appendix were filed by this Court.

Aspen is not "currently a non-party" to this appeal. Aspen is not now and never can be a party to this appeal. Its threat to "file a writ" will not make it a

party to this appeal; if Aspen desires to file a petition for a writ, it may do so, and will be a party to that proceeding.

Aspen's brief addresses issues not yet final in district court as to its own status and as to the status of the ongoing litigation in district court. St. Paul believes Aspen's representations to be incorrect as a matter of fact and law, but this appeal does not involve Aspen and is not the place to engage in a debate regarding the case against Aspen. That will likely come in a petition for a writ from Aspen, or a future appeal. At this point, the errant brief and appendix address issues not presently before this Court, and confuse and complicate this appeal.

Aspen may believe that it should have prevailed on summary judgment for the same reasons National Union prevailed, but it did not. Aspen may believe the district court's determination of the amount of its insurance coverage is the law of this case, but as a matter of law it is neither the law of the case below, nor is it the law of this appeal. St. Paul should not be required to prematurely address issues Aspen wants to inject into this appeal that do not affect the parties, and are not now before this Court.

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CONCLUSION

Based on Aspen's repeated admissions in its answering brief that it is not a party to this appeal, its brief and appendix should be stricken.

Respectfully submitted this 17 day of May, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **MOTION TO STRIKE** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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An ~~employee~~ of Hutchison & Steffen, PLLC

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EXHIBIT PAGE ONLY

EXHIBIT A

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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. <u>St. Paul's Seventh Cause of Action for Equitable Estoppel</u>

30. In the FAC, St. Paul asserts the Seventh Cause of Action for Equitable Estoppel ("Seventh Cause of Action"), seeking to preclude National Union from asserting that: (1) National Union's policies were not primarily responsible for the defense and resolution of the Underlying Action; and (2) St. Paul, a non-defending carrier, had the same obligation to resolve the Underlying Action as Aspen and National Union. (FAC ¶ 135.)

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31. Typically, equitable estoppel is raised as an affirmative defense. However, under Nevada Law, equitable estoppel can be treated as an affirmative claim under the appropriate circumstances.

32. To establish equitable estoppel, the plaintiff must prove the following: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must have relied to his detriment on the conduct of the party to be estopped. *See Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.,* 98 Nev. 609, 614, 655 P.2d 996, 999 (1982); I*n re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-1062 (2005).

33. Because the Second, Fourth, and Eighth Causes of Action fail as a matter of law, including for reasons that are unaffected by National Union's assertions that St. Paul seeks to estop, this Seventh Cause of Action must also fail.

E. St. Paul's Request for Discovery Per NRCP 56(d)

34. True and correct copies of the Nightclub Management Agreement ("NMA") and the St. Paul Excess Policy at issue in this matter have been provided as part of National Union's MSJ. As such, all necessary and potentially relevant exhibits to properly consider and determine National Union's MSJ are included in the moving papers and the record is complete.

35. There remains no genuine dispute of material facts with respect to National Union's MSJ that require further discovery.

36. Accordingly, St. Paul's Request for Discovery per NRCP 56(d) is denied.

F. Certification under NRCP 54(b)

37. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

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38. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting National Union's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of National Union's Motion for Summary Judgment, and the arguments of the parties and good cause existing, National Union's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2019.

Honorable Gloria Sturman
District Judge, Department XXVI

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EXHIBIT PAGE ONLY

EXHIBIT B

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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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EXHIBIT PAGE ONLY

EXHIBIT C

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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	CASE NO.: A-17-758902-C DEPT.: XXVI ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT

Plaintiff St. Paul Fire & Marine Insurance Company's ("Plaintiff" or "St. Paul") Motion for Partial Summary Judgment against Defendant Aspen Specialty Insurance Company ("Defendant" or "Aspen"), and Aspen's Countermotion for Summary Judgment, having come on for hearing on October 8, 2019 before the Honorable District Court Judge Gloria Sturman in Department XXVI of the Eighth Judicial District Court, Clark County, Nevada. Ryan A. Loosvelt, Esq. of Messner Reeves, LLP appeared on behalf of the Defendant, and Ramiro Morales, Esq. of Morales Fierro Reeves appeared on behalf of the Plaintiff. The Court, having reviewed the papers and exhibits submitted by the parties, rules as follows:

I.

