Case No. 81344

In the Supreme Court of Nevada

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Appellant,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; and ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB,

Respondents.

APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN, District Judge
District Court Case No. A-17-758902-C

RESPONDENTS' ANSWER TO PETITION FOR REHEARING

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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(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

National Union Fire Insurance Company of Pittsburgh, PA. is a direct wholly owned subsidiary of AIG Property Casualty U.S., Inc., which is a wholly owned subsidiary of AIG Property Casualty Inc., which itself is a wholly owned subsidiary of American International Group, Inc., a publicly-held corporation. No individual, parent entity, or publicly held entity owns 10% or more of the stock of American International Group, Inc.

Roof Deck Entertainment, LLC, is a limited liability company.

Andrew D. Herold and Nicholas B. Salerno of Herold & Sager, and Jennifer Lynn Keller and Jeremy Stamelman of Keller/Anderle LLP represented National Union and the Marquee in the district court and have appeared in this Court. National Union and the Marquee are represented in this Court by Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith of Lewis Roca Rothgerber Christie, LLP.

Dated this 16th day of February, 2023.

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ISSUES FOR REHEARING

1. Did this Court categorically reject excess-insurer subrogation in Nevada, as alleged in the petition, or did the Court merely "not need to reach the scope of equitable or contractual subrogation here because Cosmopolitan lacks an underlying claim to subrogate"?

2. At multiple levels, a settlement fully funded by insurance protected the Cosmopolitan against harm:

   a. National Union, along with the Cosmopolitan's other insurers, exhausted policy limits in a settlement prior to judgment.

   b. National Union named the Cosmopolitan an additional insured pursuant to a contract specifying that losses reimbursed by insurance—as they were here—are not losses at all.

   c. The subrogation waiver in that contract also binds the Cosmopolitan as a third-party beneficiary, triggering the subrogation-waiver endorsement in St. Paul's policy.

In these circumstances, did the Cosmopolitan suffer damages that could support a claim for subrogation?

3. Even if the Cosmopolitan had suffered a loss (which it did

not), was St. Paul equitably superior to National Union, despite that both insured the same risk at the same excess level?

4. Although the Cosmopolitan had no indemnity claim against the Marquee because insurance covered all damages, was the failure of defense counsel to assert such a meritless claim a conflict of interest?

INTRODUCTION

In an appropriate case, this Court may have to decide whether and when to recognize an excess insurer's claim to equitable subrogation. This is not such a case. St. Paul did not present the issue below or in the opening brief, and the majority recognized that St. Paul's insured sustained no damages to which St. Paul could subrogate. Because this case did not present the broader issues of contractual or equitable subrogation, the Court properly affirmed in an unpublished decision.

St. Paul did not take the hint. Even though its own policy contained a subrogation waiver, and their insured contracted away any claim for indemnity or subrogation, St. Paul insists that this Court has "turn[ed] subrogation law upside down" (Pet'n 6)—again, in an unpublished order that does not actually reach the subrogation issues. And having conceded in the opening brief that "[s]ome cases suggest that an excess judgment is necessary for bad faith exposure" (AOB 46 n.22),[1] St. Paul on rehearing seeks to retract this concession, relying

[1] The opening brief seemed to assume that an "excess verdict" would satisfy the requirement of an excess judgment. (AOB 46 n.22.) As the answering brief (at 54-55) pointed out, however, a bare verdict on com-

heavily on a case that it never cited in its briefs, in supplemental authorities, or at oral argument. (Pet'n 7-8 (citing *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 206 Cal. Rptr. 3d 176 (Ct. App. 2016)).)

This Court's decision is also consistent with the nightclub management agreement to which the Cosmopolitan is a third-party beneficiary. That agreement established that a loss reimbursed by insurance is no loss at all. The Cosmopolitan's claim against National Union would have derived from duties undertaken pursuant to that agreement; it would therefore be bound by the agreement's limitations. So, too, is St. Paul when it steps into the Cosmopolitan's shoes: it cannot flee from the agreement's disclaimer of loss.

Nor even would resolving the conflict in California law in St. Paul's favor do any good; St. Paul still cannot state a claim for equitable subrogation. The opening brief did not contest that both St. Paul and

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pensatory damages is not a judgment, nor is the insured even constructively exposed to a jury's verdict without judgment. *See Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 204–05, 462 P.3d 677, 683 (2020) (holding that even "a settlement agreement on its own [does not] stand[] in the place of a judgment"); NRCP 62(a) (providing, at the time, an automatic stay without bond of any money judgment for ten judicial days).

National Union are co-excess insurers at equal coverage levels: neither policy is superior to the other. In California, as elsewhere, without equitable superiority, there is no equitable subrogation. St. Paul ignores its own waiver on this point, rehashing a supposed $1.5 million offer of judgment that was rejected through counsel appointed by Aspen, the primary carrier who then controlled the litigation and was unwilling to tender its $1 million policy limit.[2] (12 App. 2472.) And St. Paul has now thrice forfeited its estoppel arguments, having failed to present any evidence or even any concrete NRCP 56(d) requests to the district court, abandoning the issue in the opening brief, and now failing to argue the point on rehearing.

