

IN THE SUPREME COURT OF THE STATE OF NEVADA

ASPEN SPECIALTY INSURANCE
COMPANY,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; and THE HONORABLE
GLORIA STURMAN, DISTRICT JUDGE,
DEPT. 26,

Respondents,

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

Real Parties in Interest.

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District Court Case No. A-17-758902-C

**APPENDIX OF EXHIBITS TO
PETITION UNDER NRAP 21 FOR
WRIT OF MANDAMUS OR, IN THE
ALTERNATIVE,
PETITION FOR WRIT OF
PROHIBITION**

Volume III of XIX

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DOC NO.	DOCUMENT	VOL.	BATES NO.
1	[04/25/2018] St. Paul Fire & Marine Insurance Company's First Amended Complaint [filed under seal]	I	AA00001-AA00027
2	[08/29/2019] St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment Against Aspen Specialty Insurance Company	I	AA00028-AA00051
3	[08/29/2019] Exhibits and Declaration of Marc J. Derewetzky in Support of St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment Against Aspen Specialty Insurance Company	I, II	AA00052-AA00208
4	[08/29/2019] Request for Judicial Notice in Support of St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment Against Aspen Specialty Insurance Company	II	AA00209-AA00285
5	[09/13/2019] Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment	II, III	AA00286-AA00312
6	[09/13/2019] Declaration of Nicholas B. Salerno in Support of Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment	III	AA00313-AA00315
7	[09/13/2019] Declaration of Bill Bonbrest in Support of Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment	III	AA00316-AA00318
8	[09/13/2019] Request for Judicial Notice in Support of Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment	III	AA00319-AA00322
9	[09/13/2019] Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Appendix of Exhibits in Support of Motion for Summary Judgment	III	AA00323-AA00411
10	[09/13/2019] National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment	III	AA00412-AA00439

11	[09/13/2019] Declaration of Nicholas B. Salerno in Support of National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment	III	AA00440-AA00442
12	[09/13/2019] Declaration of Richard C. Perkins in Support of National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment	III, IV	AA00443-AA00507
13	[09/13/2019] National Union Fire Insurance Company of Pittsburgh PA's Appendix of Exhibits in Support of Motion for Summary Judgment	IV, V, VI, VII	AA00508-AA00937
14	[09/13/2019] Request for Judicial Notice in Support of National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment	VII	AA00938-AA00941
15	[09/19/2019] Aspen Specialty Insurance Company's Opposition to St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment and Countermotion for Summary Judgment	VII, VIII	AA00942-AA01153
16	[09/27/2019] St. Paul Fire & Marine Insurance Company's Opposition to Motion for Summary Judgment filed by Roof Deck Entertainment, LLC d/b/a Marquee Nightclub and Countermotion Re: Duty to Indemnify	VIII	AA01154-AA01173
17	[09/27/2019] Declaration of William Reeves in Support of St. Paul Fire & Marine Insurance Company's Opposition to Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment	VIII	AA01174-AA01176
18	[09/27/2019] St. Paul Fire & Marine Insurance Company's Response to Statement of Facts Offered by Roof Deck Entertainment, LLC d/b/a Marquee Nightclub in Support of Its Motion for Summary Judgment	VIII	AA01177-AA01185
19	[09/27/2019] St. Paul Fire & Marine Insurance Company's Opposition to Motion for Summary Judgment filed by AIG and Request for Discovery per NRCP 56(d)	VIII, IX	AA01186-AA01221
20	[09/27/2019] Declaration of Marc J. Derewetzky in Support of St. Paul Fire & Marine Insurance Company's Opposition to AIG's Motion for Summary Judgment	IX	AA01222-AA01228

21	[09/27/2019] St. Paul Fire & Marine Insurance Company's Response to National Union Fire Insurance Company of Pittsburgh PA's Statement of Undisputed Facts in Support of Motion for Summary Judgment	IX	AA01229-AA01234
22	[09/27/2019] <u>Consolidated</u> Appendix of Exhibits in Support of St. Paul Fire & Marine Insurance Company's Opposition to Motions for Summary Judgment filed by AIG and Roof Deck Entertainment, LLC d/b/a Marquee Nightlife	IX, X	AA01235-AA01490
23	[10/02/2019] St. Paul Fire & Marine Insurance Company's Reply Supporting Its Motion for Partial Summary Judgment as to Aspen Specialty Insurance Company and Opposition to Aspen's Countermotion for Summary Judgment	X, XI	AA01491-AA01530
24	[10/07/2019] Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Opposition to St. Paul Fire & Marine Insurance Company's Countermotion for Summary Judgment	XI	AA01531-AA01549
25	[10/07/2019] Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Objection to Facts Not Supported by Admissible Evidence Filed in Support of St. Paul Fire & Marine Insurance Company's Opposition to Motion for Summary Judgment and Countermotion Re: Duty to Indemnify	XI	AA01550-AA01557
26	[10/07/2019] Aspen Specialty Insurance Company's Reply in Support of Its Countermotion for Summary Judgment	XI	AA01578-AA01592
27	[10/08/2019] Recorder's Transcript of Pending Motions	XI	AA01593-AA01616
28	[10/10/2019] National Union Fire Insurance Company of Pittsburgh PA's Reply in Support of Its Motion for Summary Judgment	XI	AA01617-AA01633
29	[10/10/2019] National Union Fire Insurance Company of Pittsburgh PA's Objections to Facts Not Supported by Admissible Evidence Filed in Support of St. Paul's Opposition to Motion for Summary Judgment and Request for Discovery Per NRCp 56(d)	XI, XII	AA01634-AA01656

30	[10/10/2019] Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Reply in Support of Motion for Summary Judgment	XII	AA01657-AA01667
31	[10/10/2019] St. Paul Fire & Marine Insurance Company's Reply to Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Opposition to St. Paul Fire & Marine Insurance Company's Countermotion	XII	AA01668-AA01679
32	[10/15/2019] Recorder's Transcript of Pending Motions	XII	AA01680-AA01734
33	[05/14/2020] Findings of Fact, Conclusions of Law and Order Granting Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment	XII	AA01735-AA01751
34	[05/14/2019] Findings of Fact, Conclusions of Law and Order Granting National Union Fire Insurance Company of Pittsburg PA's Motion for Summary Judgment	XII	AA01752-AA01770
35	[05/14/2020] Order Denying St. Paul Fire & Marine Insurance Company's Motion for Partial Summary Judgment and Order Granting in Part Aspen Specialty Insurance Company's Counter-Motion for Summary Judgment	XII	AA01771-AA01779
36	[06/11/2020] Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment	XIII	AA01780-AA01808
37	[06/11/2020] Appendix to Exhibits to Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment	XIII, XIV, XV	AA01809-AA02124
38	[07/02/2020] St. Paul Fire & Marine Insurance Company's Renewed Opposition to Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment	XV	AA02125-AA02164
39	[07/31/2020] Aspen Specialty Insurance Company's Reply to St. Paul Fire & Marine Insurance Company's Opposition to Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment	XV	AA02165-AA02182

40	[10/09/2020] Order Denying Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment	XV	AA02183-AA02194
41	Aspen Specialty Insurance Company's Reservation of Rights Letters dated August 5, 2014	XVI	AA02195-AA02207
42	Aspen Specialty Insurance Company Policy of Insurance issued to The Restaurant Group et al, Policy Number CRA8XYD11	XVI	AA02208-AA02325
43	St. Paul Fire and Marine Insurance Company Policy of Insurance issued to Premier Hotel Insurance Group (P2), Policy Number QK 06503290	XVII	AA02326-AA02387
44	National Union Fire Insurance Company of Pittsburgh, PA Policy of Insurance issued to The Restaurant Group et al, Policy Number BE 25414413	XVIII	AA02388-AA02448
45	Zurich American Insurance Company Policy of Insurance issued to Nevada Property I LLC, Policy Number PRA 9829242-01	XVIII, XIX	AA02449-AA02608

1	No.	Undisputed Fact	Supporting Evidence
2		of, and not contribute towards,	
3		[Marquee] Policies. The [Marquee]	
4		Policies shall apply separately to each	
5		insured against whom a claim is made,	
6		except with respect to the limits of the	
7		insurer's liability.	
8		12.2.6 All Owner Policies and	
9		[Marquee] Policies shall contain a	
10		waiver of subrogation against the	
11		Owner Insured Parties and	
12		[Marquee] and its officers, directors,	
13		officials, managers, employees and	
14		agents and the [Marquee] Principals.	
15		The coverages provided by [NRV1] and	
16		[Marquee] shall not be limited to the	
17		liability assumed under the	
18		indemnification provisions of this	
19		Agreement.	
20	20.	The NMA provides:	Bonbrest Decl., Ex. 1, at
21		13. <u>Indemnity</u>	T000126 – T000127
22		13.1 By [Marquee]. [Marquee]	
23		shall indemnify, hold harmless and	
24		defend [NRV1] and its respective	
25		parents, subsidiaries and Affiliates and	
26		all of each of their respective officers,	
27		directors, shareholders, employees,	
28		agents, members, managers,	
		representatives, successors and assigns	
		("Owner Indemnitees") from and	
		against any and all Losses to the extent	
		incurred as a result of (i) the breach or	
		default by [Marquee] of any term or	
		condition of this Agreement, or (ii) the	
		negligence or willful misconduct of	
		[Marquee] or any of its owners,	
		principals, officers, directors, agents,	
		employees, Staff, members, or	
		managers ("[Marquee]	
		Representatives") and not otherwise	
		covered by the insurance required to	
		be maintained hereunder.	
		[Marquee's] indemnification obligation	
		hereunder shall include liability for any	
		deductibles and/or self retained	
		insurance retentions to the extent	
		permitted hereunder, and shall	
		terminate on the termination of the	
		Term; provided however that such	
		indemnification obligation shall	

1	No.	Undisputed Fact	Supporting Evidence
2		continue in effect for a period of three	
3		(3) years following the termination of	
4		the Term with respect to any events or	
5		occurrences occurring prior to the	
6		termination of the Term.	
7		13.2 By [NRV1]. [NRV1] shall indemnify, hold	
8		harmless and defend [Marquee] and its respective	
9		parents, subsidiaries and Affiliates and all of each of	
10		their respective officers, directors, shareholders,	
11		employees, agents, members, managers,	
12		representatives, successors and assigns (“[Marquee]	
13		Indemnitees”) from and against any and all Losses to	
14		the extent incurred as a result of (i) the breach or	
15		default by [NRV1] of any term or condition of this	
16		Agreement or (ii) the negligence or willful	
17		misconduct of [NRV1] or any of its owners,	
18		principals, officers, directors, agents, employees,	
19		members, or managers and not otherwise covered	
20		by the insurance required to be maintained	
21		hereunder. [NRV1’s] indemnification obligation	
22		hereunder shall terminate on the termination of the	
23		Term; provided, however, that such indemnification	
24		obligation shall continue in effect for a period of	
25		three (3) years following the termination of the Term	
26		with respect to any events or occurrences occurring	
27		prior to the termination of the Term.	
28	21.	The NMA provides:	Bonbrest Decl., Ex. 1, at T000141
		20. <u>Third Party Beneficiary</u>	
		Except as otherwise expressly	
		provided herein, the Parties	
		acknowledge and agree that [NRV1]	
		may assign, delegate or jointly exercise	
		any or all of its rights and obligations	
		hereunder to or with any one or more of	
		the following: [Cosmopolitan], Hotel	
		Operator, Casino Operator and/or their	
		Affiliates, or any successors thereto	
		(collectively “Beneficiary Parties”).	
		All such Beneficiary Parties to whom	
		certain rights and obligations of	
		[NRV1] have been assigned shall, to	
		the extent of such assigned, delegated	
		or shared rights and obligations, be an	
		express and intended third-party	
		beneficiary of this Agreement. Without	
		limiting the generality of the foregoing,	
		Beneficiary Parties shall have the right	

No.	Undisputed Fact	Supporting Evidence
	to enforce the obligations of [NRV1] to the extent of the rights and obligations assigned to, delegated to or shared with the Beneficiary Party by [NRV1]. Except as provided above, nothing in this Agreement, express or implied, shall confer upon any person or entity, other than the Parties, their authorized successors and assigns, any rights or remedies under or by reason of this Agreement.	
22.	<p>The NMA provides:</p> <p>28. <u>Attorneys' Fees</u></p> <p>In the event of a dispute between the Parties concerning the enforcement or interpretation of this Agreement, the prevailing party in such dispute, whether by legal proceedings or otherwise, shall be reimbursed immediately by the other party to such dispute for reasonably incurred attorneys' fees and other costs and expenses. In the event it becomes necessary for any party to retain legal counsel for the representation of its rights hereunder in or in connection with the bankruptcy of another party, such party, if successful therein, shall be reimbursed immediately by the party in bankruptcy for reasonably incurred attorneys' fees and other costs and expenses.</p>	Bonbrest Decl., Ex. 1, at T000144
23.	Marquee is an insured under National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("National Union Policy")	FAC ¶ 30; Declaration of Richard C. Perkins in Support of National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment, Ex. 1.
24.	Cosmopolitan is an insured under St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group ("St. Paul Policy")	FAC ¶ 40; Salerno Decl., Ex. 2.

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No.	Undisputed Fact	Supporting Evidence
25.	Marquee was a named insured on the Aspen and National Union Policies, while Cosmopolitan was a named insured under the St. Paul Policy and a primary policy issued by Zurich American Insurance Company.	FAC ¶¶ 15, 24, 30, 33, 40-41.
26.	Cosmopolitan was an additional insured under the policies issued by Aspen and National Union.	FAC ¶¶ 15, 24, 30, 33, 40-41.
27.	St. Paul policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery of such payment.	Salerno Decl., Ex. 2, at T000038

V.

ST. PAUL'S FIFTH AND SIXTH CAUSES OF ACTION FOR SUBROGATION ARE BARRED BY THE SUBROGATION WAIVER PROVISIONS CONTAINED IN THE NIGHTCLUB MANAGEMENT AGREEMENT AND ST. PAUL'S POLICY

St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated to the rights of Cosmopolitan for contribution and express indemnity against Marquee. (FAC ¶¶ 116 and 126.) However, pursuant to Section 12.2.6 of the NMA, all policies issued to NRV1, Marquee, and Cosmopolitan are required to contain a waiver of subrogation for any claims against each other. In accordance with this requirement, the St. Paul policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery for such payment. (Salerno Decl., Ex. 2, at T000038.)

Waiver of subrogation provisions have been universally enforced. *See Davlar Corp. v. Superior Court*, 53 Cal.App.4th 1121, 1125 (1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 26 Cal.App.4th 1194 (1994) (waiver of rights for damages covered by insurance barred insurer's subrogation suit.); *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 169 Cal.App.4th 415 (2008) (holding tenant's failure to obtain the full amount of liability insurance required by lease did not preclude enforcement of subrogation waiver); *Commerce & Indus. Ins. Co. v. Orth*, 254 Or.

1 226 (1969) (holding insurer waived its subrogation rights against various contractors); *Touchet*
2 *Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 119 Wn.2d 334, 342 (1992)
3 (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, 2016 WL 4425095,
4 *7 (D.N.M. Feb. 29, 2016) (finding subrogation waivers serve important public policy goals, such
5 as “encouraging parties to anticipate risks and to procure insurance covering those risks, thereby
6 avoiding future litigation, and facilitating and preserving economic relations and activity.”)
7 (Citation omitted.) Pursuant to the express indemnity provision in the NMA, the parties agreed that
8 Marquee, NRV1 and Cosmopolitan would waive any claims against each other that were paid with
9 insurance proceeds.

10 The intent to waive subrogation rights for losses covered by insurance is clear as a matter of
11 law. Pursuant to Section 12.2.6 of the NMA, Cosmopolitan and Marquee mutually agreed that all
12 insurance policies issued to them would contain a waiver of subrogation of the insurers’ rights
13 against Cosmopolitan and Marquee. Thus, the clear and unambiguous intent of Cosmopolitan and
14 Marquee was to waive subrogation rights against each other for any losses paid by insurance
15 proceeds. To find otherwise would be inconsistent with the terms of the NMA and St. Paul’s
16 waiver of subrogation provision.

17 Undoubtedly, St. Paul will assert, as it did in opposition to the motion to dismiss, that the
18 subrogation waiver requirements of the NMA and the St. Paul policy do not apply because
19 Cosmopolitan, as the Project Owner, only agreed to be bound with respect to certain provision of
20 the NMA, which did not include the subrogation waiver provision contained in 12.2.6 of the NMA.
21 This argument fails because it ignores that Section 17.2 of the Lease attached as Exhibit D to the
22 NMA delegated NRV1’s insurance requirements under the NMA to Cosmopolitan. Section 17.2 of
23 the Lease provides that Cosmopolitan shall procure “all insurance required to be obtained by”
24 NRV1 under Section 12.1 of the NMA. (Bonbrest Decl., Ex. 1, at T000172, T000183.) Even if
25 Section 12.1 of the NMA was not one of the provisions of the NMA to which Cosmopolitan
26 expressly agreed to be bound, Cosmopolitan expressly assumed NRV1’s obligation to provide the
27 insurance required by Section 12.1 of the NMA in Section 17.2 of the Lease. Accordingly,

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1 Cosmopolitan assumed the obligation to procure insurance that complied with all of the terms of
2 Section 12, including the waiver of subrogation obligation set out in Section 12.2.6.

3 It is clear from the express terms of the NMA that the St. Paul policy, which was procured
4 by Cosmopolitan pursuant to the requirements of the NMA, is subject to the waiver of subrogation
5 provision. Section 12.2.6 of the NMA provides that the waiver of subrogation requirement applies
6 to both “Operator Policies” and “Owner Policies.” “Operator Policies” are defined as Marquee’s
7 insurance policies, while “Owner Policies” are defined in section 12.2.5 as insurance maintained by
8 any “Owner Insured Parties.” (Bonbrest Decl., Ex. 1, at T000078, T000080, T000126.) Section
9 12.2.3 of the NMA defines “Owner Insured Parties” to include the Owner (NRV1), the Project
10 Owner (Cosmopolitan), the landlord and tenant under the Lease (also Cosmopolitan and NRV1),
11 their respective parents, subsidiaries, affiliates, and other related persons and entities. (Bonbrest
12 Decl., Ex. 1, at T000126.) Cosmopolitan need not expressly agree to the subrogation waiver
13 provision when the unambiguous language of the NMA establishes that the subrogation rights were
14 waived and Cosmopolitan assumed the obligation to procure the Owner Insured Parties’ insurance
15 requirements set out in Section 12.2.6 of the NMA. Accordingly, despite St. Paul’s contentions
16 otherwise, the waiver of subrogation clause in the NMA expressly applies to Cosmopolitan’s
17 insurance requirements, including the policy issued by St. Paul, which mandated that
18 Cosmopolitan’s policies include a waiver of subrogation against Marquee. Where, as here, it is
19 undisputed that the loss at issue was funded by insurance proceeds, St. Paul’s subrogation claims
20 for contribution and express indemnity contained in the Fifth and Sixth Causes of Action fail as a
21 matter of law given it steps into Cosmopolitan’s shoes and Cosmopolitan and St. Paul waived any
22 subrogation rights.

VI.

**ST. PAUL'S SIXTH CAUSE OF ACTION FOR EXPRESS INDEMNITY ALSO FAILS
BECAUSE MARQUEE'S INDEMNITY OBLIGATION APPLIES ONLY
TO LOSSES THAT ARE NOT COVERED BY INSURANCE**

26 In the FAC, St. Paul alleges without support that Marquee accepted Cosmopolitan's
27 contractual indemnity tender. (FAC ¶ 25.) Even if this allegation were true, it does not save St.
28 Paul's claim because Marquee's acceptance of Cosmopolitan's tender does not change the fact that.

1 pursuant to the terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan
2 only applies to losses not covered by insurance. It is undisputed that the settlement in the
3 Underlying Action was paid by Marquee and Cosmopolitan's insurers. Cosmopolitan did not
4 sustain any uninsured losses. As such, Marquee owes no express indemnity to Cosmopolitan and
5 by extension, St. Paul, whose rights are no greater than Cosmopolitan's rights.

6 Pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify, hold harmless and
7 defend NRV1 and its parents, subsidiaries and affiliates (including Cosmopolitan), from and against
8 losses to the extent incurred as a result of the breach or default by Marquee of any term or condition
9 of the Agreement, or the negligence or willful misconduct of Marquee that is not otherwise covered
10 by the insurance required to be maintained under the Agreement. (Bonbrest Decl., Ex. 1, at
11 T000126) (Emphasis added.) The NMA further defines "losses", in pertinent part, as "liabilities,
12 obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of
13 a Person not reimbursed by insurance." (Bonbrest Decl., Ex. 1, at T000072) (Emphasis added.) St.
14 Paul's failure to accurately cite the indemnity provision in the NMA, including the underlined
15 portion of the provision, is crucial as it clearly defeats St. Paul's claim.

16 Nevada courts strictly construe indemnity obligations and will enforce them in accordance
17 with the terms of the contracting parties' agreement. *See United Rentals Hwy. Techs. v. Wells*
18 *Cargo*, 128 Nev. Adv. Op. 59 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev.*
19 *Co., Inc.*, 127 Nev. 331 (2011); *Contreras v. American Family Mut. Ins. Co.*, 135 F.Supp.3d 1208,
20 1231 (D.Nev. 2015); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F.Supp.2d 1262,
21 1268 (D.Nev. 2008) ("It is well settled that a court should enforce a contract as it is written, should
22 not create a new contract by rewriting unambiguous terms, and has no power to create a new
23 contract.") As explained by the Nevada Supreme Court in *United Rentals*:

24 "[T]his court will not 'attempt to increase the legal obligations of the parties where
25 the parties intentionally limited such obligations.' [citation omitted]. Additionally,
26 '[e]very word [in a contract] must be given effect if at all possible.' [citation
omitted]."

27 *Id.* at 229.

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1 The exclusion of insurance payments from the definition of “losses” in Section 1 of the
2 NMA and the inclusion of the phrase “and not otherwise covered by the insurance required to be
3 maintained hereunder” in the indemnity provision set out in Section 13.1 expressly limit any
4 purported indemnity obligation by Marquee to uninsured losses. When construing the waiver of
5 subrogation provision in Section 12.2.6 with the mutual indemnity provisions in Section 13 of the
6 NMA, the intent of the parties to the agreement is clear in limiting their respective indemnity
7 obligations to losses paid out-of-pocket by the respective indemnitees rather than any loss paid by
8 their insurers. Cosmopolitan’s defense in the underlying action and its joint and several liability for
9 the verdict and resulting settlement were paid for by insurance. (FAC ¶¶ 67 - 70.) Thus, there is no
10 uninsured loss for which Cosmopolitan could pursue indemnity against Marquee. Stated another
11 way, as Cosmopolitan has no losses that were not reimbursed by insurance, Cosmopolitan has no
12 right to indemnity from Marquee. Accordingly, St. Paul has no valid subrogation claim for express
13 indemnity and, therefore, the Sixth Cause of Action against Marquee fails as a matter of law.