FINDINGS OF FACT

This action relates to a post-judgment settlement by St. Paul, Defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union"), Zurich Insurance, and Aspen following a jury trial in the personal injury case of *Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("*Moradi* Action"). St. Paul seeks to recover money it paid toward that settlement from the defendants in this action including Aspen.

In the *Moradi* Action, Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a/ Marquee Nightclub ("Marquee") on April 4, 2014 asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment.

Among other pre-trial settlement offers, Moradi issued a $1.5 million Offer of Judgment that lapsed.

The *Moradi* Action went to trial and resulted in a judgment against Marquee and Cosmopolitan, and there was a post-judgment settlement funded by St. Paul, National Union, Zurich, and Aspen. St. Paul contends Aspen has a $2 million policy limit for the *Moradi* Action because the Aspen Policy provides $1 million in applicable limits for damages because of bodily injury and $1 million in applicable limits for personal and advertising Injury, which St. Paul contends were both implicated by the *Moradi* Action, whereas Aspen contends its policy operates to limit coverage for the *Moradi* Action to a $1 million.

Aspen issued insurance policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, to the Restaurant Group, et. al. ("Aspen Policy"). Defendant Roof Deck Entertainment, LLC (i.e, "Marquee) is a named insured in the Aspen Policy by endorsement.

The Aspen Policy contains a $1 million each occurrence limit for damages because of

bodily injury and property damage, a $1 million per person limit for damages because of personal and advertising injury, and a $2 million general aggregate limit. The Aspen Policy contains a "Commercial General Liability Coverage Form" and a "Liquor Liability Coverage Form." The "Commercial General Liability Coverage Form" contains Section I, Coverages, which contains "Coverage A Bodily Injury and Property Damage", "Coverage B Personal and Advertising Injury Liability", and "Coverage C Medical Payments."

The "Commercial General Liability Coverage Form" of the Aspen Policy, Section I, "Coverage A Bodily Injury and Property Damage Liability" provides:

> SECTION I – COVERAGES
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

Section I, "Coverage A Bodily Injury and Property Damage Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **2.Exclusions**
>
> This insurance does not apply to:
>
> **a. Expected Or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
>
> ***
>
> **o. Personal And Advertising Injury**
>
> "Bodily injury" arising out of "personal and advertising injury".

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial

General Liability Coverage Form" of the Aspen Policy provides:

COVERAGE B PERSONAL AND ADVERTISING

INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result.

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

***

d. Criminal Acts

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

Section V in the "Commercial General Liability Coverage Form" of the Aspen Policy includes the following definitions:

SECTION V – DEFINITIONS

***

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

***

13."Occurrence" means an accident, including continuous or

repeated exposure to substantially the same general harmful conditions.

14."Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

The Aspen Policy also contains the following Amendment by Endorsement (the "Other Insurance Endorsement"):

The Common Policy Conditions (IL 00 17 11 /98) are amended by the addition of the following:

G. Other Insurance with This Company

If this policy contains two or more Coverage Parts providing coverage for the same "occurrence," "accident," "cause of loss," "loss" or offense, the maximum limit of insurance under all Coverage Parts shall not exceed the highest limit of insurance under any one Coverage Part.

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

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II.

CONCLUSIONS OF LAW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Nev. R. Civ. P. ("NRCP") 56(c). On a summary judgment motion it is the moving party's obligation to show that there is "no genuine issues of material fact." NRCP 56(c). The party moving for summary judgment bears the initial burden of production to show the absence of material fact. Cuzze v. Univ. & Cmty. College Sys., 123 Nev. 598, 602, 172 P.3d 131 (2007). If such a showing is made, the party opposing summary judgment assumes the burden of production to show the existence of material fact. Id. A party opposing summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Wood v. Safeway, Inc., 121 Nev. 732, 121 P.3d 1026 (2005).

An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion. EDCR 2.20(f). A counter-motion will be heard and decided at the same time set for the hearing of the original motion and no separate notice of motion is required. *Id.*

Plaintiff's motion for summary judgment and Aspen's Countermotion both seek a legal determination concerning the interpretation of the Aspen Policy's policy limits for the *Moradi* Action. Plaintiff contends that Aspen's policy limit for the *Moradi* Action was $2 million and Aspen's opposition and countermotion opposes such relief and countermoves for a determination that it's policy limit was $1 million for the *Moradi* Action. Aspen's Countermotion also seeks summary judgment on Plaintiff's claims arguing they are not viable and/or fail as a matter of law.