In truth, this case will have almost no effect on subrogation in Nevada. Nothing in the unpublished decision prohibits a future case from recognizing an excess insurer's subrogation claim against a primary insurer. Rejecting St. Paul's subrogation claim—against an excess insurer at the same level in circumstances where its insured sustained no loss—

[2] On rehearing, St. Paul does not dispute that the Cosmopolitan had no claims against the Marquee. So the primary carriers—Aspen and Zurich—would both have to exhaust before turning to the excess.

hardly makes Nevada an outlier. Not a single jurisdiction has recognized that claim.

Someday this Court may have to decide whether and how insurance companies may sue one another—but not in a case where the defendant insurer exhausted its policy limits as part of a settlement funded entirely by insurance proceeds to protect the insureds, and the insureds themselves are bound by an agreement that in that circumstance they have no loss.

Because St. Paul has not met its burden, this Court should deny rehearing.

ARGUMENT

I.

THE PETITION TOUCHES JUST EQUITABLE SUBROGATION AGAINST NATIONAL UNION, NO OTHER CLAIMS

The petition seeks rehearing on just one claim: equitable subrogation against National Union. It does not reexamine the contribution claim against National Union or the claims against the Marquee, the dismissal of which was unanimously affirmed. (Order 8-10 (majority), 11 n.5 (Cadish, J., concurring in relevant part).)

II.

THIS COURT DID NOT REACH EQUITABLE SUBROGATION BECAUSE THE COSMOPOLITAN SUFFERED NO LOSS

A. The Court Did Not "Essentially Negat[e] the Existence of Subrogation"

St. Paul's petition epitomizes the strawman, distorting the Court's decision into absurdity. According to St. Paul's mischaracterization, this Court held that "there are no damages subject to subrogation when an insurer pays money on behalf of an insured," which "would mean that there is never subrogation in Nevada." (Pet'n 6.) This is not the Court's ruling, nor do the consequences follow.

While St. Paul's strawman is crude and categorical, the Court's actual holding was nuanced and narrow. This Court addressed St. Paul's specific equitable-subrogation claim against a co-excess insurer in an action that settled with only insurance funds before judgment. St. Paul brought the novel claim predicated on a specific kind of harm: a breach of the "duty to settle," which "requires the insurer to protect the insured from 'unreasonable exposure to a judgment in excess of the' insured's liability coverage limit to the extent an opportunity to settle arises." (Order 4.) But, as happened with the settlement here, "exhaustion of the

policy limits prior to an excess judgment necessarily protects the insured from the harm that the duties purport to avoid." (Order 5.)

Contrary to the broad-brush statements from St. Paul, this holding contains at least three limitations: First, the defendant insurer must exhaust its policy limits. Second, that exhaustion resulting in settlement must precede the entry of an excess judgment. And third, this holding protects only against the specific harm from a breach of the duty to settle.

This leaves the possibility of damages to the insured and a potential claim for equitable subrogation in other circumstances—when a defendant insurer does not exhaust its policy limits in a settlement that fully protects the insured, or when an excess judgment is entered.[3]

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[3] *E.g.*, *Hamilton v. Maryland Cas. Co.*, 41 P.3d 128, 137 (Cal. 2002) ("The assignment of the bad faith cause of action becomes operative after the excess judgment has been rendered." (quoting *Safeco Ins. Co. v. Superior Court*, 84 Cal. Rptr. 2d 43, 46 (Ct. App. 1999)). St. Paul's insistence that under *Century Sur. Co. v. Andrew*, 134 Nev. 819, 432 P.3d 180 (2018), "exhaustion of policy limits does not forgo a subsequent damages action" (Pet'n 10), misses the point. Exhaustion that *does not* settle the insured's liability would not fully protect, because in that circumstance the insured could still face an excess judgment. But the majority is not just referring to bare payment of policy limits in the face of an excess judgment; rather it is payment of policy limits (or the combined policy limits) that settles the insured's liability, preventing the

The holding also leaves open potential recovery in subrogation from a primary insurer's breach of the separate duty to defend where the insured or an excess insurer has to pay for the defense.[4] And of course, if the insured is being sued for a loss caused by a third party, the insured's claim against the third party can be subrogated, too.[5] Simply put, the holding does not foreclose the right of subrogation in all settings wherein an insurer pays money for an insured; St. Paul's mis-characterization of the holding should be rejected.

As discussed immediately below, this Court's analysis is correct and consistent with the nightclub-management agreement.

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entry of an excess judgment. (Order 4-5.)

[4] *E.g.*, *Safeco Ins. Co. v. Superior Court*, 84 Cal. Rptr. 2d 43, 46 n.3 (Ct. App. 1999) ("In contrast, when the insurer wrongfully refuses to defend, the insured need not wait for a final judgment on the third party claim to sue the insurer for breach of the contractual duty to defend.").

