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: A738902

OPPOSITION TO MOTION TO STRIKE PORTIONS OF REPLY BRIEF AND OPPOSITION TO MOTION FOR LEAVE TO RESPOND TO SUPPLEMENTAL AUTHORITY

Mark A. Hutchison (4639)
Alex R. Velto (14961)
HUTCHISON & STEFFEN, PLLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: 702/385-2500
mhutchison@hutchlegal.com

Attorneys for Appellant
St. Paul Fire & Marine Insurance Company

Appellant St. Paul Fire & Marine Insurance Company opposes Respondents Motion to Strike Portions of the Reply Brief and Motion for Leave to Respond to Supplemental Authority based on the following factual points and legal authorities.

Respondents are dreading the thought that this Court might read *Zurich American Ins. Co. v. Aspen Specialty Ins. Co.*, 2021 WL 3489713 (D. Nev. Aug 6, 2021). So, they file a Motion to Strike that ignores large portions of the Opening Brief to try to persuade this Court that arguments made in St. Paul's Reply are new. As an initial matter, no *Zurich* analysis can be considered new. The case was released after St. Paul filed its Opening Brief. The timing of Judge Gordon's decision shouldn't be used against St. Paul merely because the case is inconvenient to Respondents' position. New cases come out all the time. No Court has ever held that a party is precluded from referencing a new case filed after it initiates its appeal.

This Court shouldn't strike any portions of the Reply for two reasons. First, the Reply aims to help this Court decide a significant issue involving equitable superiority. This Court has the "prerogative to consider issues a party raises in its reply brief, and [the Court] will address those issues if consideration of them is in the interests of justice." *Powell v. Liberty Mut. Fire Ins. Co*., 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011). It also has a prescribed policy to evaluate cases

on the merits, and not use form as a means of ignoring arguments. *See Huckabay Props v. NC Auto Parts*, 130 Nev. 196, 198, 322 P.3d 429, 430 (2014).

Second, and as this Opposition explains at length, the arguments Respondents' claim as new are either in the Opening Brief or respond directly to Respondents' arguments in their Answering Brief. New *issues* violate NRAP 28(c), however, arguments "answering any new matter set forth in the opposing brief" are expressly permitted. As is explained below, St. Paul's arguments are based on the Opening Brief or address issues raised by Respondents in their Answering Brief.

1. St. Paul Did Not Raise New Issues in Its Reply Brief.

Respondents claim that St. Paul raised new issues "on the critical questions of St. Paul's equitable superiority, its claim for estoppel, and the enforceability of the Marquee's subrogation waiver." *Motion,* pp. 2-3. Each of these issues were briefed and argued before the district court and presented in the Opening Brief. After Respondents attempted to distinguish between St. Paul's arguments and the case law presented it was proper for St. Paul to respond at length. An appellant opening brief cannot be expected to predict and analyze all potential arguments that could be made in an answering brief. This Court's limitation on new issues presumes an issue was not contemplated or presented in an opening brief, which is not the case here.

A. St. Paul's Argument About Equitable Superiority Is Not New.

Respondents' argument ignores a fundamental element of equitable superiority. St. Paul's Opening Brief claimed that National Union caused the excess judgment. However, Respondents ignore the footnote that nearly immediately follows its succinct explanation that National Union is equitably inferior—neither citing it, quoting it, nor referencing it—in its *Motion*. Footnote 21 explains: "Here, National Union left Cosmopolitan exposed to an excess judgment," which means St. Paul is entitled to be paid under subrogation. (AOB 44-45.)

St. Paul made and supported this argument at multiple points in the Opening Brief. First, it used the equitable superiority element of subrogation when explaining the essence of its argument:

> [T]he premise of St. Paul's claims are simple: an insurance company (National Union) has breached its duty to its insured (Cosmopolitan) and caused the insured damages. The party that cleans up the mess (St. Paul) acquired the insured's rights against the offending insurance company through subrogation.

AOB 34. St. Paul's Reply Brief merely expands upon this argument and addresses Respondents' attempt to distinguish it. *See* AOB 13 ("Cosmopolitan and St. Paul

are equitably superior because National Union was the wrongdoer."); *see also* AOB 21.

