IN THE SUPREME COURT OF THE STATE OF NEVADA

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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

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

The Travelers Companies, Inc., which is publicly held, is the 100% owner of appellant St. Paul Fire and Marine Insurance Company.

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 30th day of November, 2021.

By: /s/ Mark A. Hutchison

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INTRODUCTION

This is a bad-faith insurance dispute involving real wrongdoing, victims, and injuries. Respondents, however, gloss over their misconduct in favor of misdirection. This is not a contest between co-equal excess insurance carriers or competing "towers" of insurance. A single "tower" of insurance is at issue – consisting of the general liability policy issued to Respondent Roof Deck Entertainment, L.L.C ("Marquee") by Aspen Specialty Insurance Company ("Aspen") and the excess liability insurance policy issued to Marquee by Respondent National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). Nevada Property 1, L.L.C. ("Cosmopolitan") is an additional insured under both policies.

National Union owed a duty of good faith and fair dealing to *both* of its insureds, Marquee *and* Cosmopolitan. National Union nonetheless put Respondents' interests over Cosmopolitan's, and then abandoned Cosmopolitan following a catastrophic verdict that Respondents could have avoided. Cosmopolitan's excess insurer, St. Paul Fire & Marine Insurance Company ("St. Paul") stepped up and protected Cosmopolitan by settling the claim, subject to its rights of recovery, as subrogee of Cosmopolitan, against Respondents.

Two questions therefore frame this appeal: (1) does Cosmopolitan have claims against Respondents; and, if so, (2) may St. Paul subrogate those claims? The answer to both questions is yes, and the district court erred in granting summary judgment to the Respondents.

Respondents portray themselves and St. Paul as co-equal bystanders to a series of uncaused, uncontrolled, and unfortunate events. This is inaccurate. Respondents breached their duties to Cosmopolitan. National Union unilaterally and voluntarily took control of the defense of Marquee and Cosmopolitan and gave them both the same counsel, despite their adverse interests. Marquee was the active tortfeasor and owed contractual indemnity to Cosmopolitan. But National Union's conflicted counsel never asserted almost certain claims against Marquee for indemnity and contribution.

National Union then breached its duty to Cosmopolitan by rejecting at least three reasonable settlement offers within National Union's policy limits, exposing Cosmopolitan to a jury verdict of $160.5 million. And even though Respondents knew of Cosmopolitan's (and therefore St. Paul's) substantial risk at trial, *they waited until the eve of that trial* to inform St. Paul of the Moradi incident and prior settlement offers.

Respondents want Cosmopolitan and St. Paul to bear the weight of Respondents' own misconduct, even though St. Paul breached no duty and had no

opportunity to control the litigation or settlement. They want a new court-created carve-out to ordinary equitable rules; one that leaves wrongs without remedies and wrongdoers without worry. Through Respondents' circular reasoning Cosmopolitan has no claims because St. Paul cannot subrogate them, but St. Paul cannot subrogate the claims because Cosmopolitan has none. Round and round it goes, while Respondents ignore the premise of St. Paul's appeal - those who cause harm should pay for it.

In Respondents' view, they are immune and unaccountable. They have always believed their liability in the *Moradi* litigation was capped no matter what harm they caused Cosmopolitan. Their rejection of multiple, reasonable, within-limits settlement offers is therefore no mystery. This kind of harmful self-dealing is one of the reasons why subrogation and contribution rights exist. And United States District Court Judge Gordon recently rejected many of Respondents' arguments when deciding a similar case with similar parties. *See Zurich American Ins. Co. v. Aspen Specialty Ins. Co.*, 2021 WL 3489713 (D. Nev. August 6, 2021).

In the end, Cosmopolitan has valid contractual and equitable claims against Respondents, which St. Paul can assert. Therefore, St. Paul respectfully requests that this Court reverse the lower court's summary judgment decision and denial of St. Paul's request for additional discovery.

PART I

NATIONAL UNION

1. Cosmopolitan Has Claims Against National Union.[1]

Cosmopolitan was National Union's insured. AA 2906 (FAC 26; 32). National Union voluntarily defended the *Moradi* litigation against Cosmopolitan[2], and, therefore, also owed the duty to act in good faith while defending and negotiating settlement on behalf of Cosmopolitan. Instead, National Union controlled Cosmopolitan's defense with conflicted counsel, avoided valid cross-claims against Marquee, rejected multiple settlement offers that were within its policy limits, and went to trial. AA 1211 (Derewetsky Decl. ¶ 8, Exh 18); AA 2472; 2474; 2479. A jury then held Cosmopolitan jointly and severally liable for $160.5 million. (FAC, Ex. C.)

National Union's bad defense and bad-faith failure to settle generated Cosmopolitan's claims. Had National Union accepted any of Moradi's reasonable

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[1] St. Paul has not waived its equitable estoppel claim on appeal; the district court's entire decision is reviewed *de novo*. And it is this Court's "prerogative to consider issues a party raises in its reply brief, and [it] will address those issues if consideration of them is in the interests of justice." *Powell v. Liberty Mut. Fire Ins. Co.* 127 Nev. 156, 167 n. 3, 252 P.3d 668, 675 n. 3 (2010). St. Paul never had a chance to conduct adequate discovery on the equitable estoppel claim.