[5] *E.g.*, *Duboise v. State Farm Mut. Auto. Ins. Co.*, 96 Nev. 877, 879, 619 P.2d 1223, 1224 (1980); *see also Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 105 Cal. Rptr. 3d 606, 619 (Ct. App. 2010) (citing *Patent Scaffolding Co. v. William Simpson Constr. Co.*, 256 Cal. App. 2d 506 (Ct. App. 1967) and *Pylon, Inc. v. Olympic Ins. Co.*, 77 Cal. Rptr. 72 (Ct. App. 1969)).

B. The Cosmopolitan Suffered No Loss When Its Insurers, Including National Union, Funded a Pre-Judgment Settlement

1. Excess Insurers Who Exhaust their Policies in Settlement Do Not Subject the Insured to Damages

An excess judgment against the insured is an essential element of a claim arising out of the duty to defend and settle a third-party claim because the insured cannot suffer any damages until an excess judgment is entered.[6]

And as St. Paul conceded in the opening brief (at 46 n.22), many

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[6] *See Belanger v. Geico Gen. Ins. Co.*, 623 F. App'x 684, 688 (5th Cir. 2015) ("'[N]umerous courts in other jurisdictions have squarely addressed the issue, and have repeatedly held that an excess judgment is a prerequisite to an action for bad faith failure to settle a claim against an insured within the policy limits.'" (quoting *Mathies v. Blanchard*, 959 So. 2d 986 (La. Ct. App. 2007))); *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 827 (9th Cir. 2003); *Romstad v. Allstate Ins. Co.*, 59 F.3d 608, 611 (6th Cir. 1995); *A.W. Huss Co. v. Cont'l Cas. Co.*, 735 F.2d 246, 253 (7th Cir. 1984); *Zurich Am. Ins. Co. v. U.S. Eng'g Co.*, 2011 WL 13234385, at *3 (W.D. Mo. Sept. 21, 2011); *Amoco Oil Co. v. Reliance Ins. Co.*, 1998 WL 187336, at *4 (W.D. Mo. Apr. 14, 1998); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 913 P.2d 1092, 1095 (Ariz. 1996); *Cont'l Ins. Co. v. Superior Court*, 43 Cal. Rptr. 2d 374, 383 n.11 (Ct. App. 1995); *Finkelstein v. 20th Century Ins. Co.*, 14 Cal. Rptr. 2d 305, 306 (Ct. App. 1992); *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1277-76 & nn. 17-18 (Del. 2016); *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 659 (Md. Ct. App. 1994); *Crabb v. Nat'l Indem. Co.*, 205 N.W.2d 633, 638 (S.D. 1973); *Jarvis v. Farmers Ins. Exchange*, 948 P.2d 898, 902 (Wyo. 1997).

(though not all) courts require at least an excess judgment to sustain a claim of subrogation, even if the insured need not come out-of-pocket or face collection proceedings. *See, e.g.*, *RLI Ins. Co. v. CNA Cas. of Cal.*, 45 Cal. Rptr. 3d 667, 674 (Ct. App. 2006) ("a judgment in excess of the policy must be entered before there can be a claim for breach of the primary insurer's duty to settle").

To be sure, California remains unsettled. In *Hamilton v. Maryland Casualty Co.*, the California Supreme Court held that an insured's claim for bad-faith breach of the duty to settle is premature before entry of a litigated excess judgment. 41 P.3d 128, 136-37 (2002). The courts of appeal have split on whether the *Hamilton* excess judgment requirement applies to equitable subrogation actions between excess and primary insurers. *Compare Fortman v. Safeco Ins. Co.*, 271 Cal. Rptr. 117 (Ct. App. 1990) (no excess judgment required to prove damages to the insured), *with RLI Ins. Co. v. CNA Cas. of Cal.*, 45 Cal. Rptr. 3d 667 (2006) (rejecting *Fortman* and requiring excess judgment). The California Supreme Court has not weighed in. *See RSUI Indem. Co. v. Discover P & C Ins. Co.*, 649 F. App'x 534, 535 (9th Cir. 2016) (describing the current split but predicting that the California Supreme Court would adopt

Fortman).[7]

But apart from a count of noses, there are sound policy reasons to require an excess judgment or at least a settlement not funded by insurance before allowing a claim based on the failure to settle.

For one, where insurance covers the prejudgment settlement, not only is the insured literally unharmed, but also the settlement is too speculative a measure of the insured's hypothetical damages against the primary carrier—much less an excess carrier—resulting solely from the failure to settle. *See Hamilton v. Maryland Cas. Co.*, 41 P.3d 128,

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[7] St. Paul's description of the impact of *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 206 Cal. Rptr. 3d 176, 188 (Ct. App. 2016)—a case it neglected to cite at any point before this rehearing petition—is misleading at best. The California Court of Appeal sits in six separate districts, and in divisions within each district, and each division and district may follow or conflict with decisions elsewhere until the California Supreme Court resolves the conflict. *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 940 (Cal. 1962). So *Ace American*, issued by the Second District, could not "limit[]" or otherwise abrogate the First District's *Safeco Ins. Co. of Am v. Superior Court*, 84 Cal. Rptr. 2d 43, 46 (Ct. App. 1999).