It's perplexing that Respondents now claim St. Paul's argument about equitable superiority is new. National Union responded to the Opening Brief's analysis of equitable superiority. *Id*. (quoting National Union, "who purportedly 'caused' the excess judgment does not determine equitable superiority."). If St. Paul's argument were truly new, why would Respondents respond to it in the Answering brief? *See* RAB 50.

Respondents' claim that "St. Paul for the first time [in the Reply] argues that National Union is *not* a co-excess insurer" is false. St. Paul explained in its Opening Brief that it "stepped into the shoes of Cosmopolitan with respect to the National Union Excess policy and is entitled to the contractual rights of Cosmopolitan against national Union." AOB 50. It explained further that "St. Paul does not need to have a separate contract with National Union in order to pursue a subrogation claim." AOB 50.

Respondents' failure to address this argument adequately in their Answering Brief does not warrant now claiming St. Paul never made the argument. Respondents shouldn't get a second bite at the apple and should not be permitted to analyze the issue anew in a subsequent motion. If this Court concludes St. Paul did not raise a new issue in its reply, the Court should ignore pages 3-6 of the Motion

because there Respondent attempts to argue the merits of the matter. NRAP 28(c) prevents "further briefing" unless the Court permits it. The Court has not permitted further briefing, so it should ignore Respondents' new arguments in the Motion that is pretext to respond further to the merits of arguments made in St. Paul's Opening Brief.

B. St. Paul's Argument About Estoppel is Not New.

St. Paul highlighted its estoppel argument in the Opening Brief. *See* AOB 18 (outlining St. Paul's claims before the District Court). It also highlighted the overwhelming need for discovery in at least one footnote. *See, e.g.,* AOB 19, n. 11. As such, its expansion on this argument in the Reply (ARB 4) is not a new argument. Rather, it is an "answer[to] a[ ] new matter set forth in the opposing brief." NRAP 28(c).

C. St. Paul's Argument About the Subrogation Waiver is Not New.

St. Paul's arguments about the waiver of subrogation between parties other than St. Paul is not new. It explained the law underlying waivers of subrogation in the Opening Brief. *See* AOB 55, n. 28. It also applied the arguments in the Opening Brief. *See* AOB 55 and AOB 57.

Respondents argue that St. Paul failed to argue in its Opening Brief that portions of the subrogation waiver were ambiguous. *See Motion*, p.8. However, St. Paul highlighted this issue when it described why the district court's decision

was incorrect. *See* AOB 54-56. Soon thereafter, it argued against the waiver generally. *See* AOB 57.

Respondents' failure to address this argument in its Answering Brief does not warrant now claiming St. Paul never made it. If this Court concludes St. Paul did not raise a new issue in its appeal, the Court should ignore pages 7-9 of the Motion because there Respondents attempt to argue more on the merits of the matter.

D. St. Paul's Arguments About Marquee as an Intentional Tort Feasor Are Not New.

Respondents' claim that St. Paul's arguments about intentional torts are new is incorrect. St. Paul started its argument about Marquee's indemnification duty to St. Paul beginning with the line: "Marquee committed intentional torts." AOB 57. St. Paul then proceeded to explain the difference between intentional and passive torts, and the factual underpinning for St. Paul's claim. This Court should ignore pages 9-10 of the Motion because it is Respondents' attempt to improperly and supplementally respond further to this argument in the Opening Brief.

OPPOSITION TO MOTION FOR LEAVE TO RESPOND TO SUPPLEMENTAL AUTHORITY

This Court should not grant leave to respond to supplemental authority. Respondents' request is "the opportunity to address the case in supplemental briefing." Respondents briefed its response to *Zurich American Ins. Co. v. Aspen Specialty Ins. Co.*, 2021 WL 3489713 (D. Nev. Aug. 6, 20211), thoroughly in its Motion. On pages 11-19, Respondents analyze Zurich at length and attempt to distinguish this case. There is no need for further briefing.