[2] Aspen was Marquee's primary insurer, and Aspen did not claim it had exhausted its policy obligations or ask National Union to assume the defense. National Union chose to control the defense of Marquee and Cosmopolitan.

pre-verdict settlement offers, Cosmopolitan would have owed nothing. But National Union unreasonably ignored its counsel's warning about the substantial risks of a jury trial, and gambled with Cosmopolitan's money.

A. National Union breached its duties to settle.

By voluntarily controlling Cosmopolitan's defense in the *Moradi* litigation, National Union also undertook the "right to control settlement discussions and its right to control litigation against [Cosmopolitan]." *Allstate Ins. Co. v. Miller*, 125 Nev 300, 309, 212 P.3d 318, 324 (2009). This "right to control settlement discussions create[d] the duty of good faith and fair dealing during [settlement] negotiations." *Id.* 125 Nev. 309, 212 P.3d at 324-25 (*citing Couch on Insurance* 3d § 203:1); s*ee also Central Illinois Public Service Co. v. Agricultural Ins. Co.*, 378 Ill. App.3d 728, 735 (Ill. Ct. App. 2008) (the duty to negotiate in good faith attaches to an excess insurer who takes control of the litigation.).

There is also a "special relationship between the insured and the insurer, which is similar to a fiduciary relationship." *Id*., 125 Nev. at 311, 212 P.3d at 325. (*citing Ainsworth v. Combined Ins. Co.,* 104 Nev. 587, 592, 763 P.2d 673, 676 (1988); *Love v. Fire Ins., Exchange*, 271 Cal. Rptr. 246, 251-52 (1990). "[T]he nature of the relationship requires that the insurer adequately protect the insured's interest." *Powers v. United Servs. Auto Ass'n*, 114 Nev. 690, 701-02, 962 P.2d

596, 603 (1998), *modified on other grounds, Powers v. United Servs. Auto Ass'n*, 115 Nev. 38, 979 P.2d 1286 (1999). "Thus, at a minimum an insurer must **equally consider the insured's interests as its own**." *Id,* 125 Nev. at 311, 315, 212 P.3d at 326, 328 (*citing Love,* 271 Cal. Rptr. at 253) (emphasis added); *see also Fulbrook v. Allstate Ins. Co.*, 2015 WL 439598 *2 (2015). "Under Nevada law, an insurer is liable to its insured for any bad faith refusal to settle." *Tweet v. Webster*, 610 F.Supp. 104, 105-106 (D. Nev. 1985); *see also Zurich*, 2021 WL 3489713 *4 (D. Nev. August 6, 2021); *see also Diamond Heights Homeowners Ass'n v. National American Ins. Co.*, 277 Cal.Rptr. 906 (Ct. App. 1991).

National Union could not adequately defend both its own and Marquee's interests on one hand and Cosmopolitan's on the other without conflict. Cosmopolitan had a valid contractual indemnity claim against Marquee. National Union was thus obligated to provide independent defense counsel to Cosmopolitan, who could have fully protected Cosmopolitan's interest. *See State Farm Mutual Auto Ins. Co. v. Hansen,* 131 Nev. 743, 745, 357 P.3d 338, 339 (Nev. 2015). National Union orchestrated a "unified defense" of Cosmopolitan and Marquee to protect Respondents' joint interests at Cosmopolitan's expense. National Union breached its duties to Cosmopolitan. And, at a minimum, questions still need discovery. AA 2918:15-21.

(1) Cosmopolitan suffered damages.

National Union tries dodging Cosmopolitan's claims by arguing that Cosmopolitan suffered no real harm. (Resp. Ans. Br. "RAB" 51-52). According to National Union, Cosmopolitan was not injured because St. Paul covered the post-verdict settlement.

This "no-damage" argument, however, would effectively obliterate any claims for subrogation under insurance contracts, and encourage litigation and recklessness. Why would insurance companies in National Union's position ever settle near policy limits if someone else would cover an excess verdict?

National Union's no-damages argument is really a no-subrogation argument; an argument that Judge Gordon found unpersuasive. In words apt here, Judge Gordon held that the "Cosmopolitan would have been liable if it did not have other insurance. The fact that Cosmopolitan did not actually have to pay out of pocket does not mean it suffered no loss in the context of equitable subrogation." *Zurich*, 2021 WL 3489713 at *3 (*citing Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506, 515 (9th Cir. 1984) ("equitable subrogation permits the excess insurer to assume the position of the insured as if he lacked excess coverage")).