Regarding Aspen's Countermotion to the extent it seeks a ruling on the viability of Plaintiff's claims and/or whether they fail as a matter of law, the Court views these other issues as questions of fact.

This Court therefore focuses its ruling here on the interpretation of the Aspen Policy's policy limits as it applies to the *Moradi* Action. Interpretation of a contract is a question of law.

Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties. *Farmers Ins. Exch.*, 119 Nev. at 64. The interpretation of an insurance policy presents a legal question. *Las Vegas Metropolitan Police Dept. v. Cregis Ins. Co.*, 127 Nev. 548, 553, 256 P.3d 958, 961 (2011).

In determining the meaning of an insurance policy, the language should be examined from the viewpoint of one not trained in law or in the insurance business; the terms should be understood in their plain, ordinary and popular sense. *National Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 364, 682 P.2d 1380, 1382 (1984). Where the language of the policy is not ambiguous, it should be given its plain meaning and construed as written. *Farmers Ins. Exchange v. Young*, 108 Nev. 328, 332, 832 P.2d 376, 378 (1992). Courts interpret the policy language according to its plain and ordinary meaning and will not rewrite contract provisions that are otherwise unambiguous or increase an obligation to the insured that was intentionally and unambiguously limited by the parties. *Vitale v. Jefferson Ins. Co. of NY*, 116 Nev. 590, 595, 5 P.3d 1054, 1057-1058 (2000).

Where an ambiguity in the language of the policy exists, the contract will be given a construction which will fairly achieve its object of providing indemnity for the loss to which the insurance relates. *Reno's Executive Air, Inc.*, 100 Nev. at 365. If policy language is ambiguous, an interpretation in favor of coverage is reasonable only if it is consistent with the objectively reasonable expectations of the insured. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1265, 833 P.2d 545 (1992).

A policy must be read as a whole in order to give a reasonable and harmonious meaning and effect to all its provisions. *Reno's Executive Air, Inc.*, 100 Nev. at 364. A court must look to the entire contract of insurance for a true understanding of what risks are assumed by the insurer and what risks are excluded. Id.

Nevada has adopted the "causal" approach to determining whether "a particular situation constitutes a single occurrence or multiple occurrences for the purposes of insurance liability." *Bish v. Guaranty Nat'l Ins. Co.*, 109 Nev. 133, 135, 848 P.2d 1057, 1058 (1993). The focus of the

inquiry is not on the number, magnitude or time of the injuries, but rather on the cause or causes of the injury; as long as the injuries stem from one proximate cause there is a single occurrence. *Bish,* 109 Nev. at 135; see also *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.*, 178 Cal.App.4th 620, 633-634, 55 Ca.Rptr.3d 844 (2007). Policy limits are determined by the cause of the damage. See *Century Sur. Co. v. Casino West, Inc.*, 99 F.Supp.3d 1262, 1264 (D. Nev. Mar. 27, 2015), citing *Bish,* 109 Nev. at 137; *Safeco Ins. Co. of America*, 178 Cal.App.4th at 634.

Plaintiff and Aspen do not dispute there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy. This Court also finds that all of Moradi's injuries are attributable to one proximate, uninterrupted and continuing cause and concludes there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy implicated by the *Moradi* Action.

To the extent Moradi also sought damages because of personal injury under Coverage Part B of the Aspen Policy, the Court finds that the Other Insurance Endorsement to the Aspen Policy operates in a manner of anti-stacking of the Coverage Part A and Coverage Part B limits. See e.g., *Farmers Ins. Group v. Stonik By and Through Stonik*, 110 Nev. 64, 867 P.2d 389 (1994). Considering the Aspen Policy as a whole, the Court therefore concludes that the plain language of the Aspen Policy operates to limit coverage for the *Moradi* action to $1 million.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment is DENIED and Aspen's Countermotion for Summary Judgment is GRANTED IN PART in that the Court concludes the Aspen Policy's policy limit for the *Moradi* Action is a $1 million policy limit. Aspen's Countermotion on other issues presented is denied.

IT IS SO ORDERED this 14th day of May, 2020.

DISTRICT COURT JUDGE

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APPROVED AS TO FORM AND CONTENT:

MESSNER REEVES, LLP

_____

MICHAEL M. EDWARDS
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Submitted by:

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EXHIBIT D

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

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10/9/2020 12:06 PM

Electronically Filed
10/09/2020 12:06 PM
CLERK OF THE COURT

ORDR
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Attorneys for Plaintiff
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 **ORDER DENYING DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT**

Defendant Aspen Specialty Insurance Company's ("Aspen") Renewed Motion for Summary Judgment came on for hearing on August 4, 2020, before the Honorable District Court Judge Gloria Sturman in Department XXVI of the Eighth Judicial District Court, Clark County, Nevada. The hearing was conducted remotely over Zoom.