14 **VII.**

15 **ST. PAUL’S FIFTH CAUSE OF ACTION FOR STATUTORY SUBROGATION FOR**
16 **CONTRIBUTION PURSUANT TO NRS 17.225 (UNIFORM CONTRIBUTION ACT)**
17 **ALSO FAILS AS A MATTER OF LAW DUE TO THE FINDING THAT**
18 **COSMOPOLITAN WAS LIABLE FOR THE INTENTIONAL**
TORTS OF ASSAULT, BATTERY, AND
FALSE IMPRISONMENT

19 St. Paul’s statutory subrogation claim for contribution fails as there is no right of
20 contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury.
21 NRS 17.255.¹ In the Underlying Action, Cosmopolitan was found jointly and severally liable with
22 Marquee on all of Moradi’s asserted claims, including the intentional tort claims for assault, battery,
23 and false imprisonment. (FAC ¶¶ 13-14, Ex. C.) Given Cosmopolitan was found by the jury to be
24 jointly liable with Marquee for intentional tort claims that contributed to Moradi’s injury, such a
25 finding precludes Cosmopolitan (and St. Paul) from pursuing contribution from Marquee.

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27 ¹ Worth noting is that any claim for contribution would also be barred by a determination of good faith
28 settlement pursuant to NRS 17.245.

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VIII.

**ST. PAUL'S FIFTH CAUSE OF ACTION FOR STATUTORY SUBROGATION FOR
CONTRIBUTION PURSUANT TO NRS 17.225 (UNIFORM CONTRIBUTION ACT)
ALSO FAILS AS A MATTER OF LAW BECAUSE A CLAIM FOR
CONTRIBUTION IS NOT AVAILABLE WHEN THE
PARTIES HAVE CONTRACTED FOR
EXPRESS INDEMNITY**

Pursuant to NRS 17.265, when a tortfeasor has a right to indemnity from another tortfeasor, there is no right to contribution under the Uniform Contribution Act. *See also, Calloway v. City of Reno*, 113 Nev. 564, 578 (1997) ("implied indemnity theories are not viable in the face of express indemnity agreements.") As set forth above, the NMA contains an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was covered by insurance. Given the existence of Cosmopolitan's contractually defined right to indemnity from Marquee, it has no statutory or equitable right to contribution under the Uniform Contribution Act pursuant to NRS 17.265. St. Paul will likely assert, as it did in opposition to the motion to dismiss, that the contribution claim is permitted because it is an alternative theory of recovery to the express indemnity claim. Such an argument, however, is a red herring, when a contribution theory of recovery is not permitted because the parties have entered a contract for express indemnity. Given the contract for express indemnity, Cosmopolitan has no statutory claim for contribution under NRS 17.265 as a matter of law.

IX.

MARQUEE IS ENTITLED TO RECOVER ATTORNEYS' FEES FROM ST. PAUL

Section 28 of the NMA provides that, in the event of a dispute regarding the enforcement or interpretation of the agreement, the prevailing party shall be reimbursed for reasonably incurred attorneys' fees and other costs and expenses. (Bonbrest Decl., Ex. 1, at T000144.) Given St. Paul's claims against Marquee fail as a matter of law, Marquee's motion for summary judgment should be granted and the Court should award Marquee its attorneys' fees and costs as the prevailing party under the terms of the NMA.

Notwithstanding the prevailing party provision in the NMA, NRS 18.010(2)(b) also provides grounds for the Court to award Marquee its attorneys' fees. Pursuant to NRS 18.010(2)(b),

1 the Court may make an allowance of attorneys' fees to a prevailing party "when the court finds that
2 a claim...of the opposing party was brought or maintained without reasonable ground or to harass
3 the prevailing party." *See, Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114
4 Nev. 1348 (1998) (holding that a claim is groundless if the allegations in the complaint are not
5 supported by any credible evidence); *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089 (1995);
6 *Bergmann v. Boyce*, 109 Nev. 670 (1993) (finding that sanctions are properly imposed when claim
7 is baseless and made without reasonably competent inquiry). St. Paul's claims against Marquee are
8 clearly baseless, made without (or despite) competent inquiry, and not supported by any credible
9 evidence. Despite Marquee's prior notice to St. Paul that it had no viable claim against Marquee, St.
10 Paul nonetheless went forward with the instant action without reasonable grounds. Accordingly, the
11 Court may properly award Marquee its attorneys' fees pursuant to NRS 18.010(2)(b).

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X.

CONCLUSION

Based on the foregoing, the Court should grant Marquee's Motion for Summary Judgment and award its attorneys' fees and costs.

DATED: September 12, 2019

HEROLD & SAGER

By:



Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Jeremy Stamelman, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

Attorneys for Defendant NATIONAL
UNION FIRE INSURANCE COMPANY
OF PITTSBURGH PA. and ROOF DECK
ENTERTAINMENT, LLC dba
MARQUEE NIGHTCLUB

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

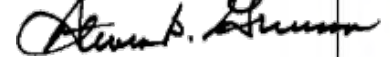
That on September 13, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 **DECL**
2 ANDREW D. HEROLD, ESQ.
3 Nevada Bar No. 7378
4 NICHOLAS B. SALERNO, ESQ.
5 Nevada Bar No. 6118
6 HEROLD & SAGER
7 3960 Howard Hughes Parkway, Suite 500
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9 JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)
10 JEREMY STAMELMAN, ESQ. (Pro Hac Vice)
11 KELLER/ANDERLE LLP
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16 jkeller@kelleranderle.com
17 jestamelman@kelleranderle.com

15 Attorneys for Defendants NATIONAL UNION FIRE INSURANCE
16 COMPANY OF PITTSBURGH, PA & ROOF DECK
17 ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

23 ASPEN SPECIALTY INSURANCE
24 COMPANY; NATIONAL UNION FIRE
25 INSURANCE COMPANY OF
26 PITTSBURGH PA.; ROOF DECK
27 ENTERTAINMENT, LLC d/b/a MARQUEE
28 NIGHTCLUB; and DOES 1 through 25,
inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT.: XXVI

**DECLARATION OF NICHOLAS B.
SALERNO IN SUPPORT OF
DEFENDANT ROOF DECK
ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S MOTION
FOR SUMMARY JUDGMENT**

1 I, Nicholas B. Salerno, declare as follows:

2 1. I am an attorney with the law firm of Herold & Sager, counsel for Defendant Roof
3 Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"). I have personal knowledge of the
4 facts stated herein and, if called as a witness, I could competently testify thereto.

5 2. Attached hereto as Exhibit 2 Marquee's Appendix of Exhibits in support of Motion
6 for Summary Judgment is a true and correct copy of St. Paul Policy No. QK 06503290, produced in
7 this action by St. Paul as part of its initial disclosures.

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

10 Dated this 12th day of September, 2019.

11
12 
13 _____
14 Nicholas B. Salerno

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

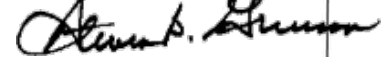
That on September 13, 2019, service of DECLARATION OF NICHOLAS B. SALERNO IN SUPPORT OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
Michael M. Edwards, Esq. Email: mmedwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 **DECL**
2 ANDREW D. HEROLD, ESQ.
3 Nevada Bar No. 7378
4 NICHOLAS B. SALERNO, ESQ.
5 Nevada Bar No. 6118
6 HEROLD & SAGER
7 3960 Howard Hughes Parkway, Suite 500
8 Las Vegas, NV 89169
9 Telephone: (702) 990-3624
10 Facsimile: (702) 990-3835
11 aherold@heroldsagerlaw.com
12 nsalerno@heroldsagerlaw.com

13 JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)
14 JEREMY STAMELMAN, ESQ. (Pro Hac Vice)
15 KELLER/ANDERLE LLP
16 18300 Von Karman Ave., Suite 930
17 Irvine, CA 92612
18 Telephone: (949) 476-8700
19 Facsimile: (949) 476-0900
20 jkeller@kelleranderle.com
21 istamelman@kelleranderle.com

22 Attorneys for Defendants NATIONAL UNION FIRE INSURANCE
23 COMPANY OF PITTSBURGH, PA & ROOF DECK
24 ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB

25 **DISTRICT COURT**

26 **CLARK COUNTY, NEVADA**

27 ST. PAUL FIRE & MARINE INSURANCE
28 COMPANY,

CASE NO.: A-17-758902-C
DEPT.: XXVI

Plaintiffs,

vs.

ASPEN SPECIALTY INSURANCE
COMPANY; NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH PA.; ROOF DECK
ENTERTAINMENT, LLC d/b/a MARQUEE
NIGHTCLUB; and DOES 1 through 25,
inclusive,

Defendants.

**DECLARATION OF BILL BONBREST IN
SUPPORT OF DEFENDANT ROOF
DECK ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S MOTION
FOR SUMMARY JUDGMENT**

1 I, Bill Bonbrest, declare as follows:

2 1. I am the Chief Operating Officer ("COO") for TAO Group, a related entity to Roof

3 Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"). I am involved in the management

4 of Marquee and am authorized to make this declaration on behalf of Marquee.

5 2. The following declaration is based upon my personal knowledge of the facts and

6 matters stated herein and could and would competently testify thereto if sworn as a witness in this

7 matter.

8 3. Marquee entered into a Nightclub Management Agreement with Nevada Restaurant

9 Venture 1, LLC on April 21, 2010 with regard to the Marquee Nightclub located within The

10 Cosmopolitan Hotel & Casino.

11 4. As part of my job responsibilities as COO, I am required to maintain, monitor,

12 review and be acquainted with the management agreements for the various nightclubs and other

13 venues of the TAO Group, including the Nightclub Management Agreement for the Marquee

14 Nightclub.

15 5. I reviewed the Nightclub Management Agreement for the Marquee Nightclub and

16 am familiar with its contents.

17 6. A true and correct copy of the Nightclub Management Agreement is filed under

18 temporary seal as Exhibit 1 to Marquee's Appendix of Exhibits in support of its Motion for

19 Summary Judgment.

20 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is

21 true and correct.

22 Dated this 13th day of September, 2019.



23
24 Bill Bonbrest

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

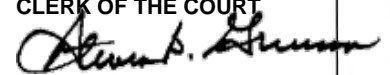
That on September 13, 2019, service of DECLARATION OF BILL BONBREST IN SUPPORT OF DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 **RFJN**
2 ANDREW D. HEROLD, ESQ.
3 Nevada Bar No. 7378
4 NICHOLAS B. SALERNO, ESQ.
5 Nevada Bar No. 6118
6 HEROLD & SAGER
7 3960 Howard Hughes Parkway, Suite 500
8 Las Vegas, NV 89169
9 Telephone: (702) 990-3624
10 Facsimile: (702) 990-3835
11 aherold@heroldsagerlaw.com
12 nsalerno@heroldsagerlaw.com
13
14 JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)
15 JEREMY STAMELMAN, ESQ. (Pro Hac Vice)
16 KELLER/ANDERLE LLP
17 18300 Von Karman Ave., Suite 930
18 Irvine, CA 92612
19 Telephone: (949) 476-8700
20 Facsimile: (949) 476-0900
21 jkeller@kelleranderle.com
22 jstamelman@kelleranderle.com
23
24 Attorneys for Defendants NATIONAL UNION FIRE
25 INSURANCE COMPANY OF PITTSBURGH PA. and
26 ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB
27
28

DISTRICT COURT

CLARK COUNTY, NEVADA

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

23 ASPEN SPECIALTY INSURANCE
24 COMPANY; NATIONAL UNION FIRE
25 INSURANCE COMPANY OF
26 PITTSBURGH PA.; ROOF DECK
27 ENTERTAINMENT, LLC d/b/a MARQUEE
28 NIGHTCLUB; and DOES 1 through 25,
inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT.: XXVI

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF DEFENDANT ROOF
DECK ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S MOTION
FOR SUMMARY JUDGMENT**

1 Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"), by and
2 through its counsel, hereby requests the Court to take judicial notice pursuant to Nevada Revised
3 Statutes sections 47.130 and 47.150 the following facts:

4 1. During proceedings on March 24, 2017, the court in the underlying bodily injury
5 action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District
6 Court Clark County, Nevada, Case No. A-14-698824-C held as a matter of law that Nevada
7 Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan"), "had a nondelegable
8 duty and can be vicariously held responsible for the conduct of the Marquee security officers..."
9 and that Marquee and Cosmopolitan could be held jointly and severally liable. A true and correct
10 copy of an excerpt of the March 24, 2017 trial transcript is attached to Marquee's Appendix of
11 Exhibits in Support of Motion for Summary Judgment as **Exhibit 3**.

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1 Courts may take judicial notice of the contents of court files in other lawsuits, including
2 transcripts of proceedings. *See Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388, fn. 9 (9th
3 Cir. 1987); *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1075 (9th Cir. 2010); *Occhiuto v.*
4 *Occhiuto*, 97 Nev. 143, 145 (1981); *Sheriff, Clark Cnty. v. Kravetz*, 96 Nev. 919, 920 (1980)
5 (relying upon a preliminary hearing transcript as basis for judicial notice).

6
7 DATED: September 12, 2019

HEROLD & SAGER

8
9 By:


Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

10
11
12
13 KELLER/ANDERLE LLP
14 Jennifer Lynn Keller, Esq. (Pro Hac Vice)
15 Steven James Aaronoff, Esq. (Pro Hac Vice)
16 18300 Von Karman Ave., Suite 930
17 Irvine, CA 92612

18 Attorneys for Defendant NATIONAL
19 UNION FIRE INSURANCE COMPANY
20 OF PITTSBURGH PA. and ROOF DECK
21 ENTERTAINMENT, LLC dba
22 MARQUEE NIGHTCLUB
23
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CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

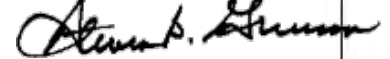
That on September 13, 2019, service of REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 APEN

ANDREW D. HEROLD, ESQ.

2 Nevada Bar No. 7378

3 NICHOLAS B. SALERNO, ESQ.

Nevada Bar No. 6118

4 HEROLD & SAGER

3960 Howard Hughes Parkway, Suite 500

5 Las Vegas, NV 89169

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7 aherold@heroldsagerlaw.com

nsalerno@heroldsagerlaw.com

8 JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)

9 JEREMY STAMELMAN, ESQ. (Pro Hac Vice)

KELLER/ANDERLE LLP

10 18300 Von Karman Ave., Suite 930

11 Irvine, CA 92612

Telephone: (949) 476-8700

12 Facsimile: (949) 476-0900

jkeller@kelleranderle.com

13 jstamelman@kelleranderle.com

14 Attorneys for Defendants NATIONAL UNION FIRE

15 INSURANCE COMPANY OF PITTSBURGH PA. and

16 ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

23 ASPEN SPECIALTY INSURANCE
24 COMPANY; NATIONAL UNION FIRE
25 INSURANCE COMPANY OF
26 PITTSBURGH PA.; ROOF DECK
27 ENTERTAINMENT, LLC d/b/a MARQUEE
28 NIGHTCLUB; and DOES 1 through 25,
inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT.: XXVI

**DEFENDANT ROOF DECK
ENTERTAINMENT, LLC d/b/a
MARQUEE NIGHTCLUB'S APPENDIX
OF EXHIBITS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

1 Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub, by and through its
2 counsel, hereby submits the following Appendix of Exhibits in support of Motion for Summary
3 Judgment.

4 **Exhibit 1:** Nightclub Management Agreement Between Nevada Restaurant Venture 1,
5 LLC and Roof Deck Entertainment, LLC (**Filed under temporary seal**
6 **pursuant to S.C.R. Part VII, Rule 3.2.)**

7 **Exhibit 2:** St. Paul Policy No. QK 06503290

8 **Exhibit 3:** Excerpt of the March 24, 2017 transcript of trial proceedings in the
9 underlying bodily injury action captioned *David Moradi v. Nevada Property*
10 *1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada,
11 Case No. A-14-698824-C

12
13 DATED: September 12, 2019

HEROLD & SAGER

14
15
16 By: 

Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

20 KELLER/ANDERLE LLP
21 Jennifer Lynn Keller, Esq. (Pro Hac Vice)
22 Jeremy Stamelman, Esq. (Pro Hac Vice)
23 18300 Von Karman Ave., Suite 930
Irvine, CA 92612

24 Attorneys for Defendant NATIONAL
25 UNION FIRE INSURANCE COMPANY
26 OF PITTSBURGH PA. and ROOF DECK
27 ENTERTAINMENT, LLC dba
28 MARQUEE NIGHTCLUB

EXHIBIT 1

FILED UNDER TEMPORARY SEAL
PURSUANT TO S.C.R. PART VII,
RULE 3.2

EXHIBIT 1

EXHIBIT 2

EXHIBIT 2

CERTIFIED POLICY

This certification is affixed to a policy which is a true and accurate copy of the document in the company's business records as of the date shown below.

No additional insurance is afforded by this copy.

St. Paul Fire and Marine Insurance Company

Name of Insuring Company(ies)

QK 06503290

Policy Number(s)

03/01/11 to 03/01/13

Policy Period(s)

04/24/18

Date



Kenneth Kupec, Second Vice President
BI Document Management



DECLARATIONS

St. Paul Fire and Marine Insurance Company

2 JERICHO PLAZA
JERICHO NY 11753

Item 1. Named Insured: PREMIER HOTEL INSURANCE GROUP (P2)
"A RISK PURCHASING GROUP"
Address: 10900 NE 4TH STREET
SUITE 1100
BELLEVUE WA 98004

Item 2. Policy Period: From: 03/01/2011 To: 03/01/2013
At 12:01 A.M. Standard Time at the address of the Named Insured shown above

Item 3. Limits Of Insurance

The Limits Of Insurance, subject to all the terms of this policy, are:

- A. \$25,000,000 Each occurrence
- B. \$100,000,000 General aggregate (in accordance with Section III, Limits Of Insurance)
- C. \$25,000,000 Products-Completed Operations aggregate (in accordance with Section III, Limits Of Insurance)

Item 4. Self Insured Retention \$0

Item 5. Premium: \$TBD
Surcharge/Surtax:

Rate, if applicable:

Minimum premium,
if applicable: \$

Item 6. Agent: NATIONAL SPECIALTY UNDERWRITERS
10900 NE 4TH STREET
SUITE 1100
BELLEVUE WA 98004

Agency Number: 4601026

Item 7. Endorsements attached: See attached schedule.

Item 8. Policy Number: QK06503290
This Replaces Policy Number: QK06502174

Brian MacLean
President

Wendy C. Shy
Secretary

POLICY FORM LIST

Here's a list of all forms included in your policy, on the date shown below. These forms are listed in the same order as they appear in your policy.

Title	Form Number	Edition Date
Disclosure Notice Terrorism Risk Insurance Act Of 2002	D0100	03-09
Declarations (St. Paul Fire and Marine Insurance Company)	SU089	03-03
Policy Form List	40705	05-84
What To Do If You Have A Loss - Specialty Commercial Umbrella Liability Policy	SU106	05-03
Specialty Commercial Umbrella Liability Policy	SU001	10-02
Amendment of Cancellation Notice	SU007	10-02
Claims-Made Coverage And Extended Reporting Period Endorsement	SU015	06-08
Anti-Stacking Endorsement	SUP028	02-10
Pollution Exclusion Exception For Certain Equipment Including Pollutants From Swimming Pools And Garages	SUP029	02-10
Employee Benefit Liability Endorsement	SU035	06-08
Lead Exclusion	SU050	10-02
Mold or Other Fungi or Bacteria Exclusion	SU061	10-02
Pesticide, Herbicide or Fertilizer Applications Endorsement	SU070	10-02
Waiver of Rights of Recovery Endorsement	SU085	10-02
Scheduled Retained Limits	SU091	03-03
Scheduled Underlying Insurance	SU109	08-08
Scheduled Underlying Insurance - Continued	SU110	03-03
Silica Exclusion	SU157	08-04
Washington Amendatory Endorsement	SU162	09-04
Unsolicited Communication Exclusion Endorsement	SU163	10-04
Application Of Limits Of Insurance	SU221	04-11
Auto Liability Limits of Ins. End't. - Exception for Damages Not Subj to Underlying Aggregate Limit Applies Only to Auto	SU244	10-06
Auto Liability Limitation	SU257	03-07
Garagekeepers Legal Liability	SU260	04-07
Pollution Exclusion Except Building Heating Or Air Conditioning Equipment Or Water Heating Equipment	SU267	03-07
Knowledge Of Occurrence Or Claim	SU280	12-07
Crisis Management Service Expense Endorsement	SU300	12-09
Failure To Notify Insurer Of Occurrence	SUM189	04-08

Name of Insured	Policy Number QK06503290	Effective Date 03/01/11
PREMIER HOTEL INSURANCE GROUP (P2)	Processing Date 05/03/11 13:52	001

40705 Ed. 5-84

Form List

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Page 1

TRAVELERS DOC MGMT 4 of 62

DISCLOSURE NOTICE TERRORISM RISK INSURANCE ACT OF 2002

On December 26, 2007, the President of the United States signed into law amendments to the Terrorism Risk Insurance Act of 2002 (the "Act"), which, among other things, extend the Act and expand its scope. The Act establishes a program under which the Federal Government may partially reimburse "Insured Losses" (as defined in the Act) caused by "acts of terrorism". An "act of terrorism" is defined in Section 102(l) of the Act to mean any act that is certified by the Secretary of the Treasury - in concurrence with the Secretary of State and the Attorney General of the United States - to be an act of terrorism; to be a violent act or an act that is dangerous to human life, property, or infrastructure; to have resulted in damage within the United States, or outside the United States in the case of certain air carriers or vessels or the premises of a United States Mission; and to have been committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

The federal government's share of compensation for Insured Losses is 85% of the amount of Insured Losses in excess of each Insurer's statutorily established deductible, subject to the "Program Trigger", (as defined in the Act). In no event, however, will the federal government or any Insurer be required to pay any portion of the amount of aggregate Insured Losses occurring in any one year that exceeds \$100,000,000,000, provided that such Insurer has met its deductible. If aggregate Insured Losses exceed \$100,000,000,000 in any one year, your coverage may therefore be reduced.

The premium charge shown below is for coverage under this policy for insured losses covered by the Act. This terrorism premium does not include any charges for the portion of insured losses covered by the federal government under the Act.