Ignoring insurance payments as damages "would be inconsistent because the [subrogation] test requires that the insured have 'an existing, assignable cause of action against the defendant which could have been asserted for its own benefit had

it not been compensated for its loss by the insurer.'" *Id.* (*quoting Fireman's Fund Ins. Co.*, 65 Cal. App. 4th at 1292.) The test assumes the insurer has paid for the insured's loss. *See Id.* And "[i]t is not a prerequisite to equitable subrogation that the subrogor suffer actual loss; it is only that he would have suffered loss had the subrogee not discharged the liability or paid the loss." *Zurich* 2021 WL 3489713 at *5 (*quoting Troost v. Est. of Deboer*, 155 Cal. App. 3d 289, 295 (Ct. App. 1984)).

No attempt to subrogate could survive National Union's radical rereading of Nevada law where an "'insurer that pays its insured *in full* for claimed losses is subrogated by operation of law to the rights, if any, which the insured may have had against the tortfeasor before payment was made.'" *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368-69, 252 P.3d 206, 208 (2011) (*quoting Duboise v. State Farm Mut. Auto Ins.*, 96 Nev. 877, 879, 619 P.2d 1223, 1224 (1980)) (emphasis in original).

Furthermore, National Union undermined Cosmopolitan's defense by providing Cosmopolitan with conflicted counsel who failed to assert indemnity claims against Marquee. In doing so, National Union put Cosmopolitan on the hook for Marquee's uninsured indemnity damages as well. And St. Paul ended up covering Marquee's indemnity liability contrary to Nevada law and the parties' contractual expectations. *See* AA 2406, at 13.1, the Nightclub Management Agreement ("NMA").

St. Paul's insurance policy protected Cosmopolitan, not Marquee. But National Union (and the district court) claimed St. Paul's coverage amounted to a covered loss that absolved Marquee of its duty to indemnify. Such an approach inverts the roles that equitable indemnitors and indemnitees should play under Nevada law.

Cosmopolitan's indemnity claim against Marquee would have exceeded the National Union and Aspen policy limits, leaving Marquee with uninsured losses. Thus, St. Paul actually extinguished both Cosmopolitan's remaining joint and several liability to Moradi, *and* Marquee's remaining uninsured liability to Cosmopolitan.

(2) No excess judgment was required.

National Union's claim that an excess judgment is an "essential element of a claim arising out of a duty to defend and settle a third-party claim" (RAB 52) is really just another attempt to argue that Cosmopolitan was not damaged. National Union says as much: "the insured cannot suffer any damages until an excess judgment is entered." (*Id.*)

First, St. Paul, as subrogee, brings Cosmopolitan's first-party claims as a National Union insured; Cosmopolitan is not a third-party claimant, so neither is its subrogee St. Paul. Second, National Union cites no Nevada authority for the idea

that an excess judgment is an "essential element" of a claim arising out of a duty to settle. And Nevada's federal court has refused to accept the lack of an excess judgment as a "de facto bar to an equitable subrogation claim." *See Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 *5 (D. Nev. 2016) ("Colony I"). Finally, there was an excess verdict, and the effective consequences are the same.

B. St. Paul may subrogate the claims against National Union.

On to the next question: May St. Paul subrogate Cosmopolitan's claims? National Union says no, basing its argument on a misreading of the law.

(1) St. Paul is entitled to equitable subrogation.[3]

Nevada law presumes equitable subrogation claims are valid unless shown otherwise. National Union incorrectly flips this presumption, arguing subrogation is prohibited where this Court has not specifically already allowed it. Generally, though, Nevada courts allow subrogation unless this Court or state statutes specifically say no. And Judge Gordon believes this Court will say yes to St. Paul's claims. *Zurich*, 2021 WL 3489713 *3 ("Under Nevada law, courts have full discretion to fashion and grant equitable remedies . . . Consequently, I predict the

[3] Aspen, Marquee's primary insurance carrier, is also a wrongdoer. The subrogation dispute between Aspen and St. Paul is pending in the district court. On November 17, 2021, Aspen filed an emergency Writ Petition asking this Court to overturn the district court's denial of summary judgment in Aspen's favor approximately one year ago. *See* Case No. 81344.

Supreme Court of Nevada would allow equitable subrogation between insurance companies when appropriate.")

When this Court wants to exempt certain claims from subrogation it says so. *See, e.g.*, *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 576, 289 P.3d 1199, 1212 (2012) (holding that Nevada statutory law on mechanic's liens precluded equitable subrogation).

California law, which Nevada state and federal courts have often looked to for guidance (*See Eichacker v. Paul Revere Life Ins. Co.*, 354 F.3d 1142, 1145 (9th Cir. 2004)), has established the elements for equitable subrogation as follows:

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

Zurich, 2021 WL 3489713 at *3 (*quoting Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (Cal. Ct. App. 1998) (emphasis omitted)).

St. Paul has met all of the elements for equitable subrogation:

- National Union caused Cosmopolitan's loss.
- National Union was primarily liable for that loss.[4]
- St. Paul compensated Cosmopolitan in whole for that loss.
- St. Paul did not voluntarily pay Cosmopolitan's claim.
- Cosmopolitan had an existing, assignable cause of action against National Union that Cosmopolitan could have asserted on its own.
- St. Paul suffered damages of $25,000,000.
- Justice requires that the loss be entirely shifted from St. Paul to the wrongdoer National Union.
- St. Paul's damages are in a liquidated sum.