St. Paul also suggests in its belated citation to *Ace American* that this conflict in the law is unfamiliar to this Court. But both St. Paul and National Union had recognized the split in their briefs (AOB 46 n.22, RAB 54); the conflict is not deepened or otherwise changed by St. Paul's extreme tardiness.

133 (Cal. 2002). St. Paul's theory assumes that for purposes of subrogation, a prior rejection of a settlement offer injures an insured precisely to the extent of a later settlement paid by insurance. Yet this ignores that the settlement process varies when the insured or an insurer is footing the bill: Plaintiffs' settlement demands are often tied to available insurance. And insurers might choose to settle a claim with insurance funds where they would not force the insured to pay that same amount out of pocket. Instead of locking in the insured's excess liability in a settlement, insurers in that circumstance would continue litigation, either avoiding an excess judgment or bonding the appeal from any excess judgment to seek to overturn it.

In addition, using settlement to fix the value of a bad-faith claim against one insurer encourages abuse—whether by the insured accepting inflated settlement for an assignment of the bad-faith claim, or by the excess carrier accepting an equally inflated settlement at or near its limits with the assurance that it will recoup against the primary carrier. *See Mercado v. Allstate Insurance Company*, 340 F.3d 824, 827 (9th Cir. 2003) ("It is only after a litigated excess judgment is obtained that an insurer's refusal to settle becomes actionable . . . . Were this not so,

'[t]he potential for abuse is apparent.'" (quoting *Safeco Ins. Co. v. Superior Court*, 84 Cal. Rptr. 2d 43, 45 (Ct. App. 1999))).

Finally, the law should not penalize an insurer for exercising its right to take a case through a final judgment. If the case concludes by judgment or settlement without a payment by the insured, no harm arises from the rejection of prior settlement offers. *Mercado v. Allstate Insurance Company*, 340 F.3d 824, 827 (9th Cir. 2003).

2. Settlement Funded by Insurance Is Not a Loss for Which an Excess Insurer is "Primarily Liable"

The requirement that equitable subrogation derive from the insured's rights dovetails with the requirement that a subrogation plaintiff show that the defendant is primarily responsible for the *loss*. *Fireman's Fund Ins. Co. v. Md. Cas. Co.*, 65 Cal. App. 4th 1279, 1296 (Ct. App. 1998).

St. Paul conflates its alleged "loss" with the prejudgment "*settlement*" of the loss among insurers. But the loss referred to is the "underlying loss"—the event for which liability insurance steps in to defend and indemnify. *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 105 Cal. Rptr. 3d 606, 619 (Ct. App. 2010) (citing *Patent Scaffolding Co. v. William Simpson Constr. Co.*, 256 Cal. App. 2d 506 (Ct. App.

1967) and *Pylon, Inc. v. Olympic Ins. Co.*, 77 Cal. Rptr. 72 (Ct. App. 1969)). It is the fire or the automobile accident or the burglary—or here, the alleged security failures inside the Marquee Nightclub at the Cosmopolitan. A third-party active wrongdoer may be primarily responsible for that loss, such that a paying insurer could subrogate to the insured's claim against that third party.[8]

In this context, a settlement among insurers who, by exhausting their limits, have insulated the insured against an excess judgment does not constitute a loss to the insured.

3. The Cosmopolitan Was Unharmed by the Prejudgment Settlement Funded by Insurance

This Court correctly applied these principles here:

> . . . National Union, along with Aspen, Zurich, and St. Paul, guaranteed Cosmopolitan financial "security, protection, and peace of mind" when they settled Cosmopolitan's liability before excess-judgment exposure. *See Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988). Therefore, Cosmopolitan did not suffer damages which would give rise to either a bad-faith claim or a breach-of-contract claim.

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[8] Vis-à-vis an excess carrier, the primary insurer may be primarily responsible for the loss by virtue of the policies' priority. But the insured would not have a claim against any excess carrier who alone or in combination with other excess carriers together protected the insured against exposure for the loss.

> St. Paul thus lacks any claim to assert on behalf of Cosmopolitan against National Union.

(Order 5.)

National Union's payment in exhaustion of its policy limits was just as integral as Aspen's, Zurich's, or St. Paul's. And this Court properly refrained from speculating what might have happened had St. Paul's policy not existed. It is fanciful to suppose that plaintiff and the remaining insurers would have reached the same settlement—with the Cosmopolitan now footing St. Paul's share of the bill—or that an excess judgment would have in fact been entered against the Cosmopolitan with no insurer bonding it for appeal. And St. Paul's theory is uniquely speculative here because it assumes that its payment was entirely a damage resulting from a breach of the duty to settle rather than the duty to defend, which was owed by the Cosmopolitan's primary carrier, Aspen.

In reality, the Cosmopolitan was fully protected by the exhaustion of policy limits by *all* insurance, including National Union as a co-excess insurer, which prevented an excess judgment from ever being entered and rendered academic any purported breach of the duty to settle. The Cosmopolitan suffered no harm.