Attorney Ryan A. Loosvelt of Messner Reeves, LLP, appeared on behalf of the Aspen. Appellant Michael K. Wall of Hutchison & Steffen, PLLC, appeared on behalf of plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"). Attorney Samuel J. Morris of Herold & Sager appeared on behalf of defendants National Union Fire Insurance Company of Pittsburgh PA ("National Union"), and Roof Deck Entertainment, LLC, d.b.a. Marquee Nightclub ("Marquee").[1]

[1]Final judgments have previously been entered in favor of National Union Marquee. Those

The Court, having reviewed the papers and exhibits submitted by the parties, rules as follows:

PROCEDURAL POSTURE

1. St. Paul previously moved for summary judgment, and Aspen filed a countermotion for summary judgment.

2. In an order dated May 14, 2020, the Court denied St. Paul's motion for summary judgment.

3. With respect to Aspen's countermotion, the Court ruled: "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."

4. Therefore, the Court granted and denied Aspen's countermotion for summary judgment as follows: "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."

5. Thereafter, the Court granted summary judgment in favor of National Union and Marquee, and certified those judgments as final and appealable pursuant to NRCP 54(b).

6. Believing that its motion for summary judgment on the issue of the viability of St. Paul's claims had been deferred, rather than denied, and believing the summary judgment in favor of National Union mandates summary judgment in favor of Aspen, Aspen filed a "Renewed Motion for Summary Judgment," on June 11, 2020.

FINDINGS OF FACT

1. This action relates to a post-judgment settlement by St. Paul, National Union, Zurich Insurance (non-party), 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").

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judgments are presently on appeal to the Nevada Supreme Court.

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LAS VEGAS, NV 89145

2. Moradi sued the Cosmopolitan and Marquee for personal injuries.

3. Zurich was the primary insurer of the Cosmopolitan. St. Paul was the excess insurer of the Cosmopolitan. Aspen was the primary insurer of Marquee. The Cosmopolitan was also an insured under the Aspen primary policy. National Union was the excess insurer for Marquee; the Cosmopolitan was also an insured under the National Union policy.

4. Aspen, as the primary insurer, provided a joint defense for both the Cosmopolitan and Marquee. National Union, as excess carrier, appointed separate counsel to jointly represent both the Cosmopolitan and Marquee.

5. *Moradi* resulted in a substantial verdict. St. Paul, National Union, Zurich and Aspen all contributed to a global settlement of Moradi's claims in a confidential amount.

6. St. Paul, alleging that it paid more than its equitable share of the settlement, seeks to recover money it paid toward the settlement from National Union and Aspen on theories of subrogation–beach of duty to settle; subrogation–breach of insurance contract; and equitable estoppel.[2]

7. On May 14, 2020, the Court granted summary judgment in favor of National Union, concluding, among other things, that "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."

8. In support of this conclusion, this Court stated: "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."

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[2]The other causes of action against other defendants are not relevant here.

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9. Having concluded that St. Paul and National Union were both excess carriers on the same footing in the underlying litigation, and that neither was in an equitably superior position as to the other, the Court refused to recognize equitable subrogation claims between by St. Paul against National Union.

10. Aspen believes the same reasoning applies to the subrogation claims against it; however, Aspen is a primary carrier, not and excess carrier, and the Court's reasoning as to St. Paul's claims against National Union does not apply to St. Paul's claims against Aspen.

11. If any of the foregoing findings of fact would more appropriately be a conclusion of law, it is so deemed.

CONCLUSIONS OF LAW

1. The Court has reviewed the transcripts of the prior hearings in this matter, including the transcript of the hearing on Aspen's original countermotion for summary judgment and the hearing on National Union's motion for summary judgment.

2. The Court concludes that it did not hold Aspen's motion for summary judgment in abeyance pending consideration of National Union's motion for summary judgment. The Court considered that questions of fact precluded the granting of Aspen's motion for summary judgment, and denied that motion, both in the transcript of the hearing, and in the written order.

3. This Court is not bound in this matter by its decisions in the National Union order. St. Paul stands in a different relationship with respect to National Union than it does with respect to Aspen.