Nevada's federal courts have embraced the *Fireman's Fund* elements. *See Zurich; see also Colony I*, and *Colony Ins. Co. v. Colorado Cas. Ins. Co*., 2018 WL 3312965 (D. Nev. July 5, 2018) ("Colony II"). There is nothing to indicate that this Court would deviate from the *Fireman's Fund* test. National Union relies on *Fireman's Fund* too. (RAB 39.) Furthermore, no Nevada statute or decision from this Court limits St. Paul's ability to subrogate Cosmopolitan's claims.

[4] Judge Gordon rejected the argument that by "primarily liable" the test refers to the primary insurance. "Primarily liable" could also mean the "party primarily responsible for causing the loss." *Zurich*, 2021 WL 3489713 *4.

(2) National Union's "equitable superiority" red herring.

National Union repeatedly argues the same incorrect premise. Supposedly, because National Union and St. Paul are both excess insurance carriers for Cosmopolitan, they share the same "equitable" position, precluding St. Paul from asserting its equitable subrogation claim against National Union.

Cosmopolitan and St. Paul are equitably superior because National Union was the wrongdoer. National Union argues that "who purportedly 'caused' the excess judgment does not determine equitable superiority among excess carriers." (RAB 50.) For National Union (without authority), all that matters is the situational standing between insurance companies – *i.e.,* who is technically an excess or primary insurer to whom—not their role in the dispute.

Yet Cosmopolitan's "liability" for the Moradi verdict is the direct result of National Union's repeated failure to accept reasonable settlement offers. National Union's compromised defense of Cosmopolitan effectively made St. Paul Marquee's insurer as well.

(a) St. Paul and National Union were not on equal footing.

Both St. Paul and National Union insured Cosmopolitan for the Moradi loss, but the carriers were not on equal footing. Respondents attempt to paint St. Paul as a bystander who stood by and did nothing. But St. Paul did not learn of the April 8,

2012 incident giving rise to the Moradi lawsuit or the lawsuit itself until February 13, 2017. By that time, trial was only *45 days* away, discovery and motion practice were closed, and National Union had *already rejected* Moradi's settlement offer for $1.5 million. As of February 13, 2017, National Union had irreparably mishandled the defense and botched settlement negotiations, leaving Cosmopolitan exposed.

If St. Paul was supposed to share the same legal and equitable burdens as National Union, St. Paul should have had an equal seat at the table and an equal say in the settlement negotiations. But National Union unilaterally rejected Moradi's pre-verdict settlement demands.

(b) The governing contract made St. Paul superior.

National Union and St. Paul both insured Cosmopolitan, but St. Paul is in fact excess over National Union. The NMA between Marquee and Nevada Restaurant Venture, LLC ("Restaurant") required Marquee to provide insurance coverage for Cosmopolitan. *See* AA 2405, at 12.1 (Nevada Property 1 LLC is Cosmopolitan). The NMA provided that Marquee's policies would be primary to any insurance maintained by Cosmopolitan: "All insurance coverages maintained by [Marquee] shall be **primary** to any insurance coverage maintained by any Owner Insured Parties (the "Owner Policies"), and any such Owner Policies shall

be in **excess** of, and not contribute towards, such [Marquee] Policies." AA 2406, at 12.2.5 (emphasis added).

Cosmopolitan was one of the "Owner Insured Parties." *See Id.*, at 12.2.3. Marquee was the "Operator" under the NMA (AA 2399). The NMA was an "Insured Contract" that National Union agreed to cover under the policy it issued to Marquee (the "Operator Policies" AA 2405, at 12.1). *See* AA 60, at N, and AA 2405, at 12.2. Thus, National Union was in fact it primary to "any" policy maintained by Cosmopolitan as one of the Owner Insured Parties. *See* AA 2406, at 12.2.5.

(c) National Union misstates the Fireman's Fund holding.

National Union argues that the "equitable position" or "superiority" of the insurer to the defendant is the "hallmark" and an "essential element" of a subrogation claim, citing *Fireman's Fund* (and *Colony I*) for authority. (RAB 39 (*quoting Fireman's Fund*, 65 Cal. App. 4th at 1292; and *Colony (I)*, 2016 WL 3360943 *4-5)). According to the *Fireman's Fund* court, though, relative equitable inferiority is just one of eight essential elements of subrogation, none of which is the "hallmark."