C. The Cosmopolitan Suffered No Loss under the Terms of the Nightclub Management Agreement

The conclusion that the Cosmopolitan suffered no damage is confirmed in the nightclub management agreement to which the Cosmopolitan is a third-party beneficiary. Under that agreement, the underlying loss, allegedly caused by the Marquee, is expressly *not* a loss precisely because it was fully reimbursed by insurance, including the payment by National Union. And the agreement's subrogation waiver likewise applied to the Cosmopolitan and bound St. Paul. That is why this Court unanimously found that St. Paul had no claims against the Marquee, and St. Paul does not press that point in rehearing.

Because the parties agreed to look to insurance, there was no underlying loss, at all.

1. The Cosmopolitan's Claim Against National Union Would Derive from Rights under the Nightclub Management Agreement

Neither the dissent[9] nor St. Paul questions the majority's analysis of the nightclub-management agreement and St. Paul's third-party-beneficiary status thereunder:

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[9] *See* Order 11 n.5 (Cadish, J., concurring in relevant part).

> While a third-party beneficiary enjoys "the same rights and remedies . . . as a promisee of the contract," 9 John E. Murray, Jr., *Corbin on Contracts* § 46.1 (2022), it also takes those rights and remedies "subject to any defense arising from the contract . . . assertible against the promisee," *Gibbs v. Giles*, 96 Nev. 243, 246-47, 607 P.2d 118, 120 (1980). This means that an intended third-party beneficiary's rights remain limited by any conditions or burdens imposed in the contract.[10]

(Order 8.)

And "[h]ere, while Cosmopolitan is not a party to the management agreement between Cosmopolitan's subsidiary and Marquee, Cosmopolitan is a third-party beneficiary." (Order 7.)

So when the Cosmopolitan seeks to enforce a right arising from that agreement, it "obtains no greater right . . . than its subsidiary and bears the same contractual burdens of its subsidiary." (Order 8.)

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[10] Citing *Mercury Cas. Co. v. Maloney*, 6 Cal. Rptr. 3d 647, 649 (Ct. App. 2003) (stating that a "third party beneficiary takes the benefits subject to the conditions and limitations set forth in the contract"); *Mendez v. Hampton Court Nursing Ctr., L.L.C.*, 203 So. 3d 146, 149 (Fla. 2016) (stating the court "will ordinarily enforce an arbitration clause" against a third-party beneficiary); *Sanders v. Am. Cas. Co. of Reading*, 74 Cal. Rptr. 634, 637 (Ct. App. 1969) (applying one-year statute of limitations in contract to bar claim by third-party beneficiary to enforce contract and explaining that "the third-party [beneficiary] cannot select the parts favorable to him and reject those unfavorable to him").

In the indemnity context, this means that the Cosmopolitan in invoking indemnity rights under the agreement would be bound by the requirement to obtain a waiver of subrogation, which in turn forecloses St. Paul's claims. (Order 8-9; *see* R. App. 67, 12 App. 2406, § 12.2.6; R. App. 124, § 17.2; R. App. 111, 12 App. 2415.)

So, too, for claims against National Union. The agreement requires both the Cosmopolitan's subsidiary and the Marquee to maintain insurance (R. App. 65-67, 12 App. 2404-06, § 12), and requires the Marquee's insurance to name the Cosmopolitan as an additional insured (R. App. 67, 12 App. 2406, §§ 12.2.3). In other words, the Cosmopolitan enjoys the rights of a National Union insured only because the management agreement required it.

2. What Insurance Reimbursed Was Not a Loss to the Cosmopolitan

Looking to the management agreement as the ultimate source of the Cosmopolitan's right to insurance, the absence of damage is plain. Under that agreement, "losses" are limited to liabilities "not reimbursed

by insurance." (R. App. 13, § 1.)[11] St. Paul's and National Union's payments satisfied that definition, keeping the Cosmopolitan from experiencing a "loss."

That is, after all, the intent of the additional-insured requirement—to protect the Cosmopolitan from losses that *it* has to pay, not to create liability for its or its business partner's insurers that protected the Cosmopolitan from loss.

3. The Court's Conclusion Is Consistent with St. Paul's Waiver of Subrogation

This Court's conclusion is likewise consistent with the waiver of subrogation required by the management agreement (R. App. 67, 12 App. 2406, §§ 12.2.3, 12.2.6)—and actually contained in the Cosmopolitan's policy with St. Paul (8 App. 1517). This, too, follows from the Cosmopolitan's third-party beneficiary status: "The subrogation waiver in the management agreement binds Cosmopolitan, as an intended third-party beneficiary, and triggers the subrogation-waiver endorsement in

[11] While "[t]he coverages provided" by insurance are "not limited to the liability assumed under the indemnification provisions" (R. App. 67, 12 App. 2406, § 12.2.6), whether the Cosmopolitan experienced a *loss* is still governed by the agreement's general definition of loss (R. App. 13, § 1).

St. Paul's policy." (Order 9.)

Without the management agreement, the Cosmopolitan would have no rights against the Marquee or National Union. So when that same agreement made clear that the parties would look to insurance—and not allow the insurers to subrogate to one another's claims—the Cosmopolitan could not claim any greater rights. Just as the Cosmopolitan could not pursue claims ultimately derivative of the Marquee's liability, St. Paul cannot run from its endorsement of the subrogation waiver in an agreement confirming that the Cosmopolitan suffered no loss.