If \$0 is shown below for the certified acts of terrorism premium charge, this policy provides such terrorism coverage for no premium charge.

The certified acts of terrorism premium charge shown below applies to all coverage under this policy for Insured Losses covered by the Act that you purchased for a premium charge. For any insuring agreement or coverage part for which you did not purchase such terrorism coverage, this policy may include one or more terrorism exclusions that apply to certified acts of terrorism. Under the federal Terrorism Risk Insurance Program Reauthorization Act of 2007, the applicable definition of certified acts of terrorism no longer requires that the act of terrorism be committed on behalf of a foreign person or foreign interest. Therefore, each such exclusion is not limited to an act of terrorism committed on behalf of a foreign person or interest.

Name of Insured: PREMIER HOTEL INSURANCE GROUP (P2)

Policy Number: QK06503290

Effective Date: 03/01/11

Certified Acts Of Terrorism Premium Charge: INCLUDED

Processing Date: 05/03/11 13:52 001

What To Do If You Have A Loss - Specialty Commercial Umbrella Liability Policy

When an Occurrence happens or is committed that will likely result in damages that are covered by this policy, you or any Insured covered under this policy are required to report the claim to:

The Travelers Companies, Inc.
Attn: Travelers Excess Casualty Claim Division
Mail Code 9275-NB08E
385 Washington Street
St. Paul, MN 55102-1396

All other terms of your policy remain the same.

Specialty Commercial Umbrella Liability Policy

This is a Commercial Umbrella Liability Policy Form. It specifies the coverage provided, restrictions or exclusions to that coverage, and the rights and duties under this contract.

Throughout this policy the words "you" and "your" refer to the **Named Insured**. The word "Named Insured" and all other words or phrases that appear in bold, other than bold used for titles, have or include special meaning as described in this form. The words "we", "us" and "our" refer to the Company indicated in the Declarations as providing this insurance.

In consideration of the payment of the premium and in reliance upon the statements in the Declarations we agree with you as follows:

Insuring Agreements

I. Coverage

A. We will pay on behalf of:

1. the **Insured** all sums in excess of the **Retained Limit** that the **Insured** becomes legally obligated to pay as damages by reason of liability imposed by law; or
2. the **Named Insured** all sums in excess of the **Retained Limit** that the **Named Insured** becomes legally obligated to pay as damages assumed by the **Named Insured** under an **Insured Contract**;

because of:

1. **Bodily Injury** or **Property Damage** that occurs during the **Policy Period** and is caused by an **Occurrence**; or
2. **Personal Injury** or **Advertising Injury** that is caused by an **Occurrence** committed during the **Policy Period**;

if such **Occurrence** takes place anywhere in the world, except for any country or jurisdiction which is subject to any trade sanction, embargo or similar regulation imposed by the United States of America that prohibits the transaction of business with or within such country or jurisdiction.

If we are prevented by law or statute from paying such sums on behalf of any **Insured**, then we will, where permitted by law or statute, indemnify that **Insured** for such sums in excess of the **Retained Limit**. In any event, the amount we will pay for damages is limited as described in Section III. **Limits of Insurance**.

There is no coverage under this policy for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** unless a **Retained Limit** applies.

B. **Retained Limit** means the greater of the following:

1. the total of the applicable limits of all **Scheduled Underlying Insurance**, and the applicable limits of any **Other Insurance**, for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** covered by such **Scheduled Underlying Insurance** or **Other Insurance**;
2. the total of the applicable limits of all **Scheduled Retained Limits** for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** covered by such **Scheduled Retained Limits**; or
3. if applicable, the amount stated in the Declarations as a **Self Insured Retention** because of any **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** not covered by either any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**, and caused by any one **Occurrence**.

- C. If coverage for the Bodily Injury, Property Damage, Personal Injury or Advertising Injury does not exist under any:

1. Scheduled Underlying Insurance; or
2. Scheduled Retained Limit;

because of a specific exclusion or other specific coverage limitation, then paragraph I. Coverage B.3 above does not apply, unless such coverage is specifically provided by endorsement to this policy.

- D. This insurance applies to Bodily Injury and Property Damage only if no Named Insured knew, prior to the Policy Period, that the Bodily Injury or Property Damage had occurred, in whole or in part. If a Named Insured knew, prior to the Policy Period, that the Bodily Injury or Property Damage had occurred, then any continuation, change or resumption of such Bodily Injury or Property Damage during or after the Policy Period will be considered to have been known by a Named Insured prior to the Policy Period if such continuation, change or resumption would otherwise be covered by this policy because of a continuous, multiple or other coverage trigger required under the law that applies.

Bodily Injury or Property Damage which occurs during the Policy Period and was not, prior to the Policy Period, known to have occurred by any Named Insured includes any continuation, change or resumption of that Bodily Injury or Property Damage after the end of the Policy Period if that would be the result because of a continuous, multiple or other coverage trigger required under the law that applies.

Bodily Injury or Property Damage will be considered to have been known to have occurred at the earliest time when any Named Insured:

1. reports all, or any part, of the Bodily Injury or Property Damage to us or any other insurer;
2. receives a written or verbal demand or Claim for damages because of the Bodily Injury or Property Damage; or
3. becomes aware by any means that the Bodily Injury or Property Damage has occurred or has begun to occur.

- E. Solely for the purpose of liability assumed by the Named Insured under an Insured Contract, reasonable attorney's fees and necessary litigation expenses incurred by or for a party other than an Insured are deemed to be damages because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury, provided:

1. liability to such party for such attorney's fees and necessary litigation expense has also been assumed by the Named Insured in the same Insured Contract; and
2. such attorney's fees and litigation expenses are for defense of such party against a Suit seeking damages covered by this policy.

- F. If any Scheduled Underlying Insurance has a limit of insurance greater than the amount shown in the Schedule of Underlying Insurance, this policy will apply in excess of that greater amount. If any Scheduled Underlying Insurance has a limit of insurance, prior to any reduction or exhaustion by payment of one or more Claims or Suits seeking damages that would be covered under this policy, that is less than the amount shown in the Schedule of Underlying Insurance, this policy will apply in excess of the amount shown in that schedule.

If any Scheduled Retained Limit has a limit of insurance greater than the amount shown in the Schedule of Retained Limits, this policy will apply in excess of that greater amount. If any Scheduled Retained Limit has a limit of insurance, prior to any reduction or exhaustion by payment of one or more Claims or Suits seeking damages that would be covered under this policy, that is less than the amount shown in the Schedule of Retained Limits, this policy will apply in excess of the amount shown in that schedule.

- G. If the total of the applicable limits of any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit** are reduced or exhausted by payment of one or more **Claims** or **Suits** seeking damages that would be covered by this policy, we will:
1. in the event of reduction of the limits of the **Scheduled Underlying Insurance** or the **Scheduled Retained Limit**, pay in excess of such reduced limits; or
 2. in the event of exhaustion of the limits of the **Scheduled Underlying Insurance** or the **Scheduled Retained Limit**, continue in force as underlying insurance upon such exhaustion;
- and subject to any specific exclusions or other specific coverage limitations of that **Scheduled Underlying Insurance** or **Scheduled Retained Limit**.
- H. The applicable limits of any **Scheduled Underlying Insurance** or **Scheduled Retained Limit** shall not, for the purpose of determining when this policy applies, be reduced or exhausted by any payment with respect to **Claims** or **Suits** seeking damages which are not covered by this policy.
- II. **Defense**
- A. We shall have the right and duty to assume control of the defense of any **Claim** or **Suit** seeking damages covered by this policy, and we shall have the right to investigate and settle such **Claim** or **Suit**, when the **Retained Limit** has been exhausted by payment of judgments or settlements that would be covered by this policy. These rights and duties apply even if the **Claim** or **Suit** is groundless, false or fraudulent.
- B. Prior to the exhaustion of the **Retained Limit** we shall have the right, but not the duty, to participate in the investigation, settlement or defense of any **Claim** or **Suit** seeking damages that would be covered by this policy. This right includes the opportunity to participate in the defense of any **Claim** or **Suit** that may result in damages covered by this policy. If we exercise this right, we will do so at our own expense.
- C. We have no duty to defend, investigate or settle any **Claim** or **Suit** seeking damages not covered by this policy.
- D. We will not defend any **Claim** or **Suit** after the applicable limits of insurance under this policy have been exhausted by payment of judgments or settlements.
- E. All expenses we incur in the defense of any **Claim** or **Suit** are in addition to the limits of insurance under this policy.
- F. When we assume the defense of any **Claim** or **Suit** we will pay the following, to the extent that they are not included in the **Scheduled Underlying Insurance**, **Scheduled Retained Limits** or in any **Other Insurance**:
1. premiums on bonds to release attachments for amounts not exceeding our limits of insurance, but we are not obligated to apply for or furnish any such bond;
 2. premiums on appeal bonds required by law to appeal any **Claim** or **Suit** we defend, but we are not obligated to apply for or furnish any such bond;
 3. all costs taxed against the **Insured** for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury**, covered by this policy, in any **Suit** we defend;
 4. pre-judgment interest awarded against the **Insured** on that part of the judgment we pay. But if we make an offer to pay the applicable limit of insurance, we will not pay any pre-judgment interest based on that period of time after the offer;
 5. all interest that accrues after entry of judgment and before we have paid, offered to pay or deposited in court the part of the judgment that is within the applicable limit of insurance under this policy; and

6. the **Insured's** reasonable expenses incurred at our request.

- G. When we have the duty to defend, but are prevented by law or otherwise from performing that duty, the **Insured** shall make or arrange for any necessary investigation or defense. We will reimburse the **Insured** for the reasonable and necessary expenses incurred to provide that investigation or defense, subject to the terms and conditions of this policy.

III. Limits Of Insurance

- A. The limits of insurance stated in Item 3 of the Declarations and the rules below establish the most we will pay regardless of the number of:

1. **Insureds**;
2. **Claims** made or **Suits** brought;
3. person or organizations making **Claims** or bringing **Suits**; or
4. coverages provided under this policy.

- B. The General Aggregate Limit is the most we will pay for all damages covered under Insuring Agreement I. Coverage except for:

1. damages included in the **Products - Completed Operations Hazard**; and
2. coverages included in the **Scheduled Underlying Insurance** or **Scheduled Retained Limits** to which no underlying aggregate applies.

If any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit** contains aggregate limits, other than an aggregate applying to the **Products-Completed Operations Hazard**, the General Aggregate stated in the Declarations will apply in the same manner as the aggregate limits of each **Scheduled Underlying Insurance** or each **Scheduled Retained Limit**.

- C. The **Products - Completed Operations Aggregate Limit** is the most we will pay for all damages included in the **Products - Completed Operations Hazard**.
- D. Subject to B. and C. above, the **Each Occurrence Limit** is the most we will pay for all damages covered under Insuring Agreement I. Coverage because of all **Bodily Injury, Property Damage, Personal Injury** and **Advertising Injury** caused by any one Occurrence.
- E. The limits of insurance of this policy apply separately to each consecutive annual period and to any remaining period of less than twelve months, starting with the beginning of the **Policy Period** shown in the Declarations. If, however, the **Policy Period** is extended after issuance for an additional period of less than 12 months, the additional period will be considered part of the last preceding period for purposes of determining the limits of insurance that apply.

IV. Definitions

- A. **Advertisement** means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For purposes of this definition:
1. notices that are published include material placed on the Internet or similar electronic means of communication;
 2. only that part of your website that is about your goods, products or services for the purpose of attracting customers or supporters is considered an **Advertisement**; and

3. the placing of advertising, borders or frames for you or others, or links for or to others, on or in your website is not considered an **Advertisement**.
- B. **Advertising Idea** means a manner or style of **Advertisement** that others use and intend to attract attention in their **Advertisement**. However, information used to identify or record customers or supporters, such as a list of customers or supporters, shall not be considered to be an **Advertising Idea**.
- C. **Advertising Injury** means injury, other than **Bodily Injury** or **Personal Injury**, arising out of your business and caused by one or more of the following offenses:
1. oral, written or electronic publication of material in your **Advertisement** that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 2. oral, written or electronic publication of material in your **Advertisement** that violates a person's right of privacy;
 3. unauthorized use in your **Advertisement** of another's **Advertising Idea**; or
 4. infringement in your **Advertisement** of another's copyright, trade dress, or **Slogan**.
- D. **Auto** means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any attached machinery or equipment. But **Auto** does not include **Mobile Equipment**.
- E. **Bodily Injury** means any physical harm, sickness or disease to the physical health of other persons, including death or any of the following resulting at any time from such physical harm, sickness or disease:
1. mental injury;
 2. mental anguish;
 3. emotional distress;
 4. shock; or
 5. humiliation.
- F. **Claim** means a demand that seeks damages.
- G. **Employee** includes any person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. However, **Employee** does not include any person who is furnished to you to substitute for a permanent **Employee** on leave or to meet seasonal or short-term workload conditions.
- H. **Hostile Fire** means a fire which becomes uncontrollable or breaks out from where it was intended to be.
- I. **Impaired Property** means **Tangible Property**, other than **Your Product** or **Your Work**, that cannot be used or is less useful because:
1. it incorporates **Your Product** or **Your Work** that is known or thought to be defective, deficient, inadequate or dangerous; or
 2. you have, or anyone acting on your behalf has, failed to fulfill the terms of a contract or agreement;
- if such property can be restored to use by:
1. the repair, replacement, adjustment or removal of **Your Product** or **Your Work**; or
 2. you, or anyone acting on your behalf, fulfilling the terms of the contract or agreement.
- As used in this definition, **Tangible Property** does not include data.

J. **Insured** means each of the following, to the extent set forth:

1. the **Named Insured**;
2. any person or organization, other than the **Named Insured**, included as an additional insured in any **Scheduled Underlying Insurance** but then for no broader coverage than is provided to such person or organization under such **Scheduled Underlying Insurance**;
3. any of your **Employees**, other than:
 - a. your managers if you are a limited liability company; or
 - b. your executive officers if you are an organization other than a partnership, joint venture or limited liability company;

but only for acts within the scope of their employment by you while performing duties related to the conduct of your business.

However, no person or organization is an **Insured** under this paragraph IV.J.3. for the ownership, maintenance, operation, use, **Loading or Unloading**, or entrustment to others, of any Autos, aircraft or watercraft unless such coverage is included under the **Scheduled Underlying Insurance** and then for no broader coverage than is provided under such **Scheduled Underlying Insurance**.

4. any person, other than any of your **Employees**, or organization while acting as your real estate manager;
5. any person, organization, trustee or estate to whom you are obligated by a written contract or agreement to provide insurance such as is afforded by this policy but only with respect to liability arising out of:
 - a. **Your Work**; or
 - b. facilities owned or used by you.
6. any person (other than any of your partners or co-venturers if you are a partnership or joint venture, any of your members or managers if you are a limited liability company, or any of your executive officers, directors or stockholders if you are an organization other than a partnership, joint venture or limited liability company, or any of your **Employees**) or organization with respect to any **Auto**:
 - a. owned by you, loaned to you or hired by you or on your behalf; and
 - b. used by that person or organization with your permission.

However, none of the following is an **Insured** under this paragraph IV.J.6.:

- a. the owner or anyone else from whom you hire or borrow an **Auto**. But this exception does not apply if the **Auto** is a trailer or semi-trailer connected to an **Auto** you own; or
- b. any person using an **Auto** while working in a business that sells, services, repairs or parks Autos unless you are in that business.

K. **Insured Contract** means that part of any contract or agreement pertaining to your business under which the **Named Insured** assumes the **Tort Liability** of another party to pay for **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** to a third person or organization, but only if:

1. the **Bodily Injury** or **Property Damage** occurs; or
2. the **Personal Injury** or **Advertising Injury** is caused by an **Occurrence** committed;

subsequent to the execution of the **Insured Contract**.

L. Loading or Unloading means the handling of property:

1. while it is being moved from the place where it is accepted for transportation;
2. while it is being loaded, transported or unloaded; and
3. until it is moved to the place where it is finally delivered.

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

1. bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
2. vehicles maintained for use solely on or next to premises you own or rent;
3. vehicles that travel on crawler treads;
4. vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - a. power cranes, shovels, loaders, diggers or drills; or
 - b. road construction or resurfacing equipment such as graders, scrapers or rollers;
5. vehicles not described in paragraphs IV.M.1., 2., 3. or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - a. air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - b. cherry pickers and similar devices used to raise or lower workers; and
6. vehicles not described in IV.M.1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not Mobile Equipment but will be considered Autos:

- a. equipment designed primarily for:
 - 1) snow removal;
 - 2) road maintenance, but not construction or resurfacing; or
 - 3) street cleaning;
- b. cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- c. air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

N. Named Insured means:

1. any person or organization listed in Item 1 of the Declarations, any company that is your subsidiary as of the effective date of this policy and any company in which you own a majority or controlling interest as of the effective date of this policy; and
2. any organization, other than a partnership, joint venture or limited liability company, which is newly acquired, controlled or formed by you during the Policy Period but only:
 - a. as respects Occurrences taking place after you acquire, take control of or form such organization;

- b. to the extent such organization is included under the coverage provided by any **Scheduled Underlying Insurance**;
- c. if you give us prompt notice after you acquire, take control of or form such organization; and
- d. if you own a majority or controlling interest in such organization;

We may make an additional premium charge for any such organizations you acquire, take control of or form during the **Policy Period**;

- 3. if you are an individual, you and your spouse, but only with respect to the conduct of a business of which you are the sole owner;
- 4. if you are a partnership or joint venture, your partners or co-venturers and their spouses, but only with respect to the conduct of your business;
- 5. if you are a limited liability company, your members, but only with respect to the conduct of your business, and your managers, but only with respect to their duties as your managers; and
- 6. if you are an organization other than a partnership, joint venture or limited liability company, any of your executive officers, directors or stockholders but only while acting within their duties or capacities as such;

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

Also, no person or organization is a **Named Insured** under paragraphs IV.N.3., 4., 5. or 6. for the ownership, maintenance, operation, use, **Loading or Unloading**, or entrustment to others, of any **Autos**, aircraft or watercraft unless such coverage is included under the **Scheduled Underlying Insurance** and then for no broader coverage than is provided under such **Scheduled Underlying Insurance**.

O. Occurrence means:

- 1. as respects **Bodily Injury** or **Property Damage**, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in **Bodily Injury** or **Property Damage**. All **Bodily Injury** or **Property Damage** caused by such exposure to substantially the same general harmful conditions shall be considered to be caused by one **Occurrence**;
- 2. as respects **Personal Injury**, an offense arising out of your business that results in **Personal Injury**. All **Personal Injury** caused by the same or related injurious material, act or offense shall be considered to be caused by one **Occurrence**, regardless of the frequency or repetition thereof, the number and kind of media used or the number of persons or organizations making **Claims** or bringing **Suits**; and
- 3. as respects **Advertising Injury**, an offense committed in the course of advertising your goods, products and services that results in **Advertising Injury**. All **Advertising Injury** caused by the same or related injurious material, act or offense shall be considered to be caused by one **Occurrence**, regardless of the frequency or repetition thereof, the number and kind of media used or the number of persons or organizations making **Claims** or bringing **Suits**.

P. Other Insurance means any insurance providing coverage for damages covered in whole or in part by this policy. **Other Insurance** includes alternative risk transfer, risk management or financing methods or programs, such as risk retention groups or self-insurance methods or programs. But **Other Insurance** does not include:

- 1. any **Scheduled Underlying Insurance**;

2. the **Self-Insured Retention**; or
 3. any policy of insurance specifically purchased to be excess of this policy and affording coverage that this policy also affords.
- Q. Personal Injury** means injury, other than **Bodily Injury** or **Advertising Injury**, arising out of your business and caused by one or more of the following offenses:
1. false arrest, detention or imprisonment;
 2. malicious prosecution;
 3. the wrongful eviction from, wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or on behalf of its owner, landlord or lessor;
 4. oral, written or electronic publication of material that slanders or libels a person or organization, or disparages a person's or organization's goods, products or services; or
 5. oral, written or electronic publication of material that violates a person's right of privacy.
- R. Policy Period** means the period of time from the inception date shown in Item 2 of the Declarations to the earlier of the expiration date shown in Item 2 of the Declarations or the termination date of this policy.
- S. Pollutant** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and **Waste**.
- T. Products - Completed Operations Hazard** means all **Bodily Injury** and **Property Damage** occurring away from premises you own, rent or borrow and arising out of **Your Product** or **Your Work** except:
1. products that are still in your physical possession; or
 2. work that has not yet been completed or abandoned. However, we will consider **Your Work** to be completed at the earliest of the following times:
 - a. when all of the work called for in your contract has been completed;
 - b. when all of the work to be done at the job site has been completed if your contract calls for work at more than one job site; or
 - c. when any person or organization, other than another contractor or subcontractor working on the same project, has put that part of the work done at a job site to its intended use.
- Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, shall be considered to be completed.
- The **Products - Completed Operations Hazard** does not include **Bodily Injury** or **Property Damage** arising out of:
1. the transportation of property, unless the **Bodily Injury** or **Property Damage** arises out of a condition in or on a vehicle created by the **Loading** or **Unloading** of that vehicle by an **Insured**; or
 2. the existence of tools, uninstalled equipment or abandoned or unused materials.
- U. Property Damage** means:
1. physical injury to **Tangible Property** of others including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
 2. loss of use of **Tangible Property** of others that is not physically injured. All such loss of use shall be deemed to occur at the time of the **Occurrence** that caused it.

As used in this definition, Tangible Property does not include data.

- V. **Scheduled Retained Limits** means the amount and type of insurance, not covered by any **Scheduled Underlying Insurance**, listed in the Schedule of Retained Limits forming a part of this policy.
- W. **Scheduled Underlying Insurance** means:
1. the policy or policies of insurance listed in the Schedule of Underlying Insurance forming a part of this policy; and
 2. automatically any renewal or replacement of any policy described in paragraph IV.W.1. above, provided that such renewal or replacement provides equivalent coverage to and affords limits of insurance equal to or greater than the policy being renewed or replaced.
- X. **Self-Insured Retention** means the amount indicated in Item 4 of the Declarations which is the maximum amount that:
1. the **Insured** becomes legally obligated to pay by reason of liability imposed by law; or
 2. the **Named Insured** becomes legally obligated to pay as damages assumed by the **Named Insured** under an **Insured Contract**;
- not covered by either any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit** and caused by any one Occurrence.
- Y. **Slogan** means a phrase that others use and intend to attract attention in their Advertisement. However, a Slogan does not include a phrase used as, or in, the name of:
1. any person or organization, other than you; or
 2. any business or any of the premises, goods, products or services of any person or organization, other than you.
- Z. **Suit** means a civil proceeding that seeks damages. Suit includes:
1. an arbitration proceeding that seeks damages and to which you must submit or do submit with our consent; or
 2. any other alternative dispute resolution proceeding that seeks damages and to which you submit with our consent.
- AA. **Tort Liability** means a liability that would be imposed by law in the absence of any contract or agreement.
- BB. **Waste** includes materials which are intended to be or have been recycled, reconditioned or reclaimed.
- CC. **Your Product** means:
1. any goods or products, other than real property, that are or were manufactured, sold, handled, distributed or disposed of by:
 - a. you;
 - b. others trading under your name; or
 - c. a person or organization whose business or assets you have acquired; and
 2. containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

Your Product includes:

1. warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **Your Product**; and
2. the providing of or failure to provide warnings or instructions.