National Union cherry-picks language from *Fireman's Fund* and ignores the decision's core. The *Fireman Fund* court did not define equitable superiority by

the types of insurance the parties offered, but by the parties' fault. The bulk of the decision concerns the difference between equitable subrogation (in which fault matters) and equitable contribution (in which fault may not matter). Equitable subrogation requires fault. "The different equitable principles on which contribution and subrogation are based are reflective of different underlying public policies. The aim of equitable subrogation is to place the burden for the loss on the party ultimately liable or responsible for it and by whom it should have been discharged, and to relieve entirely the insurer or surety who indemnified the loss and who in equity was *not* primarily liable thereof." *Fireman's Fund*, 65 Cal. App. 4th at 1296.

Distinguishing the parties' relative fault is one of the eight essential elements of subrogation. Between National Union and St. Paul, there is no dispute as to who bears more blame, an issue the district court overlooked.

(d) National Union should answer for its misconduct.

National Union tries to establish equitable parity with St. Paul by arguing that both had contractual "other insurance" clauses, which Nevada courts may find repugnant. (RAB 16-17, 43-44.) Again, National Union confuses claims between St. Paul and National Union and those between Cosmopolitan and National Union.

St. Paul brings Cosmopolitan's case against National Union for National Union's bad acts.

Both insurance companies may have similar, off-setting contractual language in different contracts with Cosmopolitan. But only one breached the duties owed to Cosmopolitan.

National Union also contends equality with St. Paul because they both had equal duties to Cosmopolitan. (RAB 55-57.) Although both are Cosmopolitan excess insurers, only National Union voluntarily assumed control of the defense of Cosmopolitan in the *Moradi* litigation. Having done so, National Union was obligated to properly defend Cosmopolitan, provide conflict-free counsel, and negotiate and settle in good faith. More, National Union may have failed to timely (and fully) notify both Cosmopolitan and St. Paul of the settlement offers it had received and given them a chance to accept. When it received within-policy settlement demands, National Union did not ask St. Paul (its alleged co-excess insurer) for input on those demands before unilaterally rejecting them. As such, National Union willingly assumed (and breached) duties that St. Paul did not have, never assumed, and did not breach.

St. Paul also had an equitable estoppel claim against National Union addressing the parties' relative equitable standing. St. Paul was not permitted the opportunity to conduct meaning for discovery on that claim.

(e) The primary insurance cases support St. Paul.

National Union attempts to sideline St. Paul's authority showing primary insurance companies subrogating claims against excess carriers. Such cases directly contradict the idea that "equitable superiority" is based entirely on the type of insurance one offers rather than the fault one bears. National Union sees these cases as simple exceptions to the general rule, and limited to one fact pattern: primary insurers seeking defense costs from excess insurers. (RAB 46-49.) But that is not what the cases hold; they ground their theory of liability on the excess insurance carrier's own misconduct, not the type of insurance it offered. *See Fin. Pac. Ins. Co. v. U.S. Fire Ins.*, 2020 WL 2748317, at *2 (C.D. Cal. Mar. 11, 2020); *Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co.*, 938 F.Supp. 2d 908, 917 (C.D. Cal. 2013); *Diamond Heights*, 277 Cal. Rptr. 915-16. Fault always matters.

(f) National Union's attempt to distinguish the super-majority rule is unsound.

Not only did St. Paul show that its claims reside comfortably under existing Nevada law, but St. Paul also showed that such equitable subrogation conforms to the super-majority rule in the United States (App. Op. Br. "AOB" 39-42.) National Union does not disagree, but tries to distinguish the law by the identity of the parties to the cases, not the principles announced within them. (RAB 40-41.) For

National Union, unless a case specifically shows equitable superiority of one excess carrier over another it is inapplicable.

The law St. Paul relies on is uniform. Equitable subrogation is flexible and permitted in circumstances similar to those raised here. National Union is a wrongdoer whose bad faith harmed Cosmopolitan.

(g) Equitable subrogation is not equitable contribution.

Lastly, National Union tries to create equitable parity between the parties by blurring the lines between equitable subrogation and equitable contribution – two very different legal doctrines.[5]

"The right of subrogation is purely derivative. An insurer entitled to subrogation is in the same position as an assignee of the insured's claim, and succeeds only to the rights of the insured." *Fireman's Fund*, 65 Cal. App.4th at 1292. "Equitable contribution is entirely different. It is the right to recover, not from the party *primarily* liable for the loss, but from a *co-obligor* who *shares* such liability with the party seeking contribution." *Id.* (emphasis in original). Equitable "contribution permits liability for the loss to be allocated among the various insurers **without regard to questions of comparative fault** or the relative equities between the insurers." *Id.* at 305 (emphasis added). Whereas "'[t]he 'true nature of

[5] St. Paul has a claim for equitable contribution, too.

subrogation' is that ' "it is applied in all cases in which 'one party pays a debt for which another is *primarily* answerable, and which, in equity and good conscience, should be discharged by the latter.'" *Id.* (*quoting Fireman's Fund Ins. Co. v. Wilshire Film Ventures, Inc.*, 60 Cal. Rptr.2d 591, 591 (Cal. Ct. App. 1997)) (emphasis added).