4. Aspen was the primary insurer in *Moradi* that made the decisions that resulted in the case going to trial, and in the verdict, and the consequent settlement. Aspen is the entity that allegedly refused to settle. Aspen is in a completely different position than National Union.

5. The Court has not previously ruled that there is no cause of action for subrogation between a primary carrier and an excess carrier; the ruling in National

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Union was between two excess carriers. That ruling does not apply here.

6. The Court finds that there are issues of fact as to whether Aspen is guilty of negligence in its handling of the case. Even with the policy limit of only $1 Million, and assuming there was no opportunity to settle within that limit, does that mean that Aspen should have refused to pay, or does it mean that Aspen should have gotten St. Paul and the other carriers involved sooner because there was not enough insurance and the risks of trial were great? There are questions of fact as to whether Aspen did not properly settle when it should have.

7. Summary Judgment is not appropriate not only because there are questions of fact, but as a matter of law, the legal principles that affect the claims as between Aspen and St. Paul are not the same as those that affect the legal issues between National Union and St. Paul.

ORDER

Based on the foregoing, Aspen's renewed motion for summary judgment is denied.

IT IS SO ORDERED this _____ day of ~~_____~~ Dated this 9th day of October, 2020.

0DA 225 E159 A89B
Gloria Sturman
District Court Judge

~~DISTRICT~~ COURT JUDGE

Respectfully submitted by:

HUTCHISON & STEFFEN, PLLC

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Attorney for Plaintiff

Approved as to Form and Content:

MESSNER REEVES LLP

DID NOT SIGN

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OUR FILE NO.: 8709-002

September 14, 2020

Via e-mail: dept26inbox@clarkcountycourts.us

Marwanda Knight
Judicial Executive Assistant to the Honorable Kathleen Delaney
Regional Justice Center, Dept. 26
200 Lewis Avenue,
Las Vegas, NV 89155

Re: St. Paul Fire & Marine Insurance Company v. Aspen Specialty Insurance Company, et. al.
Case No. A-17-758902-C

Dear Ms. Knight:

Enclosed please find St. Paul Fire & Marine Insurance Company's proposed order from the August 4, 2020 hearing. Despite attempts to prepare a countersigned order, we were unable to obtain a countersignature.

The undersigned sent the order to opposing counsel on August 19, 2020. Despite e-mails from opposing counsel indicating the undersigned would have their proposed changes, our office has not heard anything. We have attached the relevant correspondence. Having reviewed the court minutes, we believe the attached proposed order complies with this court's orders and so submit it without the signature of opposing counsel.

Sincere regards,

HUTCHISON & STEFFEN, LLC

Michael K. Wall
For the Firm

MKW/kc
Enclosures

Kaylee Conradi

From: Ryan A. Loosvelt <RLoosvelt@messner.com>
Sent: Tuesday, September 08, 2020 9:04 AM
To: Michael K. Wall; Kaylee Conradi
Cc: Desja Wilder; Michael Edwards
Subject: RE: St. Paul Fire & Marine v. Aspen Ins., et. al Supreme Ct. Appeal No. 81344

Michael, just wanted to let you know we will have approved comments over in the next day or two.

Regards,

Ryan A. Loosvelt
Partner

Messner Reeves LLP
8945 W. Russell Road | Suite 300
Las Vegas, NV 89148
702.363.5100 *main* | 702.363.5101 *fax*
rloosvelt@messner.com
messner.com

From: Michael K. Wall <MWall@hutchlegal.com>
Sent: Thursday, August 27, 2020 1:58 PM
To: Michael Edwards <medwards@messner.com>; Kaylee Conradi <kconradi@hutchlegal.com>
Cc: Ryan A. Loosvelt <RLoosvelt@messner.com>
Subject: RE: St. Paul Fire & Marine v. Aspen Ins., et. al Supreme Ct. Appeal No. 81344

Will do. Sorry about any oversight.

From: Michael Edwards [mailto:medwards@messner.com]
Sent: Thursday, August 27, 2020 10:48 AM
To: Kaylee Conradi <kconradi@hutchlegal.com>
Cc: Michael K. Wall <MWall@hutchlegal.com>; Ryan A. Loosvelt <RLoosvelt@messner.com>
Subject: RE: St. Paul Fire & Marine v. Aspen Ins., et. al Supreme Ct. Appeal No. 81344
Importance: High

Please hold off on this until next week. Your prior email did not come through to me and I see you neglected to include Ryan Loosvelt, the attorney that argued this motion, from your email thought he is included on other emails from your office. While I'm sure this is simply an oversight, please correct this error and we will provide our comment and edits to this order shortly.