Your Product does not include vending machines or other property rented to or located for the use of others but not sold.

DD. Your Work means:

1. work or operations performed or being performed by you or on your behalf; and
2. materials, parts or equipment furnished in connection with such work or operations.

Your Work includes:

1. warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **Your Work**; and
2. the providing of or failure to provide warning or instructions.

V. Exclusions

This insurance does not apply to:

A. Workers' Compensation, Disability Benefits or Unemployment Compensation Laws

Any obligation of the **Insured** under any workers compensation law, disability benefits law, unemployment compensation law or any similar law.

B. ERISA or COBRA

Any obligation of the **Insured** under:

1. the Employees Retirement Income Security Act Of 1974 (ERISA);
2. the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA); or
3. any similar common or statutory law of any jurisdiction;

including any amendments to such laws.

C. Uninsured Motorists, Underinsured Motorists or Automobile No-Fault Laws

Any liability or obligation of the **Insured** under any automobile:

1. uninsured motorists;
2. underinsured motorists; or
3. no-fault or other first party benefits law.

D. Asbestos

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of asbestos in any form by any person; or
 - b. existence of asbestos in any form.

2. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of any other solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and **Waste**, in any form by any person; or
 - b. existence of any such other irritant or contaminant in any form;and that is part of any **Claim** or **Suit** that also alleges any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** described in paragraph V.D.1. of this exclusion, above.
3. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that any **Insured** or others:
 - a. test for, monitor, clean up, remove, contain, treat, detoxify or neutralize asbestos in any form; or
 - b. respond to, or assess, in any way the effects of asbestos in any form.

Because asbestos, and any other such irritants or contaminants, are **Pollutants**, this exclusion applies in addition to any of the following exclusions that apply:

- a. the pollution exclusion in this policy; or
- b. any other pollution-related exclusion made part of this policy.

E. Employment-Related Practices

Bodily Injury or Personal Injury to:

1. a person arising out of any:
 - a. refusal to employ that person;
 - b. termination of that person's employment; or
 - c. employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, failure to promote or advance, harassment, humiliation or discrimination applied to or directed at that person; or
2. the spouse, child, parent, brother or sister of that person as a consequence of such **Bodily Injury** or **Personal Injury** to that person described in paragraph V.E.1., of this exclusion, above.

This exclusion applies to any obligation to share damages with or repay someone else who must pay damages because of the **Bodily Injury** or **Personal Injury**.

F. Property Damage to Certain Property

Property Damage to:

1. property you own, rent or occupy;
2. premises you sell, give away or abandon if the **Property Damage** arises out of any part of those premises;
3. property loaned to you;
4. personal property in the care, custody or control of any **Insured**;

5. that particular part of real property on which you or any contractors or sub-contractors working directly or indirectly on your behalf are performing operations if the **Property Damage** arises out of those operations;
6. that particular part of any property that must be restored, repaired or replaced because **Your Work** was incorrectly performed on it;
7. **Your Product** arising out of **Your Product** or any part of it; or
8. **Your Work** arising out of **Your Work** or any part of it and included in the **Products-Completed Operations Hazard**, unless the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Paragraph V.F.2. of this exclusion, above, does not apply if the premises are **Your Work** and were never occupied, rented or held for rental by you.

Paragraph V.F.6. of this exclusion, above, does not apply to **Property Damage** included in the **Products-Completed Operations Hazard**.

G. Property Damage to Impaired Property or Property Not Physically Injured

Property Damage to Impaired Property, or property that has not been physically injured, arising out of:

1. a defect, deficiency, inadequacy or dangerous condition in **Your Product** or **Your Work**; or
2. a delay or failure by you, or anyone acting on your behalf, to fulfill the terms of a contract or agreement.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to **Your Product** or **Your Work** after it has been put to its intended use.

H. Product Recall

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

1. **Your Product**;
2. **Your Work**; or
3. **Impaired Property**;

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

I. Expected or Intended Bodily Injury or Property Damage

Bodily Injury or Property Damage expected or intended from the standpoint of the **Insured**.

This exclusion does not apply to **Bodily Injury or Property Damage** resulting from the use of reasonable force to protect persons or property.

J. Known Violation of Rights

Personal Injury or Advertising Injury caused by or committed at the direction of the **Insured**, or by an offense committed at the direction of the **Insured**, with knowledge that the rights of another would be violated and that **Personal Injury or Advertising Injury** would result.

K. Material Published with Knowledge of Falsity

Personal Injury or Advertising Injury arising out of oral, written, or electronic publication of material, if done by or at the direction of the Insured with knowledge of its falsity.

L. Material Published Prior to Policy Period

Personal Injury or Advertising Injury arising out of any:

1. oral, written, or electronic publication of material whose first publication;
2. unauthorized use in your Advertisement of another's Advertising Idea if that unauthorized use first; or
3. infringement in your Advertisement of another's copyright, trade dress or Slogan if that infringement first;

took place before the beginning of the Policy Period.

M. Criminal Acts

Personal Injury or Advertising Injury arising out the willful violation of a penal statute or ordinance committed by, at the direction of, any Insured.

N. Advertising, Broadcasting, Publishing, Telecasting, Media and Internet Businesses

Personal Injury or Advertising Injury committed by an Insured whose business is:

1. Advertising, broadcasting, publishing or telecasting;
2. Designing or determining content of websites for others; or
3. An Internet search, access, content or service provider.

However, this exclusions does not apply to Personal Injury caused by any of the following offenses:

1. false arrest, detention or imprisonment;
2. malicious prosecution;
3. the wrongful eviction from, wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or on behalf of its owner, landlord or lessor.

For the purpose of this exclusion, the placing of advertising, borders or frames for an Insured or others, or links for or to others, on or in an Insured's website is not by itself considered the business of advertising, broadcasting, publishing or telecasting.

O. Breach of Contract

Personal Injury or Advertising Injury arising out of breach of contract, other than misappropriation of Advertising Ideas under an implied contract.

P. Quality or Performance of Goods - Failure to Conforms to Statements

Advertising Injury arising out of the failure of goods, products or services to conform with advertised quality or performance.

Q. Wrong Description of Prices

Advertising Injury arising out of the wrong description of the price of goods, products or services.

R. Intellectual Property

Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of the actual or alleged infringement or violation of any of the following rights or laws:

1. copyright;
2. patent;
3. trade name;
4. trade secret;
5. trademark; or
6. other intellectual property rights or laws.

This exclusion does not apply to Bodily Injury or Property Damage that:

1. results from Your Products or Your Work; or
2. is included in the Products-Completed Operations Hazard.

This exclusion also does not apply to Advertising Injury that results from:

1. the unauthorized use in your Advertisement of another's Advertising Idea; or
2. infringement in your Advertisement of another's copyright, trade dress or trademarked Slogan.

S. Pollution

1. Bodily Injury, Property Damage or Personal Injury or Advertising Injury arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of Pollutants anywhere in the world;
2. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that we, the Insured or any other person or organization test for, monitor, clean-up, remove, contain, treat, detoxify, respond to, neutralize or assess the effects of Pollutants; or
3. Any loss, cost or expense arising out of any Claim or Suit by or for any governmental authority or any other person or organization for damages arising out of the testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or responding to or assessing in any way, Pollutants.

This exclusion does not apply to Bodily Injury or Property Damage:

- a. arising out of heat, smoke or fumes from a Hostile Fire;
- b. arising out of the upset, overturn or collision of an Auto; or
- c. included in the Products-Completed Operations Hazard;

if insurance for such Bodily Injury or Property Damage is provided by any Scheduled Underlying Insurance or any Scheduled Retained Limit. However, the insurance provided by this policy for such Bodily Injury or Property Damage will not be broader than the insurance provided by such Scheduled Underlying Insurance or Scheduled Retained Limit.

T. Nuclear Material

Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of:

1. the actual, alleged or threatened exposure of any person or property to; or
2. the **Hazardous Properties** of;

any **Nuclear Material**.

As used in this exclusion:

1. **hazardous properties** includes radioactive, toxic or explosive properties;
2. **nuclear material** means source material, special nuclear material or by-product material;
3. **source material, special nuclear material and by-product material** have the meanings given them in the Atomic Energy Act of 1954 or any law amendatory thereof.

Because **Nuclear Material** is a **Pollutant**, this exclusion applies in addition to any of the following exclusions that apply:

1. the pollution exclusion in this policy; or
2. any other pollution-related exclusion made part of this policy.

VI. Additional Exclusions

This insurance does not apply to the following, unless insurance for such liability is provided by any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit** and then it will be no broader than the insurance provided by such **Scheduled Underlying Insurance** or **Scheduled Retained Limit**:

A. Fellow Employee

Liability of any **Employee** with respect to **Bodily Injury** or **Personal Injury** to:

1. another **Employee** of the same employer; or
2. the spouse or any child, parent, brother or sister of that other **Employee** as a consequence of such **Bodily Injury** or **Personal Injury** to that other **Employee** described in paragraph VI.A.1. of this exclusion.

B. Watercraft

Bodily Injury or **Property Damage** arising out of the ownership, maintenance, use, operation, **Loading** or **Unloading**, or entrustment to others of any watercraft owned, operated or rented by, or loaned to, any **Insured**. This exclusion does not apply to watercraft while ashore on premises owned or rented by any **Insured**.

C. Aircraft

Bodily Injury or **Property Damage** arising out of the ownership, maintenance, use, operation, **Loading** or **Unloading** or entrustment to others of any aircraft owned, rented or chartered by, or loaned to, any **Insured** or on an **Insured's** behalf, with or without crew.

VII. Conditions

A. Appeals

We have the right but not the duty to appeal an award or judgment, including damages covered by this policy, in excess of the applicable **Retained Limit**. If we elect to appeal we will pay, in addition to any applicable limits of insurance of this policy, all costs, interest and expenses incidental to such appeal. However, the result of an appeal will not change the limits of coverage that apply under this policy.

B. Audit

We may audit the **Insured's** books and records at any time during the term of the **Policy Period** or within three years after expiration or termination of this policy.

C. Bankruptcy or Insolvency

1. The **Insured's** bankruptcy, insolvency or inability to pay, or the bankruptcy, insolvency or inability to pay of any issuer of **Scheduled Underlying Insurance** will not relieve us of our obligations under this policy.
2. In the event of any such bankruptcy, insolvency or inability to pay:
 - a. this insurance will neither replace or reduce the insurance provided by **Scheduled Underlying Insurance** nor replace or reduce any **Scheduled Retained Limit**; and
 - b. this insurance will apply only to amounts in excess of the applicable limits of such **Scheduled Underlying Insurance** and **Scheduled Retained Limits**.

D. Cancellation

1. You may cancel this policy. You must mail or deliver to us advance written notice to us stating when the cancellation is to take effect.
2. We may cancel this policy. If we cancel because of non-payment of premium, we must mail or deliver to you not less than 10 days advance written notice stating when the cancellation is to take effect. If we cancel for any other reason, we must mail or deliver to you not less than 60 days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Declarations shall be sufficient to prove such notice.
3. The **Policy Period** will end on the day and time stated in the cancellation notice.
4. If we cancel, final premium shall be calculated pro rata based on the time this policy was in force.
5. If you cancel, final premium will be more than pro rata. It will be based on the time this policy was in force and increased by our short rate cancellation table and procedure.
6. Premium adjustment may be made at the time of cancellation or as soon as practicable thereafter, but the cancellation will be effective even if we have not made or offered any premium refund due you. Our check, or our representative's check, mailed or delivered to you at your mailing address shown in Item 1 of the Declarations, shall be sufficient tender of any such refund due you.
7. The first **Named Insured** in Item 1 of the Declarations shall act on behalf of all other **Insureds** with respect to the giving or receiving of notice of cancellation and the receipt of any premium refund that may become payable under this policy.

8. Any of these provisions that conflict with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with that law.

E. Changes

Notice to any agent or knowledge possessed by any agent or any other person will not effect a waiver of, or a change in, any part of this policy. This policy can only be changed by a written endorsement that becomes a part of this policy and that is signed by one of our authorized representatives.

F. Duties in the Event of an Occurrence, Claim or Suit

1. You must see to it that we are notified as soon as practicable of an **Occurrence** which may result in a **Claim** or **Suit** seeking damages covered by this policy. To the extent possible, notice should include:
 - a. how, when and where the **Occurrence** took place;
 - b. the names and addresses of any injured persons and witnesses; and
 - c. the nature and location of any **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** arising out of the **Occurrence**.
2. If a **Claim** is made or **Suit** is brought against any **Insured** that is reasonably likely to involve the coverage provided by this policy, you must notify us in writing as soon as practicable. You and any other involved **Insured** also must:
 - a. immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **Claim** or **Suit**;
 - b. authorize us to obtain necessary records and other information;
 - c. cooperate with us in the investigation, settlement or defense of any **Claim** or **Suit** we investigate, settle or defend; and
 - d. assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the **Insured** because of injury or damage to which this insurance may apply.
3. No **Insured** will, except at that **Insured's** own expense, voluntarily make a payment, assume any obligation, make any admission, or incur any expense, other than for first aid for **Bodily Injury** covered by this policy, without our consent.

G. First Named Insured

The person or organization first named in Item 1 of the Declarations is primarily responsible for the payment of all premiums, the giving and receiving of notice of cancellation and the receiving of any return premiums that become payable under this policy.

H. Inspection

We have the right, but are not obligated, to inspect your premises and operations at any time. Our inspections are not safety inspections. They relate only to the insurability of your premises and operations and the premiums to be charged. We may give your reports on the conditions that we find. We may also recommend changes. However, we will not undertake to perform the duty of any person or organization to provide for the health or safety of your **Employees** or the public. We do not warrant the health and safety conditions of your premises or operations or represent that your premises or operations comply with any law, regulation, code or standard.

I. Knowledge of Occurrence or Claim

Knowledge of an Occurrence, Claim or Suit by your agent, servant or Employee shall not in itself constitute knowledge by you, unless a Named Insured:

1. shall have received notice of such Occurrence, Claim or Suit from said agent, servant or Employee; or
2. otherwise has knowledge of such Occurrence, Claim or Suit.

J. Legal Action Against Us

No person or organization has a right under this policy to sue us, join us as a party, or otherwise bring us into a Suit seeking damages from, or to determine the liability of, any Insured unless:

1. you have, and any other involved Insured has, complied with all the terms of this policy; and
2. the amount you owe has been determined with our consent or by actual trial and final judgment.

K. Maintenance of Scheduled Underlying Insurance

1. During the Policy Period, you agree:

- a. to keep Scheduled Underlying Insurance in full force and effect;
- b. that the terms, including definitions, conditions and exclusions, of Scheduled Underlying Insurance shall not materially change;
- c. that the total applicable limits of Scheduled Underlying Insurance shall not decrease, except for any reduction or exhaustion of aggregate limits by payment of Claims or Suits for Bodily Injury, Property Damage, Personal Injury or Advertising Injury covered by this policy; and
- d. that any renewals or replacements of Scheduled Underlying Insurance shall provide equivalent coverage to and afford limits of insurance equal to or greater than the policy being renewed or replaced.

2. If you fail to comply with these requirements, we will be liable only to the same extent that we would have, had you fully complied with these requirements.

3. If you are unable to recover from an issuer of any Scheduled Underlying Insurance because that issuer is unable to pay or you fail to comply with any term or condition of any Scheduled Underlying Insurance, we will only pay those sums covered by this insurance which are in excess of the applicable limit of Scheduled Underlying Insurance shown in the Schedule of Underlying Insurance.

L. Other Insurance

If Other Insurance applies to damages that are also covered by this policy, this policy will apply excess of, and shall not contribute with, that Other Insurance, whether it is primary, excess, contingent or on any other basis. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

M. Premium

The premium for this policy is the amount stated in Item 5 of the Declarations. It is a flat premium unless specified as subject to an audit adjustment.

N. Separation of Insureds

Except with respect to the limits of insurance of this policy and any rights or duties specifically assigned to the first Named Insured designated in Item 1 of the Declarations, this insurance applies:

1. as if each Named Insured were the only Named Insured; and
2. separately to each Insured against whom the Claim is made or the Suit is brought.

O. Titles

The titles of the various sections or paragraphs in this policy and endorsements, if any, attached to this policy are intended solely for convenience or reference and are not to be deemed in any way to affect the provisions to which they relate.

P. Transfer of Rights of Recovery to Us

1. If any Insured has rights to recover from any other person or organization all or part of any payment we have made under this policy, those rights are transferred to us. The Insured must do nothing after loss to impair those rights and must help us enforce them.
2. Any such recovery shall be applied as follows:
 - a. first, any person or organization, including the Insured, that has paid an amount in excess of the applicable limits of insurance of this policy will be reimbursed for the actual excess amount paid under this policy;
 - b. then, we will be reimbursed up to the amount we have paid; and
 - c. last, any Insured or issuer of Scheduled Underlying Insurance is entitled to claim the remainder, up to the amount that Insured or issuer of Scheduled Underlying Insurance has paid.
3. Expenses incurred in the exercise of such rights of recovery shall be apportioned among such persons or organizations, including the Insured, in the same ratio as their respective recoveries are finally shared.

Q. Transfer of Your Rights and Duties

Your rights and duties under this policy may not be transferred without our written consent.

If you die or are legally declared bankrupt, your rights and duties will be transferred to your legal representative, but only while acting within the scope of duties as your legal representative. However, notice of cancellation sent to the first Named Insured designated in Item 1 of the Declarations and mailed to the address shown in this policy will be sufficient notice to effect cancellation of this policy.

R. Unintentional Failure to Disclose Hazards

Your failure to disclose all hazards existing as the inception date of the policy shall not prejudice you with respect to the coverage afforded by this policy, provided that any such failure or omission is not intentional.

S. When Damages Are Payable

We will not make any payment under this policy unless and until the Insured or any other insurer is obligated to pay the Retained Limit.

When the amount of loss has been determined, we will promptly pay on behalf of the **Insured** the amount of loss covered by this policy.

You shall promptly reimburse us for any amount within the **Self-Insured Retention** paid by us on behalf of an **Insured**.

In Witness Whereof we have caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by one of our duly authorized representatives where required by law.

Amendment of Cancellation Notice

Paragraph 2 of Section VII. Conditions, D. Cancellation is replaced by the following:

We may cancel this policy. If we cancel because of non-payment of premium, we must mail or deliver to you not less than 10 days advance written notice stating when the cancellation is to take effect. If we cancel for any other reason, we must mail or deliver to you not less than 90 days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Declarations shall be sufficient to prove such notice.

All other terms of your policy remain the same.

Claims-Made Coverage And Extended Reporting Period Endorsement

- A. With respect to the coverage provided by this policy that applies in excess of the Scheduled Underlying Insurance listed directly below, which provides coverage on a claims-made basis, this policy also provides coverage on a claims-made basis:

Scheduled Underlying Insurance Description: EMPLOYEE BENEFITS LIABILITY

Scheduled Underlying Insurance Carrier: PER SCHEDULE ON INDIVIDUAL ACCOUNT CERTIFICATE

Scheduled Underlying Insurance Policy #: PER SCHEDULE ON INDIVIDUAL ACCOUNT CERTIFICATE

Scheduled Underlying Insurance Limits: \$1,000,000/\$1,000,000

Scheduled Underlying Insurance Retroactive Date:

Scheduled Underlying Insurance Description:

Scheduled Underlying Insurance Carrier:

Scheduled Underlying Insurance Policy #:

Scheduled Underlying Insurance Limits:

Scheduled Underlying Insurance Retroactive Date:

Scheduled Underlying Insurance Description:

Scheduled Underlying Insurance Carrier:

Scheduled Underlying Insurance Policy #:

Scheduled Underlying Insurance Limits:

Scheduled Underlying Insurance Retroactive Date:

- B. Each of the following applies to such coverage provided by this policy on a claims-made basis:

1. The Bodily Injury or Property Damage must have occurred, the Personal Injury or Advertising Injury must have been caused by an Occurrence committed, or the negligent act, error, or omission must have been committed, on or after the Retroactive Date of this policy;
2. The Bodily Injury or Property Damage must have occurred, the Personal Injury or Advertising Injury must have been caused by an Occurrence committed, or the negligent act, error or omission must have been committed, on or before the earlier of the expiration date shown in Item 2 of the Declarations or the termination date of this policy;
3. The Claim or Suit for any Bodily Injury, Property Damage, Personal Injury, Advertising Injury, or negligent act, error, or omission must have been first made or brought during the Policy Period or within 60 days thereafter, or within any Extended Reporting Period provided under this policy. A Claim or Suit is deemed first made or brought when notice of such Claim or Suit is first received by any Insured or by us, whichever is earlier.
4. No insurance is provided by this policy for any Claim or Suit, or any notification being treated as a Claim or Suit, which is made or brought before the inception date shown in Item 2 of the Declarations and for which any Insured has given notice to any person or organization providing Other Insurance.

- C. The following is added to section VII. Conditions F. Duties in the Event of an Occurrence, Claim or Suit but only with respect to this endorsement:

4. Notice of an Occurrence as described in F.1. above is not notice of a Claim or Suit. However, if:
 - a. we are notified during the Policy Period, as specified above, of an Occurrence; and
 - b. a Claim or Suit is made or brought within 36 months from the date we are notified of that Occurrence;

then this policy will apply as if notice of that Claim or Suit has been made during the Policy Period.