* * *

From any angle, this Court's conclusion is correct: the Cosmopolitan suffered no loss—no damages from a breach of the duty to settle, no liability for the underlying torts, and no unreimbursed loss under the management agreement. The exhaustion of National Union's policy, along with those of its co-insurers, fully protected the Cosmopolitan.

For these reasons, this Court had no need to create new law and decide whether Nevada recognizes a claim for equitable subrogation among insurers. This Court's straightforward, unpublished order

should stand.

III.

ST. PAUL HAS NO SUBROGATION CLAIM AGAINST NATIONAL UNION, A CO-EXCESS INSURER THAT PAID ITS FULL POLICY LIMITS

Though the petition rests entirely on damages, that is far from the only defect in St. Paul's subrogation claim, assuming such a claim exists.

St. Paul hyperbolizes that "[a]t least 29 of 30 jurisdictions have recognized the rights of an excess insurer to sue in subrogation *in cases like this one*, with only Alabama—and now Nevada—on the other side." (Pet'n 5 (emphasis added).) We have already discussed how this Court did not join a "side" categorically rejecting insurer subrogation. Yet this statement is doubly wrong because it implies that *any* jurisdiction—let alone 29—has recognized the claim St. Paul is advancing here: one excess carrier suing another excess carrier for a risk they equally insured and equally paid to settle. In these circumstances, ordinary subrogation principles bar the claim.

A. The Level of Risk Is the Distinguishing Factor Between Contribution and Equitable Subrogation

When multiple insurers are involved in litigating and settling a

claim, sometimes the insurers fight among themselves. Although protecting the insured is paramount, some states also recognize a claim by one insurer against another. Two such claims are contribution and equitable subrogation.

The claims are distinct. Subrogation, like indemnity, is a way of shifting the *entire* loss to the party who should have paid it. If the parties *share* in that responsibility, however, the appropriate claim is contribution, not subrogation:

> The aim of equitable subrogation is to place the burden for a 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 therefor. . . . On the other hand, the aim of equitable contribution is to apportion a loss between two or more insurers *who cover the same risk*, so that each pays its fair share and one does not profit at the expense of the others.

Fireman's Fund Ins. Co. v. Md. Cas. Co., 77 Cal. Rptr. 2d 296, 305–06 (Ct. App. 1998) (internal citations omitted) (emphasis added).

Whether the two insurers cover the same risk at the same level thus determines which claim is available, if any:

> where different insurance carriers cover *different* risks and liabilities with respect to the same insured, they may proceed against each other for reimbursement by

> subrogation rather than by contribution. . . . [C]ontribution is only available in cases where there are coinsurers who share the same level of obligation on the *same* risk.

Id. at 307; *accord id.* at 303 ("Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured.").

B. Subrogation Is Unavailable Because National Union and St. Paul Are Co-Excess Insurers at an Equal Level

Equitable subrogation "arises when one party has been compelled to satisfy an obligation that is ultimately determined to be the obligation of another." *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No. 2:12-cv-01727-RFB-NJK, 2016 WL 3360943, at *3 (D. Nev. June 9, 2016). The opening brief does not cite record evidence that would, even when viewed in the light most favorable to St. Paul, support a conclusion that as between National Union and St. Paul, National Union paid less than it should have.

1. A Subrogating Insurer Must Ordinarily Be Excess to the Insurer It Is Suing

Equitable subrogation requires that "the claimed loss was one for which the insurer was not primarily liable" and, separately, that "justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (Ct. App. 1998).

Although the "justice" element may take into account a party's bad-faith conduct in causing a loss, the "primarily liable" element addresses an entirely different question: as a matter of priority, does the defendant's policy answer *before* the plaintiff's, or do they cover the same risk at the same level?

The subrogation claim that some courts recognize is specifically a claim by an excess insurer against a carrier at a lower level of coverage in the tower: if the would-be insurer subrogee is not excess to the other insurer, it does not have the equitable upper hand, and equitable subrogation is unavailable. *Alkali Co. v. Bankers Indem. Ins. Co.*, 103 F.2d 345 (2d Cir. 1939). *See generally* C.C. Marvel, Annotation, *Right to Sub-*

rogation, as Against Primary Insurer, of Liability Insurer Providing Secondary Insurance, 31 A.L.R.2d 1324 (1953). "No such claim exists between two equal-level insurers." *AMHS Ins. Co. v. Mut. Ins. Co. of Ariz.*, 258 F.3d 1090, 1100 (9th Cir. 2001).