That said, if the Court considers Respondents' analysis, it should find it unpersuasive and without merit. *Zurich* directly responds to Respondents' no-damages argument. Judge Gordon held that "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 (emphasis added) (*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")). Rather, the proper test is whether there would have been a loss if not for the subrogee paying for the loss of discharging liability. *Zurich* at *3.

Further, *Zurich*—analyzing Nevada case law—concluded that the presumption is in favor of equitable subrogation when there is no case on point.

Judge Gordon went even further, predicting that the Nevada Supreme Court would expressly recognize equitable subrogation between insurance companies if the question were presented. *See Zurich*, 2021 WL 3489713 *3 ("Under Nevada law, courts have full discretion to fashion and grant equitable remedies . . . Consequently, I predict the Supreme Court of Nevada would allow equitable subrogation between insurance companies when appropriate.")

1. Respondents Rely on A Minor Factual Distinction—That Zurich Did Not Involve Co-Excess Insurers—Which is a Difference Without Significance.

Respondents' own summary of *Zurich's* facts paints a picture of how similar these cases really are. *Motion* pp.11-12. National Union's own summary of the case lays out a striking convergence of parties, facts, and issues. The holding, which presages St. Paul's appeal here, is compelling and right on point: the Nevada Supreme Court "would allow equitable subrogation between insurance companies when appropriate." *Zurich*, at *3.

But even if this Court were to agree with Respondents' distinction, it ignores that St. Paul stepped into Cosmopolitans' shoes, which still permits a claim against Respondents. St. Paul, as subrogee, and standing in the shoes of Cosmopolitan, is suing National Union for National Union's breach of obligations owed to its insured, Cosmopolitan, under the National Union Excess Policy. St. Paul can

enforce that duty by subrogation, which is why the tower distinction presented by Respondents in the Answering Brief is irrelevant and unhelpful.

2. *Zurich's* reasoning is Sound and Persuasive.

Respondents attempt to trivialize *Zurich's* holding as a mere reflection of "a general hesitancy to dismiss claims absent direction from the Nevada Supreme Court." *Motion*, p. 13. This is another way of Respondents arguing now that a trial court should not dismiss a case without specific authority, as the district court did in this case. However, National Union argued exactly the opposite to the district court itself --- insisting that the district court should dismiss St. Paul's equitable subrogation claim because such a claim had not previously been recognized in this precise context.

Although Respondents may be correct that *Zurich* reflects a conservative approach to not dismissing cases without authority, it does much more. It reflects the substantive law across many jurisdictions, including California --- which Nevada courts routinely look to --- establishing that equitable subrogation should be broadly allowed to accomplish substantial justice. *Zurich*, at *3. As Judge Gordon put it: "Under Nevada law, 'courts have full discretion to fashion and grant equitable remedies.'. . . Consequently, I predict the Supreme Court of Nevada would allow equitable subrogation between insurance companies when appropriate." *Id.*

Respondents also attempts to mischaracterize Judge Gordon's comment about whether and when the case should be certified for review as evidence that Judge Gordon was insecure about his holding. *See Motion*, p. 13-14 (*citing Zurich* at *7). It did no such thing. Judge Gordon was merely recognizing that the case before him presented "numerous novel issues of Nevada law." *Id.* True enough. The same is true of this case, as this Court knows. That is why Judge Gordon's careful analysis under nearly identical facts is so helpful to the Court reaching its conclusion.

A. Primary Liability is Irrelevant, and Respondents' Claim to Zurich's Error is Misguided.

Following their Answering Brief, Respondents again attempt to conflate equitable subrogation, a doctrine based on who is at fault for a loss, with equitable contribution, a doctrine which does not depend on proving fault for the loss. These are long-recognized distinct doctrines. *See Zurich Am. Ins. Co. v. Southern-Owners Ins. Co.*, 248 F. Supp.3d 1268, 1288-90 (M.D. Fl. 2017) (recognizing the differences between "equitable subrogation" and "equitable contribution").