National Union contends that because both it and St. Paul were excess insurance carriers who paid the same post-verdict settlement amounts, they are both equal from an equity standpoint. But National Union's focus is on how the parties split up the amounts owed *after* National Union's bungled settlement negotiations exposed everyone to a $160.5 million verdict (contribution), and not on who was responsible for what was owed in the first place (subrogation).

(3) St. Paul can pursue contractual subrogation.

St. Paul had contractual subrogation rights under the St. Paul Excess Policy (*See* AA 1916; *see also* AA 457), which granted St. Paul the right to pursue reimbursement from the responsible parties in exchange for payment of a loss. *See* 73 Am. Jur. 2d Subrogation § 4; *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 646 (Tex. 2007).

Equitable and contractual subrogation are not mutually exclusive. *See* 73 Am. Jur. 2d Subrogation § 3; *Roberts v. Total Health Care, Inc*., 109 Md. App.

635, 648, 675 A.2d 995, 1001 (1996), *aff'd*, 349 Md. 499, 709 A.2d 142 (1998); *Phillips v. State Farm Mut. Auto. Ins. Co*., 73 F.3d 1535, 1538 (10th Cir. 1996). But they have different applications. "[A] subrogee invoking contractual subrogation can 'recover without regard to the relative equities of the parties.'" *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647 (Tex. 2007); *see, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C*., 646 A.2d 966, 971 (D.C. 1994) ("[T]he superior equities doctrine, although applicable to equitable subrogation claims, has no application in cases of conventional subrogation and assignment.").

National Union sees no differences between equitable and contractual subrogation, and argues that St. Paul's role as a co-excess insurer with National Union blocks both subrogation claims. But National Union ignores the law that St. Paul cited to show that equitable superiority is irrelevant to the question of contractual subrogation. Instead, National Union focuses on part of St. Paul's citation to argue against a proposition that St. Paul never really made regarding Nevada law. (RAB 56.)

No, St. Paul does not claim that in Nevada a party may contractually subrogate claims making the insured whole (nor would that matter here). And National Union's defense of the "make-whole" doctrine this Court reiterated in *Canfora* is just another unnecessary distraction. In fact, St. Paul cites to *Canfora*

in the very section of the Opening Brief that National Union challenges (AOB 47.) Additionally, St. Paul explicitly says that this Court has held "that where the insured is fully compensated, contractual subrogation is permitted." (AOB 49.) It is also hard to see what ground National Union is trying to occupy with this "make-whole" argument when they believe that subrogation in any form is improper, *because* St. Paul actually made Cosmopolitan whole.

Lastly, St. Paul reiterates that the *Colony* court was incorrect insofar as it held that Nevada does not allow contractual subrogation at all. Nevada does, as *Zurich* makes clear. *See* 2021 WL 3489713 *5.

C. St. Paul has a claim for equitable contribution.

As National Union concedes, Nevada federal courts have concluded that this Court will recognize a claim for equitable contribution between insurance companies.[2] *See, e.g., Great American Ins. Co. of New York v. North American Specialty Ins. Co.*, 542 F. Supp.2d 1203, 1211 (D. Nev. 2008); *Admiral Ins. Co. v. Illinois Union Ins. Co.*, 2010 WL 11579447, at *3 (D. Nev. May 24, 2010).

Furthermore, St. Paul's equitable contribution claim warrants further discovery.

(1) There was a special relationship between National Union and Cosmopolitan.

National Union claims that contribution is unavailable for claims arising out of contracts. (RAB 59.) But National Union knows that the contract here is one for insurance, where a "special relationship" similar to a fiduciary relationship exists. *See Allstate*., 125 Nev. at 311, 212 P.3d at 325. Such a relationship elevates the bad faith claim to one grounded in tort. *See Shaw v. CitiMortgage, Inc.*, 201 F. Supp. 3d 1222, 1254 (D. Nev. 2016).

PART TWO

MARQUEE

1. The District Court's Waiver Conclusion Was Wrong.

The district court relied on the NMA (which Cosmopolitan was not a party to) to determine that Cosmopolitan waived its ability to equitably subrogate a claim. This was reversable error because Cosmopolitan cannot—and should not—be bound by a clause within the NMA it never consented to, especially when it expressly consented to other clauses. In reaching its conclusion, the district court ignored that subrogation "waivers only apply to parties who had agreed to such a waiver, and a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears." 3 Am. Jur. 2d Subrogation § 73. And when a party is "neither [a] signator[y] nor part[y] to the main contract . . . the

[contracting party] cannot avail themselves of the waiver-of-subrogation clause contained therein." *St. Paul Fire & Marine Ins. Co. v. FD Sprinkler Inc.*, 76 A.D.3d 931, 932, 908 N.Y.S.2d 637, 639 (2010). The lower court is entitled to no deference here. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

A. Cosmopolitan is not a party to the NMA; it is only a beneficiary and, therefore, did not waive subrogation.

Cosmopolitan did not procure its policy with St. Paul subject to a waiver of subrogation. It couldn't have; Cosmopolitan is not a party to the NMA. For a party to be bound by a contract, that party must agree to the contract's terms. *See generally, May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). The same holds for a waiver of subrogation.