California—whose law St. Paul urges this Court to adopt—has consistently limited equitable subrogation claims to carriers that do not share the same level of risk. In *American States Insurance Co. v. National Union Fire Insurance Co. of Hartford*, for instance, the court held that equitable subrogation does not apply between two primary carriers because each primary carrier cannot be primarily liable in comparison to the other when they both provide primary coverage. 135 Cal. Rptr. 3d 177, 185 (Ct. App. 2011). The court's conclusion in *American States* rests on the plaintiff insurer's failure to meet two elements: that "the claimed loss was one for which the insurer was not primarily liable" and "the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable."[12]

[12] In addition, "where there are several policies of insurance on the same risk and the insured has recovered the full amount of its loss from one or more, but not all, of the insurance carriers, the insured has no further rights against the insurers who have not contributed to its recovery." *Id.* Because subrogation rights are purely derivative, in that

That is why equitable subrogation is not available between carriers—whether primary or excess—that insure the same level of risk.

2. "Other Insurance" Clauses Cancel One Another, Leaving Both at the Same Level

This Court has adopted a bright-line rule for determining superiority: "the 'other insurance' clause contained in one policy of insurance [is] null and void when it conflicts with a similar clause contained in another policy of insurance." *Travelers Ins. Co. v. Lopez*, 93 Nev. 463, 468, 567 P.2d 471, 474 (1977) (adopting *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 341 P.2d 110, 119 (Or. 1959) (holding that conflicting clauses self-annihilate "regardless of the nature of the clause")). In the subrogation context, both insurers' excess or "other insurance" clauses are "treated as mutually repugnant and the loss is pro rated between the insurers." 15 *Couch on Insurance* § 219:47.[13]

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situation where the insured has no right of recovery, there is no assignable cause of action to which the insurer can subrogate. *Id.*

[13] Because those two umbrella policies both afford coverage only after exhaustion of underlying insurance, "the courts will force both carriers to prorate, in derogation of the policy language." *CSE Ins. Grp. v. Northbrook Prop. & Cas. Co.*, 23 Cal. App. 4th 1839, 1842-43 (1994); *accord Century Sur. Co. v. United Pac. Ins. Co.*, 109 Cal. App. 4th 1246, 1257 (2003) (recognizing that when "two or more primary insurers' policies contain excess 'other insurance' clauses purporting to be excess to

3. St. Paul Is Not Excess to National Union

Here, St. Paul's opening brief did not contest that it insured the Cosmopolitan at the same excess level as National Union—with both superior to Aspen and Zurich, the primary carriers. The rehearing petition does not address this threshold issue, at all. Because National Union's and St. Paul's policies contain nearly identical "other insurance" clauses (8 App. 1504, ¶ L; 9 App. 1690, ¶ L), the two clauses cancel each other out. Both are excess carriers at the same level.

4. National Union's Alleged Failure to Accept a Settlement within the Primary Limits Is Irrelevant

St. Paul's misunderstanding of equitable superiority taints their view of National Union's purportedly culpable conduct. Because neither National Union nor St. Paul was "primarily liable" to the other for subrogation, St. Paul's accusation of a failure to settle is irrelevant. In typical fashion, St. Paul without citation to the record, and contrary to the facts, bridles at "the unilateral rejection of [a] $1.5 million pre-trial offer

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each other, the conflicting clauses will be ignored and the loss prorated among the insurers on the ground the insured would otherwise be deprived of protection").

of judgment by Respondent National Union." (Pet'n 12; *see also* Pet'n 2.) But National Union's alleged unwillingness to settle was irrelevant: Aspen, who then controlled the litigation, rejected the offer through its appointed counsel based on its own refusal to tender its $1 million limits. (12 App. 2472.) No obligation under an excess policy like National Union's or St. Paul's was triggered. (3 App. 454-55, ¶¶ 15-18; 3 App. 456, ¶¶ 30-31; 9 App. 1608; 10 App. 1954-55; 15 App. 2984, ¶¶ 21-22; 3 App. 458, ¶ 40, 43; 8 App. 1481; 9 App. 1730; 15 App. 2984, ¶¶ 19-20; AOB 15.)

5. St. Paul Waived Its Estoppel Claim

To make National Union anything other than an excess insurer with precisely the same rights and duties as St. Paul, St. Paul would have had to prevail on its estoppel argument. The argument in the complaint went something like this: in electing not to participate in the defense or settlement negotiations, St. Paul had relied on Aspen's and National Union's representations that their coverage was primary to the Cosmopolitan's tower, and that these carriers are now estopped from arguing that St. Paul had an obligation to resolve the Moradi action. (3 App. 475, ¶ 134.)

But St. Paul abandoned this claim on appeal. (*See* RAB 16 n.4.) And in the reply brief, St. Paul made but a half-hearted effort to revive it, arguing that "St. Paul was not permitted the opportunity to conduct meaning for discovery on that claim." (ARB 17.) St. Paul neither disputed that it abandoned the claim in the opening brief nor explained why the waiver should be excused. And on the merits, just as it failed to do at the district court level, St. Paul did not articulate what specific discovery it needed, as NRCP 56(d) requires. *Sciarratta v. Foremost Ins. Co.*, 137 Nev., Adv. Op. 32, 491 P.3d 7, 12–13 (2021).[14]

And now, on rehearing, St. Paul has again waived the issue, leaving this Court no basis on which to hold National Union primarily liable for settlement offers within the limits of the primary carriers.