Respondents seem to be getting at an argument that there should be no subrogation at all, stating that "equitable subrogation is not available between carriers—whether primary or excess—that insure the same level of risk. There was no need for the *Zurich* court to concoct a contrary meaning of 'primarily liable.'" *Motion* p. 16. This is sophistry. Equitable subrogation is available to

hold a wrongdoer accountable for its wrongful deeds. Here, National Union assumed its duties to defend Cosmopolitan and to settle on its behalf, and it badly botched those duties. Its reckless and tortious acts caused tens of millions of dollars of harm to Cosmopolitan, measured by the difference between the relatively modest and reasonable settlement demands National Union rejected and the extreme jury verdict against Cosmopolitan which resulted. National Union may not have caused the loss to Mr. Moradi—it did not assault him—but it did cause the loss to Cosmopolitan of tens of millions of dollars by mishandling its defense. St. Paul protected Cosmopolitan by paying significant settlement amounts on Cosmopolitan's behalf. By doing that, St. Paul became subrogated to Cosmopolitan's tort rights against National Union for the portion of the loss caused to Cosmopolitan by National Union. St. Paul has briefed this at length, s*ee, e.g.* Reply Brief, pp. 10-20, and does not need to relitigate the issue in this Opposition. Judge Gordon recognized this right in *Zurich.* No amount of confusion-sowing by Respondents can change the correctness of Judge Gordon's decision in *Zurich.*

3. This Court Should Not Order Supplemental Briefing.

This Court should not order further briefing. Respondents briefed its response to *Zurich American Ins. Co. v. Aspen Specialty Ins. Co.*, 2021 WL 3489713 (D. Nev. Aug. 6, 2021) thoroughly in its Motion. Indeed, Respondents spend *eight pages* analyzing *Zurich* and attempting to distinguish this case.

Further, this Court should consider how long it has been since Respondents had notice of *Zurich.* The Court can reasonably presume Respondents have known about *Zurich* since it was released --- on August 6, 2021. At the very latest, Respondents had notice since November 30, 2021, when St. Paul filed its Reply. Even with that notice, Respondents waited over three months to file its Motion. Respondents also waited until *the day after* this Court scheduled oral arguments to *defacto* provide the Court with Respondents' supplemental briefing and thereby prejudice St. Paul.

CONCLUSION

This Court should deny Respondents' Motion to Strike as well as Motion for Leave to Respond.

DATED this 25th day of March, 2022.

HUTCHISON & STEFFEN, PLLC

/s/ Mark A. Hutchison

Mark A. Hutchison (4639)
Alex R. Velto (14961)
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: 702/385-2500
Mhutchison@hutchlegal.com
avelto@hutchlegal.com

Attorneys for Appellant St. Paul Fire & Marine Insurance Company

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 25rd day of March, 2022 the foregoing **OPPOSITION TO MOTION TO STRIKE PORTIONS OF REPLY BRIEF AND OPPOSITION TO MOTION FOR LEAVE TO RESPOND TO SUPPLEMENTAL AUTHORITY** 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.

Daniel F. Polsenberg (2376)
Abraham G. Smith (13250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Ste. 600
Las Vegas, NV 89169
dpolsenberg@lrrc.com
asmith@lrrc.com
T: 702.474.2689
F: 702.949.8398
Attorneys for Respondent National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

Andrew D. Herold, Esq. (7378)
Nicholas B. Salerno, Esq. (6118)
HEROLD & SAGER
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
aherold@heroldsagerlaw.com
nsalerno@herlodsagerlaw.com
T: 702-990-3624
F: 702-990-3835

Attorneys for Respondent National Union Fire Insurance Company of Pittsburgh, PA and Roof Deck Entertainment, LLC dba Marquee Nightclub

/ / /

/ / /

Michael M. Edwards, Esq. (6281)
Nicholas L. Hamilton, Esq. (10893)
MESSNER REEVES LLP
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
medwards@messner.com
nhamilton@messner.com
efile@messner.com
T: 702-363-5100
F: 702-363-5101

Attorneys for Defendant Aspen Specialty Company

/s/ Madelyn B. Carnate-Peralta

An Employee of Hutchison & Steffen, PLLC