Marquee looks to the NMA: "Owner Policies . . . contain a waiver of subrogation." (RAB 27.) Cosmopolitan, however, is not the "Owner" under the NMA. Restaurant is. *See* AA 2399 ("Nevada Restaurant Venture 1 LLC . . . *as OWNER.*") (emphasis added). Marquee is the "Operator, and Cosmopolitan is the "Project Owner.'" AA 2398. The district court ignored the NMA's defined terms. The NMA never identifies Cosmopolitan as a party because it was not a party. AA 2398.

Additionally, the waivers in the NMA were qualified or restricted to the extent that "Losses" sustained by Marquee and Restaurant were covered by insurance required in the NMA itself. Conversely, the indemnity owed by Marquee was restricted to uninsured losses. But Cosmopolitan's indemnity claim against Marquee exceeds Marquee's two insurance policies, making the claim uninsured losses, which, Marquee, not St. Paul should have paid.

B. Cosmopolitan refused the subrogation waiver.

Cosmopolitan was not a party to the NMA, but, as "Project Owner" Cosmopolitan expressly approved some of the NMA's terms. None included a waiver of subrogation. *See* AA 2408 (again, Nevada Property 1, LLC is Cosmopolitan). When Cosmopolitan executed the NMA, it consented only to specific sections:

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

AA 2410.

Section 12.2.6 of the NMA contains the subrogation waiver. Cosmopolitan did not acknowledge or agree to this section, and never waived subrogation. *See* AA 2406.

C. Nevada public policy strictly construes insurance agreements in favor of the insured.

When there is ambiguous language in an insurance contract, the "contract must be construed against the insurer and in favor of the insured." *Serrett v. Kimber*, 110 Nev. 486, 489, 874 P.2d 747, 750 (1994). This is because coverage and limitations on insurance "should be construed to effectuate the reasonable expectations of the insured." *National Union Fire Ins. Co. of State of Pa, Inc. v. Reno Executive Air, Inc.*, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984). The basis of Marquee's claim is that there should be no protection for Cosmopolitan's damages because the NMA waived subrogation. Although the NMA is not an insurance policy, this Court should read the claimed waiver strictly before concluding the waiver precludes St. Paul's claim, since doing otherwise counters the basis of providing insurance coverage.

D. Cosmopolitan suffered a loss.

(1) Marquee's argument that the NMA precludes an indemnifiable loss assumes the NMA binds Cosmopolitan.

Marquee essentially argues that Cosmopolitan's choice to carry excess insurance precludes recovery because there is no actual loss. However, as previously explained, Cosmopolitan was not a party to the NMA and cannot be bound by this term. Furthermore, as explained in Section A(1) above,

Cosmopolitan suffered real loss. *See Troost,* 155 Cal. App. 3d at 294 ("Payment by the insurance company does not change the fact that a loss has occurred"). If an insurer never paid, there could be no claim for equitable subrogation. As one court aptly put it:

> Under Cleveland's view, no insurer could ever state a cause of action for subrogation in order to recover amounts it paid on behalf of its insured, because of the fact that it had paid amounts on behalf of its insured. Not only is this illogical, it contradicts decades of cases consistently holding that an insurer may be equitably subrogated to its insured's indemnification claims.

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

Marquee's argument actively discourages insurance carriers from providing coverage. Equitable subrogation lies where "justice requires that the loss should be shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer." *Wilshire Film Ventures, Inc.*, 52 Cal App. 4th at 566. This Court has never deviated from similar principles. Respondents caused St. Paul to cover Cosmopolitan's loss, including forcing it to cover Marquee's liability, too.

(2) Cosmopolitan's choice to have insurance does not preclude recovery.

Cosmopolitan was not required to maintain insurance under the NMA. The indemnity provision in Section 13.1 of the NMA applies to "the negligence or

misconduct of Operator (Marquee) . . . not otherwise covered by the insurance required to be maintained hereunder." AA 2406 (Appendix, Ex A, p 63). Therefore, this limitation does not apply to St. Paul's policy. The NMA could only serve to protect Cosmopolitan's interests.

(3) The NMA does not limit Cosmopolitan's loss.

A third-party beneficiary can only enforce the contract to its benefit, it cannot be bound by the defenses in the contract. *See Canfora v. Coast Hotels & Casinos, Inc*., 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005). Marquee and Restaurant, therefore, cannot agree to waive Cosmopolitan's rights.

Marquee cites no law for the proposition an injured party whose insurance covers the damages precludes recover under equitable subrogation. Instead, it relies on a *Gibbs*, which imputes the statute of limitations onto a third-party beneficiary to an agreement. *Gibbs v. Gibbs*, 96 Nev. 243, 247, 607 P.2d 118, 120 (1980). That case is significantly distinguishable. There, the Court was discussing defenses arising out of law, such as the statute of limitations, applying to third-party beneficiaries. It did not consider contractual limitations that prevent a party from bringing a claim. And it certainly did not consider equitable subrogation claims.