[14] The word "discovery" appears just twice in the opening brief—once to state the fact that "[n]o discovery has been conducted" (AOB 19 n.11) without so much as mentioning NRCP 56(d) *or* estoppel, and another time in an unrelated context. (AOB 5 n.3.) There, St. Paul suggests that because "all that was before the district court was the pleadings and argument," any allocation of fault between National Union and Aspen would have to be resolved on remand. Neither footnote cites any authority whatsoever.

C. Contribution Is Unavailable Because St. Paul and National Union Each Exhausted their Limits

Because St. Paul and National Union are equal-level insurers with respect to the Cosmopolitan, any claim would have to sound in equitable contribution. St. Paul asked this Court to recognize this claim, but this Court had no occasion to:

> [W]e do not need to reach whether to recognize equitable contribution between equal-level insurers here, as St. Paul did not contribute a disproportionate share. . . . Here, National Union and St. Paul undisputedly contributed their full policy limits to the settlement of the patron's lawsuit.

(Order 6.)

The full Court agreed. (Order 11 n.5 (Cadish, J., concurring in relevant part).) And St. Paul has not urged rehearing.

St. Paul cannot state a claim for equitable subrogation or contribution, even if this Court believed that the insurer-funded settlement harmed the Cosmopolitan.

IV.

THE COURT UNANIMOUSLY AND CORRECTLY REJECTED ST. PAUL'S CLAIMS OF CONFLICT

St. Paul's final grievance is as confusing as it is irrelevant. St. Paul gripes that "[n]owhere in this Court's Order of Affirmance is there

recognition of the fact and significance of the conflicted legal counsel that was deployed by Respondent National Union in this case." (Pet'n 13.) But St. Paul establishes neither the fact nor the significance of any conflict.

A. Defense Counsel Was Not Conflicted

St. Paul repeatedly invokes an "intractable conflict of interest" that supposedly "sacrificed the interests of its additional insured, the Cosmopolitan, in favor of its named insured, the Marquee." (Pet'n 13.)

But St. Paul's authority is *ipse dixit*. (Pet'n 13-14.) St. Paul is apparently unable to identify a single ethical rule or judicial doctrine that insurer-appointed defense counsel violated.[15] St. Paul sputters only that

[15] The cited passages of the briefs (AOB 5 n.2, 12 n.6 and ARB 2, 4, 6, 8, 17 are likewise devoid of legal citation, save one reference in reply (ARB 6) to *State Farm Mutual Auto Ins. Co. v. Hansen*, 131 Nev. 743, 745, 357 P.3d 338, 339 (2015), Nevada's adoption of *Cumis* counsel. But apart from having waived the issue by forgoing cogent authority in the opening brief, *see Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006), *Hansen* alone does not achieve liftoff, either. For *Hansen* merely states that "*[w]hen* a conflict of interest exists between an insurer and its insured," the insurer must appoint counsel. 131 Nev. 743, 749, 357 P.3d 338, 341 (2015). St. Paul must still prove the predicate conflict.

(assumedly) "conflicted counsel could not file a crossclaim" for the Cosmopolitan against the Marquee.

St. Paul has not pointed to any record of any party or insurer having objected to the supposed conflict during the Moradi action or shown how the Cosmopolitan would not have suffered the same loss. (*See* AOB 12, 15, 22 n.14 (discussing the alleged conflict and St. Paul's reservation of rights, but indicating no place in the record where the conflict was timely raised during the Moradi action). St. Paul is the only one to allege a conflict, for the first time in its own suit.

And even if preserved, the asserted conflict is baseless. It would scarcely have helped to have two jointly and severally liable defendants pointing fingers at one another—especially because, as the district court found, the Cosmopolitan had a non-delegable duty to protect its patrons. (8 App. 1556.) Insofar as the Cosmopolitan suffered no unreimbursed loss, there simply was no conflict of interest associated with the joint representation of these parties that resulted in any damage to the Cosmopolitan. (*See* R. App. 67-68, 12 App. 2406-07, § 13; R. App. 13, § 1.)

B. The Unchallenged Judgment for the Marquee Erases the Predicate for a Conflict

Moreover, St. Paul's stated basis for the conflict—a supposed crossclaim for indemnity—has evaporated. St. Paul seeks rehearing only on the subrogation claim against National Union. It has abandoned its challenge to the judgment in the Marquee's favor, which included affirmance on the absence of a claim for indemnity: As the Court unanimously agreed, the indemnification provision in the management agreement binds the Cosmopolitan, eliminating both contractual indemnity and statutory contribution. (Order 8-10 (majority), 11 n.5 (Cadish, J., concurring in relevant part).) The crossclaim that counsel were supposedly "conflicted" from filing was nonexistent, after all.

CONCLUSION

This Court correctly rejected St. Paul's appeal. The Court made no law on subrogation because St. Paul could not sustain a claim against National Union even if it existed. This Court should deny rehearing.

Dated this 16th day of February, 2023.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 6,938 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

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CERTIFICATE OF SERVICE

I certify that on February 16, 2023, I submitted the foregoing "Respondents' Answer to Petition for Rehearing" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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