D. The following is added to section VII. Conditions:

Extended Reporting Period

1. If the Insured cancels or does not renew this policy, or if we either cancel or non-renew this policy for any reason other than non-payment of premium, the Insured may elect to purchase the Extended Reporting Period.
2. The Extended Reporting Period will apply only if:
 - a. The Insured requests it in writing within 60 days after the end of the Policy Period;
 - b. The Insured has paid all premiums due for this policy at the time the Insured makes such request; and
 - c. The Insured pays the additional premium for such Extended Reporting Period as charged by us. The additional premium will not exceed 200%
3. Once the Extended Reporting Period is effective, neither we nor you may cancel the Extended Reporting Period, and we shall not refund any part of the premium paid for the Extended Reporting Period for any reason.
4. Any Claim or Suit first made or brought during the Extended Reporting Period will be deemed to have been made or brought on the last day of the Policy Period. The Extended Reporting Period will not extend the Policy Period or reinstate or increase the Limits of Liability of this policy.
5. Any insurance provided by this policy for Claims or Suits made or brought during the Extended Reporting Period is excess over any Other Insurance providing coverage for such Claims or Suits made or brought after the Extended Reporting Period begins.

E. With respect to this endorsement only, the following are added to section IV. Definitions:

Extended Reporting Period means a period of 5 years or the length of the add'l Extended Reporting Period in your Scheduled Underlying Insurance, whichever is less, starting with the expiration date of this policy, during which Claims or Suits may be first made or brought.

Retroactive Date means . If no retroactive date is shown, then the retroactive date of this policy is the same as the retroactive date shown on the applicable Scheduled Underlying Insurance listed in part A. of this endorsement.

All other terms of your policy remain the same.

Anti-Stacking Endorsement

For the purpose of this endorsement only, the following is added to section **III. Limits of Insurance**:

Regardless of the Limits specified in the Declarations of this policy, if any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** covered by this policy is also covered by any other Named Insured Certificate issued on the Premier Hotel Insurance Group policy QK06503290 and QK06503289, then the maximum that we will pay for all such **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** will be the highest applicable Each Occurrence Limit under any one of those certificates.

This endorsement does not apply to certificate holders that have no contractual relationship or common ownership between them.

All other terms of your policy remain the same.

Pollution Exclusion Exception For Certain Equipment Including Pollutants From Swimming Pools And Garages

The following is added to the second paragraph of section V. Exclusions S. Pollution 3.

- d. arising out of the discharge, dispersal, seepage, migration, release or escape of pollutants from:
 - 1. chlorine equipment, refrigeration equipment, ventilation equipment, air conditioning equipment; or
 - 2. release of a substance from a swimming pool or a garage.

All other terms of your policy remain the same.

Employee Benefits Liability Endorsement

1. The following is added to section I. Coverage A:

We will also pay on behalf of the **Insured** all sums in excess of the **Retained Limit** that the **Insured** becomes legally obligated to pay as damages by reason of liability imposed by law because of any negligent act, error or omission committed in the **Administration** of your **Employee Benefits Program**. However, the insurance provided by this endorsement will not be broader than the insurance provided by the applicable **Scheduled Underlying Insurance** or the applicable **Scheduled Retained Limit** for such damages.

2. The following are added to section IV. Definitions:

Administration means any of the following administrative functions:

1. Providing information to **Employees**, including dependents and beneficiaries, with respect to eligibility for or scope of an **Employee Benefit Program**;
2. Handling records in connection with an **Employee Benefit Program**; or
3. Effecting or terminating any **Employee's** participation in a plan included in the **Employee Benefit Program**.

Employee Benefit Program means any of the following plans:

1. Group life insurance; group accident or health insurance; dental, vision and hearing plans; and flexible spending accounts; provided that no one other than an **Employee** may subscribe to such insurance or plans and such plans are generally available to those **Employees** who satisfy the plan's eligibility requirements;
2. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an **Employee** may subscribe to such plans and such plans are generally available to all **Employees** who are eligible under the plan;
3. Unemployment insurance, social security benefits, workers compensation and disability benefits;
4. Vacation plans; or
5. Any other plan designated in the **Schedule of Designated Plans** below or added by endorsement to this policy.

Schedule of Designated Plans

All other terms of your policy remain the same.

Lead Exclusion

This Insurance does not apply to:

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of lead in any form by any person; or
 - b. existence of lead in any form.
2. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of any other solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and Waste, in any form by any person; or
 - b. existence of any such other irritant or contaminant in any form;and that are part of any **Claim or Suit** that also alleges any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** described in paragraph 1. of this exclusion, above.
3. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that any **Insured** or others:
 - a. test for, monitor, clean up, remove, contain, treat, detoxify or neutralize lead in any form;
 - b. respond to, or assess, in any way the effects of lead in any form.

Because lead, and any other such irritant or contaminant, are **Pollutants**, this exclusion applies in addition to any of the following exclusions that apply:

- a. the pollution exclusion in this policy; or
- b. any other pollution-related exclusion made part of this policy.

All other terms of your policy remain the same.

Mold or Other Fungi or Bacteria Exclusion

This insurance does not apply to:

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:

- a. absorption, ingestion or inhalation of **Mold or other fungi or Bacteria** in any form by any person; or
- b. existence of **Mold or other fungi or Bacteria** in any form;

Paragraph 1 of this exclusion does not apply to:

- a. **Bodily Injury or Property Damage** arising out of **Mold or other fungi or Bacteria** which are in, on or part of any good or product that is intended to be consumed as food, beverage or medicine;
- b. **Bodily Injury** arising out of **bacteria** which are directly transmitted solely by or from another person to the person sustaining the **Bodily Injury**, or
- c. **Bodily Injury** arising out of a bacterial infection which develops in connection with physical harm to the person sustaining the **Bodily Injury**, if such physical harm is not excluded by this paragraph of this exclusion, or by any other part of this exclusion, and a **Claim or Suit** is made or brought against the **Insured** because of such physical harm;

2. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual, alleged or threatened:

1. absorption, ingestion or inhalation of any other solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and **Waste**, in any form by any person; or
2. existence of any such other irritant or contaminant in any form;

and that is part of any **Claim or Suit** that also alleges any **Bodily Injury, Property Damage, Personal Injury, or Advertising Injury** described in paragraph 1. of this exclusion, above; or

3. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that any **Insured** or others:

- a. test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Mold or other fungi or Bacteria** in any form; or
- b. respond to, or assess in any way, the effects of **Mold or other fungi or Bacteria** in any form.

Because **Mold or other fungi or Bacteria** can be **Pollutants**, and such other irritants or contaminants are **Pollutants**, this exclusion applies in addition to any of the following exclusions that apply:

- a. the pollution exclusion in this policy; or
- b. any other pollution-related exclusion made part of this policy.

For purposes of this endorsement only, the following words or phrases have or include special meaning:

1. **Molds or other fungi** means:
 - a. any type or form of mold or mildew;
 - b. any other type or form of fungus; or
 - c. any mycotoxin, spore, scent or byproduct that is produced or released by such mold, mildew or other fungus.

2. Bacteria means:

- a. any type or form of bacterium; or
- b. any mycotoxin, spore, scent or byproduct that is produced or released by such bacterium.

All other terms of your policy remain the same.

Pesticide, Herbicide or Fertilizer Applications Endorsement

The following is added to Section V, Exclusions, F, **Property Damage to Certain Property**:

Paragraph V.F.5. of this exclusion, above, does not apply to **Property Damage** to real estate property arising out of **Your Work** in the application of any pesticide, herbicide or fertilizer.

All other terms of your policy remain the same.

Waiver of Rights of Recovery Endorsement

The following is added to section VII. Conditions, P. Transfer of Rights of Recovery to Us:

If, prior to an Occurrence, covered by this policy, you have agreed in a written contract, to waive your rights to recovery of payment for damages for **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** caused by that Occurrence, then we agree to waive our right of recovery for such payment.

All other terms of your policy remain the same.

SCHEDULED RETAINED LIMITS

Type of Coverage	Limits Of Liability
Certified Acts of Terrorism	\$1,000,000

Name of Insured	Policy Number QK06503290	Effective Date 03/01/11
PREMIER HOTEL INSURANCE GROUP (P2)	Processing Date 05/03/11 13:52	001

SU091 Ed. 3-03
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Page 1 of 1

TRAVELERS DOC MGMT 39 of 62

Scheduled Underlying Insurance

Comprehensive General Liability <hr/> Carrier <u>PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.</u> <hr/> Policy Number <u>PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.</u> <hr/> Policy Period SEE ACCOUNT CERTIFICATE <hr/> Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	Limits Of Liability <hr/> General Aggregate. \$2,000,000 <hr/> Products/Completed Operations Aggregate. \$1,000,000 <hr/> Personal and Advertising Injury. \$1,000,000 <hr/> Each Occurrence. \$1,000,000
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Automobile Liability <hr/> Carrier <u>PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.</u> <hr/> Policy Number <u>PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.</u> <hr/> Policy Period SEE ACCOUNT CERTIFICATE <hr/>	Limits Of Liability <hr/> Bodily Injury And Property Damage Combined, Each Accident \$1,000,000 CSL <hr/> Bodily Injury. Each Person Each Accident \$ \$ <hr/> Property Damage. Each Accident \$
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Employers Liability <hr/> Carrier <u>PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.</u> <hr/> Policy Number <u>PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.</u> <hr/> Policy Period SEE ACCOUNT CERTIFICATE <hr/>	Limits Of Liability <hr/> Bodily Injury By Accident Each Accident \$500,000* <hr/> Bodily Injury Disease Policy Limit Each Employee \$500,000* \$500,000*
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*UNLIMITED IN THE STATE OF NEW YORK

ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)

Name of Insured	Policy Number QK06503290	Effective Date 03/01/11
PREMIER HOTEL INSURANCE GROUP (P2)		Processing Date 05/03/11 13:52 001

SU109 Rev. 8-08
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Page 1

TRAVELERS DOC MGMT 40 of 62

Scheduled Underlying Insurance

Comprehensive General Liability		Limits Of Liability	
Carrier		General Aggregate.	\$
Policy Number		Products/Completed Operations Aggregate.	\$
Policy Period		Personal and Advertising Injury.	\$
Coverage is:	<input type="checkbox"/> claims-made <input type="checkbox"/> not claims-made	Each Occurrence.	\$

Automobile Liability	Limits Of Liability	
Carrier	Bodily Injury And Property Damage Combined. Each Accident	
	\$	
Policy Number	Bodily Injury. Each Person	Each Accident
	\$	\$
Policy Period	Property Damage. Each Accident	
	\$	

Employers Liability	Limits Of Liability	
Carrier	Bodily Injury By Accident Each Accident	
Policy Number	\$	
	Bodily Injury By Disease	
	Policy Limit	Each Employee
Policy Period	\$	\$

Scheduled Underlying Insurance - Continued

Type Of Coverage: FOREIGN LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$1,000,000 EACH OCCURRENCE \$1,000,000 AGGREGATE
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Type Of Coverage: LIQUOR LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$1,000,000 EACH COMMON CAUSE \$1,000,000 AGGREGATE
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Type Of Coverage: GARAGEKEEPERS LEGAL LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$1,000,000 EACH OCCURRENCE
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Name of Insured	Policy Number QK06503290	Effective Date 03/01/11
PREMIER HOTEL INSURANCE GROUP (P2)		Processing Date 05/03/11 13:52 001

SU110 Ed. 3-03

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Page 1

TRAVELERS DOC MGMT 42 of 62

Scheduled Underlying Insurance - Continued

Type Of Coverage: MARINE OPERATORS LEGAL LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$5,000,000 OCCURRENCE \$5,000,000 AGGREGATE
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Type Of Coverage: PROTECTION & INDEMNITY LIABILITY Carrier PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	Limits Of Liability \$5,000,000 \$5,000,000
Policy Number PER SCHEDULE ON INDIVIDUAL ACCOUNT CERT.	ABOVE LIMITS OF LIABILITY ARE MINIMUM LIMITS ONLY. INDIVIDUAL CERTIFICATE MAY REQUIRE HIGHER UNDERLYING LIMITS OR COVERAGE MAY NOT APPLY. (SEE INDIVIDUAL ACCOUNT CERTIFICATE)
Policy Period SEE ACCOUNT CERTIFICATE	
Coverage is: <input type="checkbox"/> claims-made <input checked="" type="checkbox"/> not claims-made	

Type Of Coverage:	Limits Of Liability
Carrier	
Policy Number	
Policy Period	
Coverage is: <input type="checkbox"/> claims-made <input type="checkbox"/> not claims-made	

Silica Exclusion

This insurance does not apply to:

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of any actual, alleged or threatened:
 - a. absorption, ingestion or inhalation of silica in any form by any person; or
 - b. existence of silica in any form.
2. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of any actual, alleged or threatened:
 - a. absorption, ingestion, or inhalation of any other solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and Waste, in any form by any person; or
 - b. existence of any such other irritant or contaminant in any form;and that are part of any **Claim or Suit** that also alleges any **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** described in paragraph 1 of this exclusion above.
3. Any loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that any **Insured** or others:
 - a. test for, monitor, clean up, remove, contain, treat, detoxify or neutralize silica in any form; or
 - b. respond to, or assess, in any way the effects of silica in any form.

Because silica, and any other such irritants or contaminants, are **Pollutants**, this exclusion applies in addition to any of the following exclusions that apply:

- a. the pollution exclusion in this policy; or
- b. any other pollution-related exclusion made part of this policy.

All other terms of your policy remain the same.

Washington Amendatory Endorsement

This endorsement changes your policy to comply with, or otherwise respond to, Washington law. Therefore, each change made by this endorsement applies only to the extent:

1. required by Washington statutory or regulatory law; or
2. specifically described in the part of this endorsement which makes that change.

As a result, if the address shown for you in Item 1 of the Declarations of your policy is outside Washington, each change that is made to comply with Washington statutory or regulatory law applies only if, and to the extent:

1. your policy provides coverage for damages that result from your operations in, or which affect, Washington; and
2. that law applies to that coverage.

1. Section VII. Conditions D. Cancellation 2. is replaced by the following:

2. We may cancel this policy. If we cancel because of non-payment of premium, we must mail or deliver to you and your agent or broker not less than 10 days advance written notice stating when the cancellation is to take effect. If we cancel for any other reason, we must mail or deliver to you and your agent or broker not less than 60 days advance written notice stating when the cancellation is to take effect. The cancellation notice will state the specific reason for cancellation.

2. The following condition is added to Section VII. Conditions D. Cancellation:

We may decide not to renew or continue this policy. If so, we will mail or deliver a notice of nonrenewal to you and your agent or broker at least 60 days before policy expiration unless you have obtained replacement insurance or you fail to pay any premium when due after we have offered to renew this policy at least 20 days before the expiration date. The notice will state the reason for cancellation. Mailing that notice to you at your mailing address shown in Item 1 of the Declarations shall be sufficient to prove such notice.

All other terms of your policy remain the same.

Unsolicited Communication Exclusion Endorsement

1. The following is added to section V. Exclusions:

Unsolicited Communication

This insurance does not apply to Bodily Injury, Property Damage, Personal Injury or Advertising Injury:

1. arising out of the actual or alleged violation of any law or regulation that restricts or prohibits the transmitting of **Unsolicited Communication**; or
2. alleged in a **Claim** or **Suit** that also alleges a violation of any law or regulation that restricts or prohibits the transmitting of **Unsolicited Communication**.

2. The following is added to section IV. Definitions:

Unsolicited Communication means any communication, in any form, that:

1. is received by any person or organization; and
2. such person or organization did not ask to receive.

All other terms of your policy remain the same.

Application of Limits of Insurance

1. The following replaces Section III. Limits Of Insurance B. of this policy:

- B. The General Aggregate Limit, applicable separately to each individual Certificate issued to member of The Premier Hotel Insurance Group, is the most we will pay for all damages covered under Insuring Agreement I. Coverage except for:
 1. damages included in the Products-Completed Operations Hazard, applicable separately for each individual Certificate issued to member of The Premier Hotel Insurance Group; and
 2. damages that would have been covered under any Automobile Liability type of coverage included in the Scheduled Underlying Insurance or Scheduled Retained Limits to which no aggregate limit applies.

For damages because of Bodily Injury or Property Damage, if any one Scheduled Underlying Insurance or any one Scheduled Retained Limit contains aggregate limits in the same policy that apply separately to each Location or Project, other than an aggregate limit applying to the Products-Completed Operations Hazard, then the General Aggregate Limit stated in the Declarations will apply in the same manner as such aggregate limits of that Scheduled Underlying Insurance or Scheduled Retained Limit.

However, with respect to The Premier Hotel Insurance Group and to each separate Certificate issued to members of The Premier Hotel Insurance Group, we will not pay more than \$100,000,000 for the combined total of all damages covered under Insuring Agreement I. Coverage because of Bodily Injury and Property Damage that arises out of any Location or Project. For the purposes of determining the applicable General Aggregate Limit, each Location or Project that includes premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, or waterway, or by a right-of-way of a railroad, will be considered a single Location or Project.

2. The following is added to section III. Limits of Insurance:

With respect to each separately numbered Certificate issued to members of The Premier Hotel Insurance Group, endorsed to this policy, and evidenced by monthly bordereaux to us, the General Aggregate Limit will apply jointly to all Named Insureds shown on such Certificate.

3. The following is added to Section IV. Definitions of this policy:

Location means any premises, site or location that you rent or lease from others, or own.

Project means any area away from any premises, site, or location that you rent or lease from others, or own, and at which you are performing operations pursuant to a contract or agreement.

4. The following is added to section IV. Definitions R. Policy Period:

For purposes of the beginning and ending date of coverage under this insurance for each Named Insured, Policy Period shall mean the period of time from the inception date shown on the applicable Certificate to the earlier of the expiration date shown on such Certificate or the termination date of this policy.

All other terms of your policy remain the same.

**Auto Liability Limits of Insurance Endorsement -
Exception for Damages Not Subject to Underlying Aggregate Limit
Applies Only to Auto Liability**

The following replaces the first paragraph of Section III. **Limits Of Insurance B.** of this policy:

B. The General Aggregate Limit is the most we will pay for all damages covered under Insuring Agreement I.
Coverage except for:

1. damages included in the **Products-Completed Operations Hazard**; and
2. damages that would have been covered under any **Automobile Liability** type of coverage included in the **Scheduled Underlying Insurance** or **Scheduled Retained Limits** to which no aggregate limit applies.

All other terms of your policy remain the same.

Auto Liability Limitation

The following is added to section V. Exclusions:

Auto

This insurance does not apply to **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the ownership, maintenance, operation, use, **Loading or Unloading** or entrustment to others of any **Auto**.

However, if insurance for such **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** is provided by any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**, then:

1. this exclusion shall not apply; and
2. the insurance provided by this policy will not be broader than the insurance provided by that **Scheduled Underlying Insurance** or that **Scheduled Retained Limit**.

All other terms of your policy remain the same.

Garagekeepers Legal Liability

This insurance does not apply to **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of:

Garagekeepers Legal Liability.

However, if insurance for such **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** is provided by any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**, then:

1. this exclusion does not apply;
2. section V. F. **Property Damage To Certain Property** does not apply; and
3. the insurance provided by this policy will not provide broader coverage than the insurance provided by that **Scheduled Underlying Insurance** or that **Scheduled Retained Limit**.

All other terms of your policy remain the same.

Pollution Exclusion Except Building Heating Or Air Conditioning Equipment Or Water Heating Equipment

1. The following is added to Section V. Exclusions S. Pollution of this policy:

This exclusion also does not apply to **Bodily Injury** arising out of **Building Heating or Air Conditioning Equipment or Water Heating Equipment Fumes, Smoke, Soot, or Vapors** if insurance for such **Bodily Injury** is provided by any **Scheduled Underlying Insurance** or any **Scheduled Retained Limit**. However, the insurance provided by this policy for such **Bodily Injury** will not be broader than the insurance provided by such **Scheduled Underlying Insurance** or **Scheduled Retained Limit**.

2. The following is added to Section IV. Definitions of this policy:

Building Heating or Air Conditioning Equipment or Water Heating Equipment Fumes, Smoke, Soot, or Vapors means only the fumes, smoke, soot, or vapors that:

1. result from equipment used to:
 - a. heat, cool or dehumidify, a building; or
 - b. heat water for personal use by persons within a building;
2. are within that building.

All other terms of your policy remain the same.

Knowledge Of Occurrence Or Claim

- 1 The following replaces section VII. Conditions I. Knowledge of Occurrence or Claim

Knowledge of Occurrence or Claim

Knowledge of an Occurrence, Claim or Suit by your agent, servant or Employee shall not in itself constitute knowledge by you, unless an Executive Officer or anyone working in the capacity as Partner

1. shall have received notice of such Occurrence, Claim or Suit from said agent, servant or Employee; or
2. otherwise has knowledge of such Occurrence, Claim or Suit.

All other terms of your policy remain the same.

Crisis Management Service Expenses Endorsement

1. The following is added to section I. Coverage:

Crisis Management Service Expenses

We will reimburse you, or pay on your behalf, **Crisis Management Service Expenses** arising out of a **Crisis Management Event** that first commences during the **Policy Period**. The most we will pay for all **Crisis Management Service Expenses** for all **Crisis Management Events** that first commence during the **Policy Period** is the **Crisis Management Service Expenses Limit**. The **Crisis Management Service Expenses Limit** is 1% of the General aggregate limit stated in Item 3.B. of the Declarations. A **Crisis Management Event** will be deemed to first commence at the time when any **Executive Officer** first becomes aware of an **Occurrence** that leads to a **Crisis Management Event** and will end when we determine that the crisis no longer exists, or when the **Crisis Management Service Expenses Limit** has been exhausted, whichever occurs first.

A **Retained Limit** does not apply to **Crisis Management Service Expenses**.

Any payment of **Crisis Management Service Expenses** that we make under this endorsement shall not be determinative of our obligations under this policy with respect to, nor create any duty to defend against or indemnify any **Insured** for, any **Claim** or **Suit**.

2. The following is added to section III. **Limits of Insurance**:

The most we will pay for **Crisis Management Service Expenses** arising out of all **Crisis Management Events** is the **Crisis Management Service Expenses limit** as stated in paragraph 1. above. Payment of any such **Crisis Management Service Expenses** is in addition to, and shall not reduce, any aggregate limits under this policy.

3. The following is added to section IV. **Definitions**:

Crisis Management Event means an **Occurrence** that an **Executive Officer** of the **Named Insured** reasonably determines has resulted, or may result, in:

1. damages covered by this policy that are in excess of the total applicable limits of the **Scheduled Underlying Insurance** or **Scheduled Retained Limit**; and
2. significant adverse regional or national media coverage.

Crisis Management Service Expenses means the reasonable and necessary expenses you incur in:

1. retaining a public relations consultant or firm, or a crisis management consultant or firm; or
 2. planning or executing your public relations campaign;
- to mitigate the negative publicity generated from a **Crisis Management Event**.

Executive Officer means the:

1. Chief Executive Officer;
 2. Chief Operating Officer;
 3. Chief Financial Officer;
 4. President;
 5. General Counsel;
 6. general partner (if the **Named Insured** is a partnership); or
 7. sole proprietor (if the **Named Insured** is a sole proprietorship);
- of the **Named Insured**, or any person acting in the same capacity as any individual listed above.