Michael M. Edwards
Partner

Messner Reeves LLP
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Reno, NV 89501

11620 Wilshire Boulevard | Suite 500
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medwards@messner.com
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From: Kaylee Conradi <kconradi@hutchlegal.com>
Sent: Wednesday, August 26, 2020 11:20 AM
To: Michael Edwards <medwards@messner.com>
Cc: Michael K. Wall <MWall@hutchlegal.com>
Subject: FW: St. Paul Fire & Marine v. Aspen Ins., et. al Supreme Ct. Appeal No. 81344

Good morning Mr. Edwards,

I am following-up on the below and attached. Please note that our office intends to submit the attached order tomorrow (8/27).

Thank you,
Kaylee

From: Michael K. Wall
Sent: Wednesday, August 19, 2020 8:31 AM
To: Michael Edwards <medwards@messner.com>
Subject: RE: St. Paul Fire & Marine v. Aspen Ins., et. al Supreme Ct. Appeal No. 81344

Mr. Edwards,

Please find attached (in several formats so you will be sure to be able to open it) a proposed order on the renewed motion for summary judgment. If you approve, please sign and return an original, or let me know whether I can attach you e-signature. If you would like to propose changes, I look forward to your input.

From: Michael Edwards [mailto:medwards@messner.com]
Sent: Tuesday, August 18, 2020 8:38 AM
To: lwl1@sbcglobal.net; Nicholas Salerno <nsalerno@heroldsagerlaw.com>; Kaylee Conradi <kconradi@hutchlegal.com>
Cc: Michael K. Wall <MWall@hutchlegal.com>; Jennifer Keller <jkeller@kelleranderle.com>; Laurie Moreno <LMoreno@messner.com>; Ryan A. Loosvelt <RLoosvelt@messner.com>; Desja Wilder <DWilder@messner.com>; Andy Herold <aherold@heroldsagerlaw.com>; Jeremy Stamelman <jstamelman@kelleranderle.com>; Smith, Abraham <asmith@lrrc.com>; Daniel F. Polsenberg <dpolsenberg@lrrc.com>; Michael Edwards <medwards@messner.com>
Subject: RE: St. Paul Fire & Marine v. Aspen Ins., et. al Supreme Ct. Appeal No. 81344

Aspen is agreeable to October 1, starting at 9:00 a.m.

Michael M. Edwards
Partner

Messner Reeves LLP
8945 W. Russell Road| Suite 300
Las Vegas, NV 89148

One East Liberty Street | Suite 600

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

St. Paul Fire & Marine Insurance Company, Plaintiff(s) vs. Aspen Specialty Insurance Company, Defendant(s)	CASE NO: A-17-758902-C DEPT. NO. Department 26

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 10/9/2020

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EXHIBIT E

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Appellant,
vs.
ASPEN SPECIALTY COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, D/B/A MARQUEE NIGHTCLUB,
Respondents.

No. 81344

FILED

MAY 06 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING MOTION AND TO FILE DOCUMENT

Cause appearing, the motion filed by respondents National Union Fire Insurance Company and Roof Deck Entertainment, LLC, requesting a second extension of time to file the answering brief is granted. NRAP 31(b)(3)(B). National Union and Roof Deck shall have until June 1, 2021, to file and serve the answering brief. No further extensions of time shall be permitted absent demonstration of extraordinary circumstances and extreme need. *Id.* Counsel's caseload normally will not be deemed such a circumstance. *Cf. Varnum v. Grady*, 90 Nev. 374, 528 P.2d 1027 (1974).

The answering brief from respondent Aspen Specialty Company was due March 31, 2021. To date, Aspen has failed to file the answering brief. Aspen shall have 7 days from the date of this order to file and serve the answering brief. Failure to comply with this order may result in the imposition of sanctions, including the resolution of this appeal without answering briefs from respondents. *See* NRAP 31(d).

It is so ORDERED.

_____, C.J.

cc: Hutchison & Steffen, LLC/Las Vegas
Lewis Roca Rothgerber Christie LLP/Las Vegas
Herold & Sager/Las Vegas
Keller/Anderle LLP/Irvine
Messner Reeves LLP