(4) The NMA cannot limit cognizable loss because Marquee's misconduct was intentional.

A jury and court determined Marquee's conduct was intentional. "[C]ourts will not enforce exculpatory and limiting provisions if they . . . relieve parties from their own willful, wanton, reckless, or intentional conduct. *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1191 (Colo. Ct. App. 2008); *Jones v. Dressel*, 623 P.2d 370, 376 (Colo.1981) ("An exculpatory agreement, which attempts to insulate a party from liability from his own negligence, must be closely scrutinized, and in no event will such an agreement provide a shield against a claim for willful and wanton negligence."). A Nevada federal court upheld a contractual limitation on liability, in large part, because it did "not seek immunity from gross negligence or wilfull [*sic*] misconduct." *Bernstein v. GTE Directories Corp*., 631 F.Supp. 1551, 1554 (D. Nev. 1986) (the court recognized the majority rule that "a telephone company may, by contract, limit its liability for omissions and mistakes . . . so long as it does not seek immunity from gross negligence or wilfull [*sic*] misconduct.").

Marquee tries to escape indemnity and equitable contribution for its active, intentional misconduct by claiming Cosmopolitan's passive, vicarious liability makes Cosmopolitan just as guilty as Marquee. That is not the law. If it were, the law would allow intentional tortfeasors to refuse contractual promises and

equitable rules that the merely negligent could not. And Marquee should not be able to use its own bad acts to avoid liability for those acts.

(5) Cosmopolitan's joint and several liability does not bar its indemnity claim.

Cosmopolitan's vicarious joint and several liability does not bar either the indemnity or the contribution claims. Marquee posits that St. Paul, under its rights obtained from Cosmopolitan, cannot seek contribution because Cosmopolitan was held jointly and severally liable for its vicarious liability arising from intentional misconduct, under which the agent and principal are treated euphemistically as "one." This argument completely ignores the heart of an indemnity claim – that while the agent and principal are jointly and severally liable, their relationship for the purpose of an indemnity claim and the acceptance of the tender is the active-passive dichotomy between them. They are not treated the same, as vicarious liability is not automatically "active fault." Thus, the release of Marquee does not bar indemnity or contribution claims under NRS 17.245.

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PART THREE

THE RECORD

2. Respondents' Arguments About The Record Are Misplaced And Untimely.

Respondents cannot support the district court's grant summary judgment with factual arguments raised for the first time on appeal. (RAB 60.) Respondents argue the following facts are undisputed: "the purported insufficiency of the defense [and/or] the supposed unreasonableness of the settlement." (*Id.* at 63.) Respondents claim insufficient evidence "to create a jury issue regarding either of the two asserted facts that are indispensable to the success of St. Paul's claim." (*Id.* at 64.) But Respondents did not challenge these two "indispensable" facts in the court below. *See* AA 1454-61 & 1583-1585. "Generally, an issue which is not raised in the district court is waived on appeal." *Nye County v. Washoe Medical Center*, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992).

This Court should disregard these factual issues, or remand them to the district court. St. Paul is not required to prove its entire case at the summary judgment stage. Respondents must have first challenged specific disputed or undisputed facts during the summary judgment phase. *See* NRCP 56(c)(1). St. Paul must have had the opportunity to oppose those assertions. *Id.* St. Paul had no obligation to address grounds not raised in Respondents' motions for summary

judgment. *See e.g. Titran v. Ackman*, 893 F.2d 145, 148 (7th Cir.1990) ("When a party moves for summary judgment on ground A, the opposing party need not address grounds B, C, and so on; the number of potential grounds for (and arguments against) summary judgment may be large, and litigation is costly enough without requiring parties to respond to issues that have not been raised on pain of forfeiting their position."); *see also Eklof v. Steward*, 385 P.3d 1074 (Or. 2016) (issues not "raised in the motion" are not properly before the trial court on summary judgment).

A. St. Paul Was Entitled To Discovery.

Since Respondents did not raise the adequacy of the defense or the sufficiency of the settlement in their motions for summary judgment, St. Paul did not have to respond to these issues. The lower court also denied St. Paul's request for additional discovery pursuant to NRCP 56(d) despite little discovery having occurred at all, and none on the adequacy of the defense or sufficiency of settlement. If these "indispensable" facts were at issue, the district court abused its discretion by denying additional discovery. *See Sciarratta v. Foremost Ins. Co.*, 137 Nev. Adv. Op. 32, 491 P.3d 7, 12 (2021).

Should this Court reverse the district court's ruling, additional discovery will also be necessary. *See Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1435 (9th Cir.1984).

CONCLUSION

This Court should reverse the district court's summary judgments in favor of National Union and Marquee.

DATED this 30th day of November 2021.

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ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6,951 words.

3. Finally, I certify that I have read this reply brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of November, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 30th day of November, 2021, the foregoing **APPELLANT'S REPLY BREIF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list below.

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