4. The following is added to section V. Exclusions:

Newly Acquired, Controlled or Formed Entities

Crisis Management Service Expenses arising out of a **Crisis Management Event** that occurred prior to the date you acquired, controlled or formed any other entity, even though an **Executive Officer** only first becomes aware of an **Occurrence** that leads to such **Crisis Management Event** after such date.

5. The following is added to section VII. Conditions F. Duties in the Event of an Occurrence, Claim or Suit:

You must also see to it that we are notified by telephone within 24 hours of a **Crisis Management Event** that may result in **Crisis Management Service Expenses**.

You must also provide written notice as soon as practicable. To the extent possible, notice should include:

- a. how, when and where the **Crisis Management Event** took place;
- b. the names and addresses of any injured persons and witnesses;
- c. the nature and location of any **Bodily Injury, Property Damage, Personal Injury** or **Advertising Injury** arising out of the **Crisis Management Event**; and
- d. the reason it is likely to involve damages covered by this policy in excess of the **Retained Limit** and involve regional or national media coverage.

You must submit all incurred expenses within 180 days after we have notified you of our determination that the **Crisis Management Event** no longer exists. Expenses submitted after 180 days of such notice are not reimbursable.

All other terms of your policy remain the same.

Failure To Notify Insurer Of Occurrence

The following is added to section VII. Conditions F. 2:

Your failure to notify us of an Occurrence that may result in a Claim or Suit seeking damages covered by this Policy because you inadvertently notified another insurer of such Occurrence will not invalidate this Policy, but only if you notify us immediately after you become aware of such inadvertent error.

All other terms of your policy remain the same.

POLICY CHANGE ENDORSEMENT

This endorsement summarizes the changes to your policy. All other terms of your policy not affected by these changes remain the same.

How Your Policy Is Changed

EFFECTIVE 11/01/2011 THE FOLLOWING FORMS ARE ADDED TO YOUR POLICY BUT ONLY WITH RESPECT TO THE NAMED INSURED AND CERTIFICATE LISTED:

SUP001 DESIGNATED PREMISES LIMITATION AS RESPECTS:
NEVADA PROPERTY 1 LLC DBA THE COSMOPOLITAN OF LAS VEGAS
CERTIFICATE #2149-A

SUP009 DESIGNATED OPERATIONS EXCLUSION AS RESPECTS:
NEVADA PROPERTY 1 LLC DBA THE COSMOPOLITAN OF LAS VEGAS
CERTIFICATE #2149-B

SUP007 PROFESSIONAL SERVICES EXCLUSION AS RESPECTS:
NEVADA PROPERTY 1 LLC DBA THE COSMOPOLITAN OF LAS VEGAS
CERTIFICATE #2149-C

SU301 LIMITED ABUSE OR MOLESTATION COVERAGE ENDORSEMENT AS RESPECTS:
NEVADA PROPERTY 1 LLC DBA THE COSMOPOLITAN OF LAS VEGAS
CERTIFICATE #2149-D

Premium Change Which Is Due Now

Additional premium N/A

Returned premium N/A

If issued after the date your policy begins, these spaces must be completed and our representative must sign below.

Policy issued to:
PREMIER HOTEL INSURANCE GROUP (P2)

Authorized Representative

Endorsement takes effect: 11/01/11
Policy number: QK06503290
Processing date: 11/22/11 14:10 090

40704 Ed. 5-84

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Endorsement

Page 1

TRAVELERS DOC MGMT 56 of 62

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206

Designated Premises Limitation

This endorsement changes your Specialty Commercial Umbrella Liability Policy, but only as respects to:

Nevada Property I LLC dba The Cosmopolitan of Las Vegas
Certificate #2149-A
Effective Date of Cert Holder 11/01/2011
Effective Date of Endorsement 11/01/2011
Pol #QK06503290

This insurance only applies to Bodily Injury, Property Damage, Personal Injury or Advertising Liability arising out of:

1. the ownership, maintenance, occupancy or use of the premises designated in the Schedule of Covered Premises, below, including any property located on such premises; or
2. any goods or products manufactured, distributed or serviced at or from such premises.

Schedule of Covered Premises

Description and Location of Premises:

	Added	Deleted
Cosmopolitan Hotel 3708 Las Vegas Blvd, Las Vegas NV 89109	11/01/2011	
Leased Office Space 4285 Polaris Ave, Las Vegas NV 89103	11/01/2011	
Leased Space - Recruitment Center 7180 Pollack Drive, Suites 100 and 140, Las Vegas NV 89119	11/01/2011	
Leased Office Space 3485 West Harmon Blvd, Las Vegas NV 89103	11/01/2011	
Leased Office - Training Space 650 White Drive, Suite 280, Las Vegas NV 89103	11/01/2011	
Leased Office Space - Corporate Office 5170 Badura Avenue, Las Vegas NV 89118	11/01/2011	
Leased Warehouse Space Units 100,110,120,130 6025 Procyon Street, Las Vegas NV 89118	11/01/2011	
Parking Lot - Used for Employee Parking 3200 West Tomkins Avenue, Las Vegas NV 89103	11/01/2011	

Description and Location of Premises (continued):

All other terms of your policy remain the same.

Designated Operations Exclusion

This endorsement changes your Specialty Commercial Umbrella Liability Policy, but only as respects to:

Nevada Property I LLC dba The Cosmopolitan of Las Vegas
Certificate #2149-B
Effective Date of Cert Holder 11/01/2011
Effective Date of Endorsement 11/01/2011
Pol #QK06503290

The following is added to section V. Exclusions:

Described Operations

This insurance does not apply to Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of the operations designated in the Schedule of Designated Operations below.

Schedule of Designated Operations

All Operations covered under OCIP/Wrap Up for the construction of the Cosmopolitan Hotel of Las Vegas and all property damage to "your work" arising out of it or any part of it including the Products/Completed Operations Hazard related to the original construction.

Professional Services Exclusion

This endorsement changes your Specialty Commercial Umbrella Liability Policy, but only as respects to:

Nevada Property I LLC dba The Cosmopolitan of Las Vegas
Certificate #2149-C

Effective Date of Cert Holder 11/01/2011

Effective Date of Endorsement 11/01/2011

Pol #QK06503290 with respect to Emergency Medical Technicians (EMT's)

This insurance does not apply to Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of the rendering of, or failure to render, any professional service by or on behalf of the Insured.

All other terms of your policy remain the same.

Limited Abuse Or Molestation Coverage Endorsement

Nevada Property I LLC dba The Cosmopolitan of Las Vegas

Certificate #2149-D

Effective Date of Cert Holder 11/01/2011, Effective Date of Endorsement 11/01/2011

Pol #QK06503290

1. The following is added to section V. Exclusions:

This insurance does not apply to Bodily Injury, Property Damage, Personal Injury, or Advertising Injury arising out of any Abuse or Molestation.

However if insurance for such Bodily Injury or Personal Injury is provided by any Scheduled Underlying Insurance or any Scheduled Retained Limit, then:

1. this exclusion does not apply; and
2. the insurance provided by this policy will not provide broader coverage than the insurance provided by that Scheduled Underlying Insurance or that Scheduled Retained Limit.

2. The following is added to section IV. Definitions J. Insured:

However, none of the following is an Insured under paragraph IV. J. for Bodily Injury or Personal Injury arising out of any Abuse or Molestation:

1. any Perpetrator;
2. any person or organization that has been added to your policy as an additional insured, or any employee, leased worker, agent, representative or volunteer worker of such person or organization; or
3. any of your independent contractors, or any employee, leased worker, agent, representative or volunteer worker of such independent contractor.

Subject to section II. Defense of this agreement, paragraph 2.1 above does not apply to any Perpetrator once a final, non-appealable adjudication in the Suit establishes that such Perpetrator did not commit the Abuse or Molestation.

Also, paragraph 2.2. above does not apply to any person or organization:

1. to whom you have agreed in a written contract requiring insurance to include such person or organization as an additional insured; or
2. that has been added to your policy as an additional insured because such person or organization owns property that you manage, but only to the extent such Abuse or Molestation is committed on such property.

Such person or organization is an Insured, but only to the extent that the Bodily Injury or Personal Injury is caused by Abuse or Molestation arising out of your business. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization. The insurance provided to such additional insureds shall be limited to the limits of liability required by that written contract requiring insurance. This endorsement shall not increase the limits of insurance described in section III. Limits of Insurance.

3. The following is added to section IV. Definitions O. Occurrence:

As respects Bodily Injury or Personal Injury arising out of any Abuse or Molestation, all single, multiple, continuous, sporadic or related acts of Abuse or Molestation, committed by one Perpetrator or two or more Perpetrators acting together, will be deemed to be one Occurrence, regardless of the number of:

1. Insureds;
2. Claims made or Suits brought; or

3. persons or organizations making **Claims** or bringing **Suits**.

Such **Occurrence** will be deemed to have been committed on the date the first such **Abuse or Molestation** is committed, regardless of when such acts or contacts are actually committed.

4. The following are added to section **IV. Definitions**:

Abuse or Molestation means any illegal or offensive physical act or contact committed by any **Perpetrator** against any person who is:

1. under 18 years of age;
2. legally incompetent; or
3. in the care, custody or control of any **Insured** and is physically or mentally incapable of consenting to such physical act or contact.

Perpetrator means any of the following persons who actually or allegedly commit any illegal or offensive physical act or contact:

1. you or your spouse, if you are an individual;
2. your partners or members, or their spouses, if you are a partnership or joint venture;
3. your managers or members, if you are a limited liability company;
4. your executive officers or directors, if you are an organization other than a partnership, joint venture or limited liability company;
5. your **Employees** or volunteer workers; or
6. any other person acting together with any of the persons described in paragraphs 1. through 5. above.

5. The following is added to section **II. Defense A.**:

We have no duty to defend, investigate or settle any **Claim** or **Suit** on behalf of any **Perpetrator**. However, we will reimburse you or such **Perpetrator** for the amount of such person's reasonable and necessary defense costs:

1. once a final, non-appealable adjudication in the **Suit** establishes that such **Perpetrator** did not commit the **Abuse or Molestation**;
2. when the **Retained Limit** has been exhausted by payment of judgment or settlements that would be covered by this policy; and
3. only to the extent that such defense costs are also covered by the applicable **Scheduled Underlying Insurance** or **Scheduled Retained Limit**.

All other terms of your policy remain the same.

EXHIBIT 3

EXHIBIT 3

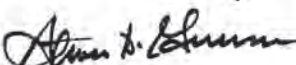
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DISTRICT COURT

CLARK COUNTY, NEVADA



CLERK OF THE COURT

DAVID MORADI, Individually,)

Plaintiff,)

vs.)

CASE NO.: A-14-698824-C

DEPT. NO.: XX

NEVADA PROPERTY 1, LLC, d/b/a)

"The Cosmopolitan of Las)

Vegas"; ROOF DECK)

ENTERTAINMENT, LLC, d/b/a)

"Marquee Nightclub"; and DOES)

I through X, inclusive; ROE)

CORPORATION I through X,)

inclusive,)

Defendants.)

REPORTER'S TRANSCRIPT OF JURY TRIAL, PM SESSION

BEFORE THE HONORABLE JUDGE ERIC JOHNSON

DEPARTMENT XX

FRIDAY, MARCH 24, 2017

2:18 P.M.

Reported by: Amber M. McClane, NV CCR No. 914

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1 APPEARANCES:

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13 -AND-

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A-14-698824-C • 03/24/2017

1 LAS VEGAS, NEVADA; FRIDAY, MARCH 24, 2017

2 2:18 P.M.

3 * * * * *

4 P R O C E E D I N G S

5 * * * * *

6 THE COURT: I think we finished up this
7 morning with plaintiff's brief relating to evidence to
8 vote improper bias or animus. Am I correct? Is there
9 anything we -- I think we covered everything on that
10 one.

11 Then is there something still outstanding as
12 it relates to Dr. Duke?

13 MR. AICKLEN: There is, Your Honor. I
14 apologize. I thought we were done when I left this
15 afternoon. I thought we were going to do it now. So I
16 wasn't here when the issue came up.

17 THE COURT: Okay.

18 MR. AICKLEN: Josh Aicklen, for the
19 defendants, Your Honor.

20 My understanding of what was discussed, the
21 plaintiff didn't argue their personal attacks or to
22 discredit him based on him being my -- my wife's
23 physician. To tell you the truth, I brought that out
24 before the depo. If I had never brought it up, they
25 would have never known because of HIPAA.

But my wife in 2016 had a herniated disc,

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1 cervical spine. I asked Dr. John Herr who's the best
2 neurosurgeon in town, just like Ms. Cohen asked who's
3 the best neurosurgeon in town for the plaintiff, they
4 told me Derek Duke. I took my wife there. When I had
5 problems with it, a doctor told me I needed a
6 laminectomy, I went to him.

7 As far as allegations by plaintiff's counsel
8 that I spoke to Dr. Duke about Mr. Moradi, that's
9 absolutely false. And if needs be, if you want to
10 swear me in on that issue --

11 **THE COURT:** Hold on. All right. Are you
12 plan -- is anybody planning on bringing up his --

13 **MR. AICKLEN:** It was in the briefing.

14 **THE COURT:** -- his wife or him being --

15 **MR. RAVIPUDI:** With the understanding --

16 **THE COURT:** -- patients of Dr. Duke?

17 **MR. RAVIPUDI:** What the understanding is that
18 the scope of his testimony, as discussed before we took
19 the lunch break, that will not be the topic of
20 anything.

21 **THE COURT:** Okay. All right. I mean,
22 that's --

23 **MR. DIAL:** Your Honor, the scope that I
24 discussed this morning was what I was going to cover in
25 opening. I specifically said there might be other

A-14-698824-C • 03/24/2017

1 areas that Mr. Aicklen would want to discuss because
2 he's --

3 **THE COURT:** I am.

4 **MR. DIAL:** -- he's putting him on, not me.

5 **THE COURT:** Let me just say, I'm good with
6 what we discussed this morning, which was that he went
7 to see Dr. Duke, Dr. Duke looked at the scan --

8 **MR. AICKLEN:** CT scan.

9 **THE COURT:** -- said it was a normal-looking
10 scan, said that he might have a minor concussion, and
11 he should avoid stimulation for the next couple weeks.

12 **MR. RAVIPUDI:** Yeah. Whatever's contained in
13 his letter of diagnoses.

14 **THE COURT:** Letter of diagnosis. Are we
15 going --

16 **MR. AICKLEN:** Can I address that?

17 **THE COURT:** -- somewhere beyond that --

18 **MR. AICKLEN:** I would like to if I could,
19 Your Honor.

20 **THE COURT:** Okay. I mean, I'll let you do
21 that. I'm just saying --

22 **MR. AICKLEN:** I appreciate it.

23 **THE COURT:** -- I'm hoping that was going to
24 be where we were going to stop.

25 **MR. AICKLEN:** So that's where we're at now,

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1 but I'd like to go beyond that, if we could.

2 Your Honor, if I can approach, I want to show
3 you plaintiff's February 25th, 2015, designation, their
4 first initial 16.1.

5 **THE COURT:** Okay.

6 **MR. AICKLEN:** Just to show it to you real
7 quick.

8 **THE COURT:** I mean, this is yours, but, I
9 mean, do you know what he's showing me or --

10 **MR. PADDA:** If we can see what he's showing.

11 **MR. RAVIPUDI:** I haven't seen -- I don't
12 know.

13 **MR. AICKLEN:** It's your initial dated
14 February 25th.

15 **THE COURT:** Well, I know it's there. But, I
16 mean, rather than us have them hunt for it, show what
17 you're going to show me real quick so they know what
18 we're talking about.

19 **MR. AICKLEN:** Can we get the ELMO?

20 **THE COURT:** Yeah, you can use the ELMO. I
21 think we can.

22 **MR. AICKLEN:** I know it picked up on my blank
23 legal pad.

24 **THE COURT:** All right.

25 **MR. AICKLEN:** There we go. This is

A-14-698824-C • 03/24/2017

1 plaintiff's initial 16.1, Your Honor. This -- their
2 argument is that this witness should have been
3 designated by us, a report, testimony, history, and
4 everything. That is not correct. This witness is --
5 was a treating physician who plaintiff chose.

6 Now, under the federal rules, I could reach
7 out and talk to this doctor. But under the state
8 rules, I cannot. I couldn't have gone to Dr. Duke as a
9 treating physician and said, "Hey, I need you to do a
10 report. I need you to get me a rate sheet," and all
11 those things. I could not have designated him.

12 But I want you to know what the plaintiffs
13 designated him as. Dr. Derek A. Duke -- this is in
14 their initial disclosure -- is also listed, Your Honor,
15 within their 16(a) -- (3) (1) (a).

16 It says, "This witness and/or these witnesses
17 shall testify as to the authenticity and genuineness of
18 all records and billings; plaintiff's injuries and
19 causation therefor; the reasonableness and necessity of
20 all past, present, and future medical treatment
21 rendered to plaintiff, and causation therefor; the
22 reasonableness, necessity, customary nature of said
23 treatment, and relating billings and causation
24 therefor."

25 This is their description of how they're

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A-14-698824-C • 03/24/2017

1 going to use Dr. Duke.

2 Under 16.1 I have the right to rely upon that
3 in my -- whether I call him direct if they drop him as
4 a witness or in my cross-examination of him. I could
5 not ethically, under the state law, have reached out to
6 Dr. Duke to demand a report -- or to request a report
7 and a rate sheet and a case list that you normally do
8 with a 16.1 expert.

9 So -- but under 16.1, I want to show you
10 their pretrial designation as well.

11 Here is plaintiff's pretrial disclosure
12 pursuant to NRCP 16.1(a) (3) dated 1/6/2017. And it
13 just lists the witness. Right? You just have to
14 list -- this isn't an expert disclosure or 16.1. This
15 is these are who the witnesses are. We've already
16 described what they're going to testify to. Dr. Derek
17 A. Duke is in there.

18 So I have the right -- and also if you look
19 at our disclosure, Dr. Duke is in there. And it also,
20 in our disclosure, says that defendant reserves the
21 right to question any expert witness called by the
22 plaintiff.

23 So I would argue to you, Your Honor, that
24 Dr. Duke, even though he is a one-time treating
25 physician, if you think about an IME, even though he's

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1 not an IME doctor, so that order issue isn't there.
2 But if you think about an IME, the IME doctor only
3 sees -- generally only sees the plaintiff one time as
4 well. And every day we have very qualified Hallmark
5 experts coming in after one examination of the
6 plaintiff.

7 So I say that under our rules and 16.1, I
8 have a right to rely upon their designation of Duke as
9 an expert and to call him as such.

10 **THE COURT:** Okay. So what are you going to
11 want to call him to testify to?

12 **MR. AICKLEN:** The -- what you earlier
13 mentioned, okay, the factual.

14 Ms. Padda referred plaintiff to you. Did you
15 get a CT scan?

16 Yes.

17 Did you review it?

18 Yes.

19 Did you review a cervical CT?

20 Yes.

21 Did you talk to him?

22 Yes.

23 What did you tell him?

24 I told him he probably had a concussion; he
25 should take it easy for a couple weeks.

A-14-698824-C • 03/24/2017

1 Now, when I took his deposition -- so this
2 isn't going to come as a surprise to them -- I paid him
3 as an expert. He'd been designated as a causation
4 expert by the plaintiffs. And I asked him all the
5 expert questions.

6 "Did you find that he had a traumatic brain
7 injury?

8 "No, I did not. I found that he had
9 postconcussive syndrome.

10 "What's the difference between a TBI and
11 postconcussive?

12 "Well, postconcussive" --

13 **THE COURT:** I mean, did he find that during
14 his examination?

15 **MR. AICKLEN:** Yes, he did. He found it was
16 postconcussive syndrome.

17 **THE COURT:** Okay. All right. Go ahead.
18 What else? So we have everything -- okay. What
19 else -- where else are you going to go with him?

20 **MR. AICKLEN:** I would say that that's it.

21 **THE COURT:** Okay.

22 **MR. AICKLEN:** Did you examine him? Did you
23 tell him he had a postconcussive syndrome? Did you
24 find any traumatic brain injury?

25 No, sir, I did not.

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1 Why?

2 Here's why.

3 And the points that enforce it.

4 **THE COURT:** All right. What's the
5 plaintiff's position in reference to that?

6 **MR. RAVIPUDI:** So, again, if that is
7 literally the scope of the testimony, then that's the
8 scope of the testimony. I think that's -- just to put
9 it in front, this is Exhibit A to Dr. Duke's
10 deposition, which is part of the record. And I think
11 there's a stipulated admissibility as to this document.
12 And just to show it -- and then on Exhibit -- oops. I
13 hope I didn't do anything. There we go. Okay. Let me
14 try to zoom in now that I see how this works.

15 But here's the diagnoses. And, you know,
16 postconcussive syndrome with symptoms of decreased
17 concentration, photophobia, severe headache, and lack
18 of concentration. And he goes on to describe what his
19 findings are, in this document.

20 He specifically testifies in his deposition
21 he has no recollection of examining Mr. Moradi, has no
22 recollection of actually what was told to him, but this
23 is his -- I guess, his past recollection recorded.

24 And so he should be limited to that.

25 Questions were asked of Dr. Duke: Well, what do you

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1 think of neuroradiologist Dr. Keith Lewis?

2 Oh, I have lots of opinions about Dr. Lewis.

3 You know, that's --

4 **THE COURT:** You're not going there, are you?

5 **MR. AICKLEN:** No. I don't care about

6 Dr. Lewis.

7 **MR. RAVIPUDI:** Okay. Dr. Duke had not
8 reviewed any MRIs that were performed after the --
9 after his treatment of him on April 11. He doesn't
10 know what other doctors Mr. Moradi saw.

11 He specifically says in here that if he's got
12 any issues, he should continue to treat with the
13 neurologist. And that neurologist that he treated with
14 was not Dr. Duke.

15 So it really -- his scope of his exam is
16 limited to that. And if that's what's going to happen,
17 then --

18 **THE COURT:** Okay.

19 **MR. RAVIPUDI:** -- I've got no qualms.

20 **THE COURT:** I just feel like we're arguing
21 about nothing. I'm going to be frank. So, you know --
22 you know, Dr. Duke met him. He didn't find whatever
23 you said he didn't -- you asked him, did you find -- I
24 forget what.

25 **MR. AICKLEN:** Traumatic brain injury.

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1 **THE COURT:** -- traumatic brain injury. He
2 said, no. He'll say, "No, I didn't find it." You
3 don't have a problem if he says -- says that?

4 **MR. RAVIPUDI:** If he says that and that's
5 what his records are, that's fine.

6 **THE COURT:** I mean, that's --

7 **MR. RAVIPUDI:** Then if he says -- if the
8 question is asked, "Does he have a traumatic brain
9 injury?" he shouldn't be able to answer that question.
10 He should just say, "I didn't diagnose him" --

11 **THE COURT:** Well, you can ask him, "Did you
12 diagnose it?" And then he'd say --

13 **MR. RAVIPUDI:** -- whatever he says, yeah.

14 **THE COURT:** And that's fair. Whether he has
15 one -- he -- at least when he left there, he didn't
16 diagnose one.

17 **MR. RAVIPUDI:** That's it.

18 **THE COURT:** That's fair.

19 **MR. AICKLEN:** And I'm certainly -- just to
20 assuage the Court, I'm certainly not going to ask him
21 about developments with Mr. Moradi beyond his
22 treatment. He didn't look at any records or anything
23 like that.

24 **MR. RAVIPUDI:** That was the scope of our
25 motion.

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1 **THE COURT:** All right. I think we're --

2 **MR. RAVIPUDI:** Okay.

3 **THE COURT:** -- on the same page. You can ask
4 Dr. Duke about his one-day experience with Mr. Moradi
5 and his CT scan and what his conclusions were at the
6 end of the examination. You know, if there's something
7 far beyond what's in that letter -- I'm assuming that
8 you're -- you know, then raise it with me before you do
9 it. But that's -- that's -- that's fine, and everybody
10 seems to be on the same page. That's fine.

11 **MR. AICKLEN:** Thank you, Your Honor.

12 **MR. RAVIPUDI:** Thank you, Your Honor.

13 **THE COURT:** Okay. All right.

14 All right. Let me clarify. I've dealt with
15 the motion for reconsideration for summary judgment and
16 the joint and several liability materials. I go back,
17 and I see where defense is coming from with my original
18 minute order relating to Rockwell v. Sun Harbor Budget
19 Suites and minute order relating to whether the Marquee
20 security people were employees of The Cosmopolitan.

21 And I've gone back, looked at Rockwell v. Sun
22 Harbor, and I've gone back and read through the
23 available legislative history on 651.015.

24 While I don't find that the Marquee security
25 people were employees of The Cosmopolitan, I do find

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1 that The Cosmopolitan has a nondelegable duty and can
2 be vicariously held responsible for the conduct of the
3 Marquee security officers based upon Rockwell in which
4 Rockwell ultimately says that if someone such -- has a
5 responsibility for security, hires an independent
6 contractor to do it, that they still are responsible in
7 Nevada.

8 And I appreciate I've got other cases that
9 were given to me, but my reading of Rockwell is Nevada
10 adopts the rule which provides that, if you have an
11 obligation for security and you contract that away to
12 somebody else who then hires the security, you still
13 have a nondelegable duty, which effectively makes them
14 in the nature of employees, whether or not they really
15 are employees.

16 I've looked at 651.051, and, you know, it's
17 very clear the crux of that statute was looking at the
18 essentially criminal acts of third parties coming onto
19 the premises of casinos. I note that in testimony to
20 the Senate committee considering it, Harvey Whittemore
21 expressed that judicial interpretation could find that
22 the references to control and supervision would
23 encompass independent contractors.

24 It's going to be my ruling here that,
25 effectively, the concepts of control and supervision

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1 extend in this instance because I think that The
2 Cosmopolitan has a responsibility for security and it
3 can't escape that responsibility by essentially
4 subcontracting it and subleasing it off as it did in
5 this case.

6 I haven't had time to look at plaintiff's
7 joint venture theory, so I'm not making any
8 determination upon that. But I'm going to tell you
9 that at this point in time, I find that The
10 Cosmopolitan has a nondelegable duty in reference to
11 the security that -- in that, effectively, you know,
12 Marquee employees, if they did engage in intention or
13 negligent conduct, that can be vicariously held to The
14 Cosmopolitan.

15 Consequently, I'm going to deny the motion
16 for reconsideration of summary judgment, and I'm going
17 to find that for -- at this point in time, I'm going to
18 deny -- well, I don't know. Brief for determination of
19 several liability, I'm going to find that the Marquee
20 and Cosmopolitan -- I guess it should be Rooftop
21 Entertainment -- or Roof Deck Entertainment can be
22 jointly and severally liable.

23 So that's my rulings on that. Everybody is
24 going to disagree one way or another. Unless you
25 really feel you need something --

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1 **MR. ROBERTS:** Very --

2 **THE COURT:** -- on the record --

3 **MR. ROBERTS:** Very briefly --

4 **THE COURT:** -- I've made my decision, so...

5 **MR. ROBERTS:** I understand. This is just to
6 preserve the record. I don't know if we thoroughly
7 addressed it in the brief and find some of the
8 supplemental authority that we submitted.

9 And I just wanted to state, one, we don't
10 believe the record shows that Nevada Property was the
11 person in control of the premises who had the
12 nondelegable duty to hire security. In fact, Nevada
13 Restaurant is the one that hired Roof Deck, not just to
14 provide security but to operate the entire club; and,
15 therefore, it's not a parallel situation.

16 In addition, I would note that even in the
17 Rockwell case, in discussing the last cause of action,
18 the court analyzed the security guard as a third party
19 as to the landlord and said that there had to be
20 foreseeability in order to hold the landlord liable
21 under that final cause of action.

22 If the Court had truly meant that this was a
23 vicarious liability which could be imposed without any
24 foreseeability or fault on behalf of the landlord, it
25 would have been completely unnecessary to reach the

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1 issue of analysis of liability for a third party, as
2 the Rockwell court did in that case.

3 And if you look at that, they cite
4 Restatement 344. Restatement 344 is the concept which
5 the Rockwell court drew upon for their finding on the
6 third cause of action, which is also clear from the
7 comments that foreseeability of this event is a
8 condition to holding the landlord responsible for the
9 actions of the third-party security guard.

10 Thank you, Your Honor.

11 **THE COURT:** Okay.

12 **MR. AICKLEN:** Your Honor, on the issue of
13 joint and several liability?

14 **THE COURT:** Okay.

15 **MR. AICKLEN:** There are only negligence
16 actions against Cosmopolitan, and there are negligence
17 and also intentional acts allegations against Marquee.

18 So in the negligence actions, I think the
19 record is pretty clear and I think -- you know, I don't
20 want a preruling, but we are going to have a
21 comparative fault instruction under 41.141.

22 **THE COURT:** And, you know, I'm not -- I'm
23 not -- I'm just saying at this point in time, in terms
24 of what you asked me, I'm not prepared to say there is
25 a joint and several liability. You may very well --

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1 **MR. AICKLEN:** Wait. There is or is not?

2 **THE COURT:** You can be held jointly and
3 severally liable.

4 **MR. AICKLEN:** At this moment.

5 **THE COURT:** At this time, yes.

6 Now, as the case develops and I get the jury
7 instructions, I'll take a look at the comparative
8 negligence issue.

9 **MR. AICKLEN:** Okay.

10 **THE COURT:** But you're wanting something
11 today because you said you needed it for opening
12 statements on Monday. So I'm giving you my initial --
13 my initial position in all this right now.

14 **MR. AICKLEN:** All right. Your Honor, then I
15 would ask, though, that the issue of joint and several
16 liability not be addressed -- that's a legal issue --
17 it not be addressed in opening statement.

18 **THE COURT:** I don't -- I assume you're not
19 going to get into that in opening statements, but I was
20 told you needed a preliminary decision from me for your
21 opening statements; otherwise, I would have put off
22 dealing with this in more detail to begin with.

23 **MR. AICKLEN:** So the understanding is with
24 prejudice and they can't open it -- or discuss it in
25 opening because it's a legal issue, an instruction of

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1 law, then --

2 **THE COURT:** Were you planning on discussing
3 it in opening?

4 **MR. RAVIPUDI:** "Joint and several liability"
5 were not words that I thought I would be using in
6 opening statement.

7 **THE COURT:** All right. Then there's -- we'll
8 deal with the issue in more detail later.

9 **MR. AICKLEN:** All right. Thank you, Your
10 Honor. So denied without prejudice.

11 **THE COURT:** Yeah, denied without prejudice.

12 **MR. AICKLEN:** Okay. Thank you.

13 **THE COURT:** Okay. So okay. Let's look at
14 the Wynn records. I gave you my preliminary ruling
15 this morning. I am generally good with letting in
16 defendant's gaming activity, both prior to the incident
17 and after the incident, both in terms of the games
18 played and the amount of time spent playing the games.

19 I'm open as to the issue of win or loss,
20 whether or not that's really necessary to include
21 and -- but I'll let you give me some more thought in
22 that regard. I'm not inclined to get into any records,
23 you know, he open -- you know, somebody stuck a card
24 key in the door or he ate something out of the mini bar
25 or he went to a restaurant and ate anything. I'm

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(Whereupon, the proceedings concluded at 3:58 p.m.)

-o0o-

ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF
PROCEEDINGS.

Amber M. McClane
 /S/ Amber M. McClane, NV CCR No. 914

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CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

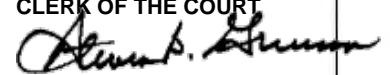
That on September 13, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S APPENDIX OF EXHIBITS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

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Executed on the 13th day of September, 2019.


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16 ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

23 ASPEN SPECIALTY INSURANCE
24 COMPANY; NATIONAL UNION FIRE
25 INSURANCE COMPANY OF
26 PITTSBURGH PA.; ROOF DECK
ENTERTAINMENT, LLC d/b/a MARQUEE
NIGHTCLUB; and DOES 1 through 25,
inclusive,

27 Defendants.
28

CASE NO.: A-17-758902-C
DEPT.: XXVI

HEARING REQUESTED

**DEFENDANT NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH PA'S MOTION FOR
SUMMARY JUDGMENT**


1 Comes now, Defendant National Union Fire Insurance Company of Pittsburgh, PA, by and
2 through its attorneys of record, and hereby moves for summary judgment on Plaintiff St. Paul Fire
3 & Marine Insurance Company's Second, Fourth, Seventh and Eighth Causes of Action in the First
4 Amended Complaint.

5 This Motion is made and based upon the Memorandum of Points and Authorities,
6 Declarations of Nicholas B. Salerno and Richard Perkins in support thereof, the Appendix and all
7 attached Exhibits, all papers and pleadings on file with the Court in this action, and any argument
8 that may be heard at the hearing of this Motion.

9
10 DATED: September 12, 2019

HEROLD & SAGER

11
12 By:


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27 ENTERTAINMENT, LLC dba
28 MARQUEE NIGHTCLUB

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND	2
A. Underlying Action.....	2
B. Insurance Policies.....	4
1. The Cosmopolitan Insurance Tower	4
a. Cosmopolitan's Primary Policy with Zurich American Insurance Company	4
b. Cosmopolitan's Excess Policy with St. Paul.....	4
2. The Marquee Insurance Tower	5
a. Marquee's Primary Policy with Aspen Specialty Insurance Company.....	5
b. Marquee's Excess Policy with National Union	5
C. St. Paul's Claims Against National Union	6
III. LEGAL STANDARDS.....	8
IV. STATEMENT OF UNDISPUTED FACTS	9
V. NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE SECOND AND FOURTH CAUSES OF ACTION BECAUSE ST. PAUL HAS NO LEGAL BASIS TO ASSERT A CLAIM FOR EQUITABLE SUBROGATION	12
A. Finding An Equitable Subrogation Claim Between Insurers Creates New Nevada Law The Nevada Supreme Court Has Never Recognized	12
B. Finding An Equitable Subrogation Claim Between Excess Carriers in Separate Towers of Coverage Providing the Same Level of Coverage Creates New Law No Known Court Anywhere Has Recognized	12
C. Nevada Has Rejected Claims for Conventional Subrogation Between Insurers	14
VI. NATIONAL UNION IS ALSO ENTITLED TO SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION BECAUSE A SUPERIOR EQUITY CANNOT EXIST BETWEEN EXCESS INSURERS WITH THE SAME OBLIGATIONS TO THE INSURED	15

1
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TABLE OF CONTENTS (continued)

Page

VII. NATIONAL UNION IS ALSO ENTITLED TO SUMMARY JUDGMENT ON THE
FOURTH CAUSE OF ACTION BECAUSE COSMOPOLITAN HAS SUFFERED NO
DAMAGES 17

VIII. NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE EIGHTH
CAUSE OF ACTION BECAUSE EQUITABLE CONTRIBUTION IN NOT AN
AVAILABLE REMEDY AS A MATTER OF LAW 19

 A. Contribution Claims Between Insurers is Not An Established Right Under Nevada
 Law..... 19

 B. Contribution is Not An Available Remedy to Seek Damages Beyond
 Policy Limits 19

IX. NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE SEVENTH
CAUSE OF ACTION WHERE AS HERE ST. PAUL HAS NO LEGAL BASIS TO
ASSERT CLAIMS FOR SUBROGATION AND EQUITABLE CONTRIBUTION 20

X. CONCLUSION 21

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Ace American Ins. Co. v. Fireman's Fund Ins. Co.</i> 2 Cal.App.5th 159 (2016).....	12
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<i>Bramalea California, Inc. v. Reliable Interiors, Inc.</i> 119 Cal.App.4th 468 (2004).....	17
<i>Bulbman, Inc. Nevada Bell</i> 108 Nev. 105 (Nev. 1992).....	8
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<i>Carmel Dev. Co. v. RLI Ins. Co.</i> 126 Cal.App.4th 502 (2005).....	13
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TABLE OF AUTHORITIES (continued)

	<u>Page(s)</u>
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<i>Mahban v. MGM Grand Hotels, Inc.</i> 100 Nev. 593 (1984)	20
<i>Matsushita Electric Industrial Co. v. Zenith Radio</i> 475 U.S. 574 (1986)	8
<i>Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.</i> 126 Cal.App.3d 593 (1981)	13
<i>Progressive West Ins. Co. v. Yolo County Sup. Ct.</i> 135 Cal.App.4th 263 (2005)	15
<i>Richardson v. Jones</i> 1 Nev. 405 (1865)	17
<i>Sapiano v. Williamsburg Nat'l Ins. Co.</i> 28 Cal.App.4th 533 (1994)	15
<i>Sompo Japan Ins. Co. of America v. Action Exp., LLC</i> 19 F.Supp.3d 954 (C.D. Cal. 2014)	16
<i>State Farm General Ins. Co. v. Wells Fargo Bank, N.A.</i> 143 Cal.App.4th 1098 (2006)	16
<i>Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co.</i> 93 Cal.App.4th 1142 (2001)	13
<i>Viets v. Wachovia Mortg.</i> 2012 WL 6720617 (D. Nevada Dec. 26, 2012)	20
<i>Wood v. Safeway v. Zenith Radio</i> 121 Nev. 724 (2005)	8
<u>Nevada Rules of Civil Procedure</u>	
Rule 56	8

I.

INTRODUCTION

The claims raised by Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") in the First Amended Complaint ("FAC") against Defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union") fail as a matter of law. Subrogation and equitable contribution claims between insurers are not established rights in Nevada. For this Court to find in St. Paul's favor on these claims would create new Nevada law. Even if such claims between insurers were established in Nevada (which they are not), St. Paul has no legal basis to pursue either type of claim against National Union because subrogation and equitable contribution claims between equal level excess insurers have never been allowed in any known jurisdiction and this Court should not be the first to create such new law.

On these legal issues, National Union submitted a motion to dismiss St. Paul's claims against National Union in this matter. On February 28, 2019, the Court issued a minute order denying the motion to dismiss on the premise such motion asked the court to go beyond the pleadings to analyze insurance policies without testing through discovery whether the National Union excess policy was complete and due to the absence of the St. Paul policy from the record.¹ As such, the motion to dismiss was denied without prejudice to raise the presented issues in a motion for summary judgment. In so doing, the Court's Minute Order stated "[b]ased on the record before the Court at this time, there appears to be no material questions of fact and the only issues remaining are purely questions of law."

Discovery has now established the true and correct copies of the insurance policies that are relevant to a determination of the legal issues necessary to decide summary judgment of the claims against National Union as a matter of law. Namely, that the St. Paul policy is not excess to the National Union policy as a matter of law because St. Paul and National Union are both excess carriers at the same level of coverage for the common insured, Cosmopolitan. As such, even if Nevada were to recognize a right of subrogation by an excess carrier against a lower-level carrier

¹ Despite repeated requests, St. Paul refused to attach its insurance policy to the First Amended Complaint.

1 (which the Nevada Supreme Court has never done), St. Paul's subrogation claims against National
2 Union fail as a matter of law.

3 In the Second and Fourth Causes of Action, St. Paul asserts claims against National Union
4 premised on an alleged right to subrogation for which it has no legal basis or standing to pursue
5 given that St. Paul and National Union are both excess insurers at the same level of coverage. Both
6 of these causes of action, if recognized at all, are inapplicable between carriers who offer coverage
7 to a common insured at the same level of coverage.

8 The Second Cause of Action also fails because St. Paul cannot show a superior equity
9 position to National Union as a matter of law because it had its own independent obligations to
10 Cosmopolitan and could have settled the underlying action prior to verdict if desired. The Fourth
11 Cause of Action also fails because St. Paul has no legal basis or standing to step into the shoes of
12 Cosmopolitan to pursue subrogation for breach of contract against National Union when, as in the
13 underlying action, Cosmopolitan was fully defended and indemnified by the insurers and, thus,
14 suffered no damages covered under the insurance contract.

15 The Eighth Cause of Action for equitable contribution fails as a matter of law given
16 contribution between insurers is not a recognized remedy in Nevada and, if it were, contribution
17 does not apply to an attempt to recover damages outside of policy limits as St. Paul attempts to do
18 here. The Seventh Cause of Action for equitable estoppel fails as a matter of law given it is
19 dependent on the legal viability of the other causes of action against National Union that fail as a
20 matter of law and seeks no monetary damages. Accordingly, National Union is entitled to summary
21 judgment as a matter of law.

22 II.

23 FACTUAL BACKGROUND

24 A. Underlying Action

25 This action arises out of an underlying bodily injury action captioned *David Moradi v.*
26 *Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case
27 No. A-14-698824-C ("Underlying Action"). (FAC ¶ 6.) Plaintiff David Moradi ("Moradi") alleged
28 that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan

1 Hotel and Casino to socialize with friends, when he was beaten by Marquee employees, whose
2 conduct was allegedly ratified, encouraged and countenanced by Cosmopolitan, resulting in bodily
3 injuries. (FAC ¶¶ 6-7.) Moradi filed a complaint against Nevada Property 1, LLC d/b/a The
4 Cosmopolitan of Las Vegas (“Cosmopolitan”) and Roof Deck Entertainment, LLC d/b/a Marquee
5 Nightclub (“Marquee”) on April 4, 2014, asserting causes of action for Assault and Battery,
6 Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (FAC ¶¶ 8-10,
7 Exhibit A.) Moradi alleged that, as a result of his injuries, he suffered past and future lost
8 wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit
9 A.)

10 During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the
11 owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced
12 exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)
13 Specifically, the Court held as a matter of law that Cosmopolitan, as owner of the property, “had a
14 nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security
15 officers...” and that Marquee and Cosmopolitan can be jointly and severally liable. (RJN, Ex. 5.)

16 After a five-week trial, the jury in the Underlying Action issued a special verdict on April
17 26, 2017 finding that Moradi established his claims for assault, battery, false imprisonment and
18 negligence against Marquee and Cosmopolitan jointly and that the actions of the employees of the
19 Marquee nightclub were a legal cause of injury or damage to Moradi and awarded compensatory
20 damages in the amount of \$160,500,000. (FAC, Ex. C.) After the verdict and during the punitive
21 damages phase of the trial, Moradi made a global settlement demand to Marquee and
22 Cosmopolitan. (FAC ¶ 66.) National Union, St. Paul and the other insurers accepted the settlement
23 demand and resolved the Underlying Action with the confidential contributions set forth in the FAC
24 filed by St. Paul under seal. (FAC ¶¶ 67-70.) The settlement was funded entirely by the various
25 insurance carriers for the entities at issue, no defendant in the underlying case contributed any
26 money toward the settlement.

27 ///

28 ///

1 **B. Insurance Policies**

2 **1. The Cosmopolitan Insurance Tower**

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

5 Zurich American Insurance Company ("Zurich") issued commercial general liability policy
6 number PRA 9829242-01, effective November 1, 2011 to November 1, 2012 to Nevada Property 1
7 LLC ("Zurich Primary Policy"). (FAC ¶ 69; Declaration of Nicholas B. Salerno ("Salerno Decl."),
8 Ex. 3, at T000040.) Cosmopolitan is an insured under the Zurich Primary Policy. (Salerno Decl.,
9 Ex. 2, at W005478.) The Zurich Primary Policy contains limits of \$1,000,000 each occurrence and
10 \$2,000,000 general aggregate. (Salerno Decl., Ex. 2, at W005508.) The Zurich Primary Policy
11 provides that Zurich will pay "those sums that the insured becomes legally obligated to pay as
12 damages because of 'bodily injury' or 'property damage' to which this insurance applies." (Salerno
13 Decl., Ex. 2, at W005497 – W005498.) The Zurich primary Policy provides that it applies to
14 "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the
15 policy period. (Id.)

16 **b. Cosmopolitan's Excess Policy with St. Paul**

17 St. Paul issued commercial umbrella liability policy number QK06503290, effective March
18 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group ("St. Paul Excess Policy") (FAC
19 ¶ 40; Salerno Decl., Ex. 3, at T000002.) Cosmopolitan is an insured under the St. Paul Excess
20 Policy. (FAC ¶ 40; Salerno Decl., Ex. 3, at T000056.) The St. Paul Excess Policy contains limits of
21 \$25,000,000 with each occurrence and \$25,000,000 general aggregate. (Salerno Decl., Ex. 3, at
22 T000002.) The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums
23 in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by
24 reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained
25 Limit" that the named insured becomes legally obligated to pay as damages assumed by the named
26 insured under an "Insured Contract." (Salerno Decl., Ex. 3, at T000007.)

27 ///

28 ///

1 The St. Paul Excess Policy contains an Other Insurance provision, which provides:

2 If Other Insurance applies to damages that are also covered by this policy,
3 this policy will apply excess of and shall not contribute with, that Other
4 Insurance, whether it is primary, excess, contingent or any other basis.
However, this provision will not apply if the Other Insurance is specifically
written to be excess of this policy.

5 (Salerno Decl., Ex. 3, at T000025.)

6 **2. The Marquee Insurance Tower**

7 **a. Marquee's Primary Policy with Aspen Specialty Insurance Company**

8 Aspen Specialty Insurance Company ("Aspen") issued primary commercial general liability
9 policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 to The Restaurant
10 Group et. al. ("Aspen Primary Policy"). (FAC ¶ 15; Declaration of Richard C. Perkins in Support of
11 National Union Fire Insurance Company of Pittsburgh PA's Motion for Summary Judgment
12 ("Perkins Decl."), Ex. 1, at 32.) Marquee is an insured under the Aspen Policy. (Salerno Decl., Ex.
13 4, at ASPEN000063.) The Aspen Policy contains limits of \$1,000,000 each occurrence and
14 \$2,000,000 general aggregate. (Salerno Decl., Ex. 4, at ASPEN000036.) The Aspen Policy provides
15 that Aspen will pay "those sums that the insured becomes legally obligated to pay as damages
16 because of 'bodily injury' or 'property damage' to which this insurance applies." (Salerno Decl.,
17 Ex. 4, at ASPEN000042.) The Aspen Policy provides that it applies to "bodily injury" and
18 "property damage" only if caused by an "occurrence" that occurs during the policy period. (Id.)

19 **b. Marquee's Excess Policy with National Union**

20 National Union issued commercial umbrella liability policy number BE 25414413, effective
21 October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. ("National Union Excess
22 Policy") (Perkins Decl., Ex. 1, at 6.) Marquee is an insured under the National Union Excess Policy.
23 (FAC ¶ 30; Perkins Decl., Ex. 1, at 57.) The National Union Excess Policy contains limits of
24 \$25,000,000 each occurrence and \$25,000,000 general aggregate. (Perkins Decl., Ex. 1, at 6.) The
25 National Union Excess Policy provides that National Union will pay on behalf of the insured "those
26 sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages
27 by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and
28 Advertising Injury to which this insurance applies or because of Bodily Injury or Property Damage

1 to which this insurance applies assumed by the Insured under an Insured Contract.” (Perkins Decl.,
2 Ex. 1, at 8.) The National Union Excess Policy defines Retained Limit, in pertinent part, as the total
3 applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance providing
4 coverage to the Insured. ((Perkins Decl., Ex. 1, at 30.) The policy defines Scheduled Underlying
5 Insurance as the policy or policies of insurance and limits of insurance shown in the Schedule of
6 Underlying Insurance forming a part of the National Union Excess Policy. (Id.) Other Insurance is
7 defined in the National Union Excess Policy as a valid and collectible policy of insurance providing
8 coverage for damages covered in whole or in part by this policy. (Perkins Decl., Ex. 1, at 29.)

9 The National Union Excess Policy contains an Other Insurance provision, which provides:

10 If other valid and collectible insurance applies to damages that are also
11 covered by this policy, this policy will apply excess of the Other Insurance.
12 However, this provision will not apply if the Other Insurance is specifically
written to be excess of this policy. (Perkins Decl., Ex. 1, at 23.)

13 Cosmopolitan was an additional insured to the National Union Excess Policy with respect to
14 the Underlying Action. (FAC ¶ 33.) National Union received notice of the Underlying Action
15 against Marquee and Cosmopolitan and provided a defense to Cosmopolitan and Marquee in the
16 Underlying Action under a reservation of rights. (FAC ¶ 35.)

17 **C. St. Paul’s Claims Against National Union**

18 In the Second Cause of Action for Subrogation – Breach of the Duty to Settle, St. Paul
19 alleges that National Union breached its duty to settle by refusing to settle the Underlying Action in
20 response to pre-trial settlement demands within its applicable policy limits and by failing to initiate
21 and/or attempt settlement prior to or during trial for an amount within the applicable policy limits.
22 (FAC ¶¶ 88-89.) St. Paul further asserts that it is subrogated under its policy and principles of
23 equity to the rights of Cosmopolitan for claims against National Union for breach of the duty to
24 settle and seeks reimbursement for the amount St. Paul paid towards the settlement of the
25 Underlying Action. (*Id.* at ¶¶ 93-95.)

26 In its Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract, St.
27 Paul makes very similar allegations to those raised in its cause of action for breach of the duty to
28 settle. St. Paul asserts that National Union breached its obligations to Cosmopolitan by failing to

1 provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan's interests,
2 failing to pay all available limits under the National Union Excess Policy to resolve Cosmopolitan's
3 liability, and failing to pay any amount on Cosmopolitan's behalf towards the settlement of the
4 Underlying Action. (FAC ¶ 105.) St. Paul claims it was damaged because it was required to
5 contribute to the settlement of the Underlying Action as a result of this alleged breach. (*Id.* ¶¶ 108,
6 111.) St. Paul alleges that pursuant to the express terms of the St. Paul Primary Policy and
7 principles of subrogation, it is entitled to step into Cosmopolitan's shoes and pursue its rights of
8 recovery against National Union. (*Id.* ¶ 110.)

9 St. Paul's Seventh Cause of Action for Equitable Estoppel is asserted against both National
10 Union and Aspen. St. Paul alleges that, throughout the Underlying Action, the insurers represented
11 "through both words and actions" that the coverage provided by Aspen and National Union to
12 Cosmopolitan was primary to Cosmopolitan's direct coverage under Cosmopolitan's own policies,
13 including the St. Paul Excess Policy. (FAC ¶ 132.) St. Paul alleges that it and Cosmopolitan's other
14 direct carriers did not participate in the defense or settlement negotiations on behalf of
15 Cosmopolitan based on these representations. (*Id.* ¶ 134.) St. Paul alleges that equity requires that
16 National Union now be precluded from claiming that St. Paul and National Union were co-excess
17 carriers and that St. Paul had the same obligation to resolve the Underlying Action.

18 Finally, in its Eighth Cause of Action, St. Paul seeks Equitable Contribution from National
19 Union. St. Paul alleges that in contributing to the settlement of the Underlying Action, it incurred
20 amounts in excess of its equitable share and that National Union failed to contribute its fair and
21 equitable share towards the settlement of the Underlying Action on behalf of Cosmopolitan. (FAC
22 ¶¶ 138-139.) St. Paul accordingly alleges that National Union is obligated under principles of equity
23 to reimburse St. Paul for the settlement amounts St. Paul contributed towards settlement of the
24 Underlying Action. (*Id.* ¶ 141.)

25 All of these causes of action against National Union fail as a matter of law. The FAC asserts
26 that principles of equity entitle it to subrogation against National Union. The Nevada Supreme
27 Court, however, has not recognized an insurer's right to pursue equitable subrogation or equitable
28 contribution against another insurer. Additionally, Nevada courts have rejected an insurer's claim

1 for contractual subrogation against another insurer, which precludes St. Paul's claims that are not
2 based on equity. Further, even if claims for contractual and/or equitable subrogation were
3 recognized in Nevada, St. Paul's claims against National Union fail as a matter of law given St.
4 Paul and National Union were both excess insurers at the same level of coverage. In other words,
5 St. Paul has no superior equity to National Union as St. Paul owed a separate concurrent duty to
6 Cosmopolitan to settle the Underlying Action.

7 St. Paul's alternative claim for equitable contribution against National Union fails as the
8 National Union Excess Policy exhausted when the Underlying Action was settled, precluding any
9 further contribution obligation from National Union. Finally, St. Paul's claim for equitable estoppel
10 fails as it is derivative of St. Paul's other causes of action and seeks no monetary damages.
11 Accordingly, all of the claims alleged in St. Paul's FAC fail as a matter of law.

12 III.

13 LEGAL STANDARDS

14 Nevada Rules of Civil Procedure ("NRCPP") 56(a) and (b) authorize the court to enter
15 summary judgment "upon all or any part" of the claims made by or against the moving party.
16 Summary judgment is appropriate when the pleadings and all other evidence before the court
17 demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to
18 judgment as a matter of law. *Frederic and Barbara Rosenberg Living Trust v. MacDonald*
19 *Highlands Realty, LLC*, 427 P.3d 104, 109 (Nev. 2018); *Wood v. Safeway*, 121 Nev. 724 (2005).

20 While evidence is interpreted in favor of the non-moving party, the non-moving party must
21 "do more than simply show that there is some 'metaphysical doubt' as to the operative facts in
22 order to avoid summary judgment being entered in the moving party's favor." *Wood*, 121 Nev. at
23 732 (quoting *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986)).
24 Accordingly, the non-moving party "must, by affidavit or otherwise, set forth specific facts
25 demonstrating the existence of a genuine issue for trial or have summary judgment entered against
26 him." *Id.* (quoting *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110 (Nev. 1992)). This Motion
27 establishes that there is no genuine issue of material fact and that National Union is entitled to
28 judgment as a matter of law on all of the claims asserted by St. Paul.

IV.

STATEMENT OF UNDISPUTED MATERIAL FACTS

No.	Undisputed Fact	Supporting Evidence
1.	This action arises out of an underlying bodily injury action captioned <i>David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.</i> , District Court Clark County, Nevada, Case No. A-14-698824-C (“Underlying Action”).	FAC ¶ 6.
2.	In the Underlying Action, David Moradi (“Moradi”) alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was attacked by Marquee employees resulting in personal injuries.	FAC ¶¶ 6-7.
3.	Moradi filed his complaint in the Underlying Action against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas (“Cosmopolitan”) and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub (“Marquee”) on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment.	FAC ¶¶ 8-10, Ex. A.
4.	Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages.	FAC ¶ 9, Ex. A.
5.	During the course of the Underlying Action, Moradi asserted that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi.	FAC ¶ 13.
6.	The Court in the Underlying Action held as a matter of law that Cosmopolitan, as owner of the property, “had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers...” and that Marquee and Cosmopolitan could be held jointly and severally liable.	RJN, Ex. 5.
7.	The Underlying Action went to trial and, on April 28, 2017, the jury returned a verdict in Moradi’s favor and awarded compensatory damages in the amount of \$160,500,000.	FAC, Ex. C.
8.	During the punitive damages phase of the trial in the Underlying Action, Moradi made a global settlement demand to Marquee and Cosmopolitan	FAC ¶ 66.

1	No.	Undisputed Fact	Supporting Evidence
2	9.	National Union, St. Paul and the other insurers accepted Moradi's settlement demand and resolved the Underlying Action, the specific contributions of which are confidential.	FAC ¶ 67-70.
3			
4	10.	National Union and St. Paul contributed the same amount towards the settlement of the Underlying Action.	FAC ¶ 67-70.
5			
6	11.	National Union issued commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. ("National Union Excess Policy")	Perkins Decl., Ex. 1
7			
8	12.	Marquee is an insured under the National Union Excess Policy	FAC ¶ 30; Perkins Decl., Ex. 1.
9	13.	The National Union Excess Policy contains limits of \$25,000,000 each occurrence and \$25,000,000 general aggregate.	Perkins Decl., Ex. 1.
10			
11	14.	The National Union Excess Policy provides that National Union will pay on behalf of the insured "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and Advertising Injury to which this insurance applies or because of Bodily Injury or Property Damage to which this insurance applies assumed by the Insured under an Insured Contract."	Perkins Decl., Ex. 1.
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18	15.	The National Union Excess Policy contains an Other Insurance provision, which provides: "If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the Other Insurance. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy."	Perkins Decl., Ex. 1.
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23	16.	The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy	Perkins Decl., Ex. 1.
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27	17.	National Union's contribution towards the settlement of the Underlying Action exhausted the National Union Excess Policy.	Perkins Decl., Ex. 1; FAC ¶ 68.
28			

1	No.	Undisputed Fact	Supporting Evidence
2	18.	Cosmopolitan was an additional insured to the National Union umbrella policy with respect to the Underlying Action.	FAC ¶ 33
3	19.	National Union received notice of the Underlying Action against Marquee and Cosmopolitan and provided a defense to Cosmopolitan and Marquee in the Underlying Action under a reservation of rights.	FAC ¶ 35
4	20.	St. Paul issued commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group ("St. Paul Excess Policy")	FAC ¶ 40; Salerno Decl., Ex. 3
5	21.	Cosmopolitan is an insured under the St. Paul Excess Policy.	FAC ¶ 40; Salerno Decl., Ex. 3
6	22.	The St. Paul Excess Policy contains limits of \$25,000,000 with each occurrence and \$25,000,000 general aggregate.	Salerno Decl., Ex. 3
7	23.	The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained Limit" that the named insured becomes legally obligated to pay as damages assumed by the named insured under an "Insured Contract."	Salerno Decl., Ex. 3, at T000007
8	24.	The St. Paul Excess Policy contains an other insurance provision, which provides: If Other Insurance applies to damages that are also covered by this policy, this policy will apply excess of and shall not contribute with, that Other Insurance, whether it is primary, excess, contingent or any other basis. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.	Salerno Decl., Ex. 3, at T000025

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V.

**NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE SECOND AND
FOURTH CAUSES OF ACTION BECAUSE ST. PAUL HAS NO LEGAL BASIS TO
ASSERT A CLAIM FOR EQUITABLE SUBROGATION**

**A. Finding An Equitable Subrogation Claim Between Insurers Creates New Nevada Law
The Nevada Supreme Court Has Never Recognized**

The Nevada Supreme Court has never recognized a subrogation claim between insurers. St. Paul's claim for equitable subrogation for failure to settle fails as a matter of law because Nevada has not established an insurer's right to pursue a claim for equitable subrogation against another insurer, let alone allowing an insurer to pursue another insurer for failure to settle. Given equitable subrogation against other insurers is not a right for insurers in Nevada, St. Paul has no legal basis to assert equitable subrogation claims against National Union based upon National Union's alleged failure to settle.

**B. Finding An Equitable Subrogation Claim Between Excess Carriers in Separate Towers
of Coverage Providing the Same Level of Coverage Creates New Law No Known
Court Anywhere Has Recognized**

Even if equitable subrogation claims between insurers were established in Nevada (which they are not), St. Paul cannot not pursue such a claim against National Union because no known court has allowed a subrogation claims between the equal level excess insurers. National Union respectfully submits that this Court should not be the first to make that new law.

In opposing this motion, National Union expects St. Paul will cite cases from a Nevada federal District Court and other jurisdictions, such as California, which have allowed an *excess insurer* to pursue equitable subrogation *against a lower level insurer in the same tower of coverage* for failure to settle. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 (D. Nev. June 9, 2016); *Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co.*, 938 F.Supp.2d 908, 916-917 (C.D. Cal. 2013); *Ace American Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal.App.5th 159 (2016). However, the circumstances of this matter are markedly different from the *Colony* case and the California cases where excess insurers have been allowed to pursue lower level insurers in the same tower of coverage for failure to settle an underlying case.

1 In the FAC, St. Paul asserts that its policy is excess to the National Union Excess Policy.
2 (*see, e.g.*, FAC ¶ 44.) However, general insurance principles and the St. Paul and National Union
3 policies demonstrate that it is indisputable the St. Paul Excess Policy is not excess to National
4 Union's Excess Policy as a matter of law. It is well-established that "[p]rimary coverage is
5 insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the
6 happening of the occurrence that gives rise to liability" and that "[e]xcess or secondary coverage is
7 coverage whereby, under the terms of the policy, liability attaches only after a predetermined
8 amount of primary coverage has been exhausted." *Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co.*,
9 93 Cal.App.4th 1142, 1149 (2001) citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126
10 Cal.App.3d 593, 597-598 (1981); *Carmel Dev. Co. v. RLI Ins. Co.*, 126 Cal.App.4th 502, 513-514
11 (2005) (finding "umbrella coverage is generally regarded 'as true excess over and above any type of
12 primary coverage, excess provisions arising in any manner, or escape clauses'." (Citation omitted.)

13 As admitted by St. Paul in the FAC and shown by the National Union and St. Paul policies,
14 St. Paul and National Union both issued umbrella policies and, as such, are co-excess insurers
15 which provided coverage to Cosmopolitan under two separate and distinct coverage towers, *i.e.*, as
16 a named insured under the St. Paul Excess Policy and as an additional insured under the National
17 Union Excess Policy. (FAC ¶¶ 30, 40; Perkins Decl., Ex. 1.) St. Paul's self-serving graphic in the
18 FAC depicting the St. Paul and National Union policies in a single tower, which reflects St. Paul as
19 a second layer excess policy above National Union is misleading and contrary to the indisputable
20 facts as a matter of law.

21 Marquee and Cosmopolitan had separate insurance towers. Marquee was a named insured
22 on the Aspen Primary Policy and National Union Excess Policy, while Cosmopolitan was a named
23 insured under the Zurich Primary Policy and the St. Paul Excess Policy. Cosmopolitan qualified as
24 an additional insured under the policies issued by Aspen and National Union, but that status did not
25 alleviate St. Paul's obligations to Cosmopolitan under its separate tower of coverage and does not
26 position St. Paul as a second layer excess carrier above National Union as St. Paul contends. An
27 accurate graphic of the insurance towers for Marquee and Cosmopolitan is as follows:

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MARQUEE TOWER
National Union Fire Insurance Company of Pittsburgh, PA (Umbrella)
Aspen Specialty Insurance Company (Primary)

COSMOPOLITAN TOWER
St. Paul Fire & Marine Insurance Company (Umbrella)
Zurich American Insurance Company (Primary)

Further, the National Union Excess Policy is a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured, including St. Paul. (Perkins Decl., Ex. 1.) The St. Paul Excess Policy similarly provides that it is excess over scheduled underlying insurance and applicable other insurance providing coverage to the insured. (Salerno Decl., Ex. 3.) The National Union and St. Paul policies contain nearly identical excess other insurance provisions. When two policies contain such language, applicable law requires that neither policy shall be excess to the other. *See Everest Nat. Ins. Co. v. Evanston Ins. Co.*, 2011 WL 534007 at *3 (Feb. 8, 2011) (ruling judgment and defense costs were to be shared equally between insurers that contained the same amounts of limits and both contained Other Insurance clauses providing they were excess to other available insurance); *See, CSE Ins. Group v. Northbrook Property & Cas. Co.*, 23 Cal.App.4th 1839, 1842-1843 (1994); *Century Surety Co. v. United Pacific Ins. Co.*, 109 Cal.App.4th 1246, 1257 (2003).

The St. Paul Excess Policy is not excess to the National Union Excess Policy as a matter of law. Both St. Paul and National Union had independent obligations to Cosmopolitan as a matter of law, both discharged those obligations, both had the same limits of insurance, and neither is in an equitably superior position as to the other. Accordingly, even if the Court were to recognize equitable subrogation rights under Nevada law, St. Paul has no legal basis to assert a claim for subrogation against National Union for failure to settle the Underlying Action.

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1 **C. Nevada Has Rejected Claims for Conventional Subrogation Between Insurers**

2 In its FAC, as compared to its original complaint, St. Paul deleted the word “equitable”
3 from its subrogation causes of action and seeks to step into Cosmopolitan’s shoes to pursue
4 subrogation “under its policy, by law, and principles of equity”, presumably asserting liability
5 theories under both conventional and equitable subrogation. (FAC ¶ 93.) However, St. Paul’s
6 attempt to expand its claim to include a claim for conventional (or contractual) subrogation does
7 not save its causes of action, as any right to subrogation an insurer may have arises by operation of
8 law and is not dependent on or enlarged by policy provisions. *Sapiano v. Williamsburg Nat’l Ins.*
9 *Co.*, 28 Cal.App.4th 533, 538 (1994) (noting that although insurers may place subrogation clauses
10 in their policies, those provisions typically are general and add nothing to the rights of subrogation
11 arising by law); *Progressive West Ins. Co. v. Yolo County Sup. Ct.*, 135 Cal.App.4th 263, 272
12 (2005).

13 Further, the Nevada District Court has expressly rejected contractual subrogation claims
14 between co-insurers finding that “in the insurance context, contractual subrogation is generally
15 applied not by an excess insurer against a primary insurer, but between an insurer and a third-party
16 tortfeasor.” *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943 at *6 (D. Nev. June 9,
17 2016). Notably, the *Colony* court cited to the *Progressive West Ins. Co.* decision in support of its
18 holding. The *Colony* court soundly noted that “the Nevada Supreme Court has held that
19 contractual subrogation in the context of insurers and insureds may contravene public policy” and
20 that contractual subrogation may provide for windfalls in the insurance context. (*Id.*) Accordingly,
21 St. Paul’s claim for contractual subrogation against National Union fails as a matter of law.

22 **VI.**

23 **NATIONAL UNION IS ALSO ENTITLED TO SUMMARY JUDGMENT ON THE**
24 **SECOND CAUSE OF ACTION BECAUSE A SUPERIOR EQUITY CANNOT**
25 **EXIST BETWEEN EXCESS INSURERS WITH THE SAME**
OBLIGATIONS TO THE INSURED

26 While subrogation allows an insurer to step into the shoes of its insured, the insurer’s
27 substitute position is subject to important equitable principles, one of which is the doctrine of
28 superior equities, which prevents an insurer from recovering against a party whose equities are

1 equal or superior to those of the insurer. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*,
2 143 Cal.App.4th 1098, 1107 (2006); *Sompo Japan Ins. Co. of America v. Action Exp., LLC*, 19
3 F.Supp.3d 954, 958 (C.D. Cal. 2014).

4 St. Paul asserts that its insurance coverage to Cosmopolitan is excess to that provided by
5 National Union, however, for the reasons stated above, that simply is not the case as a matter of
6 law. Cosmopolitan was a named insured under the St. Paul Excess Policy. As such, St. Paul owed
7 an independent concurrent obligation to Cosmopolitan under its policy, separate and apart from any
8 obligation owed by National Union and could have settled the case against Cosmopolitan prior to
9 the verdict, if it believed that an adverse verdict was going to occur. If St. Paul truly believed there
10 was a substantial likelihood of an adverse verdict, then it should have settled the case on behalf of
11 Cosmopolitan prior to the verdict. St. Paul chose not to do so and, therefore, has no superior equity
12 to National Union as a matter of law for the alleged failure to settle. St. Paul instead sat idly by and
13 now complains about the outcome.

14 While St. Paul may assert that Cosmopolitan was akin to an innocent bystander in this
15 matter, neither the underlying allegations, nor the history of the litigation would support such a
16 position. Cosmopolitan was facing its own liability for breach of the “non-delegable duty” to keep
17 patrons safe for which Cosmopolitan was ultimately found to be jointly and severally liable with
18 Marquee. Cosmopolitan’s liability for its own independent negligence is covered by its insurance
19 provided by Zurich and St. Paul, who were placed on notice of the Underlying Action.

20 St. Paul cannot establish superior equity to National Union as National Union did not cause
21 St. Paul’s loss. St. Paul asserts that National Union breached its duty to settle the Underlying Action
22 prior to verdict. (FAC ¶¶ 88-89.) St. Paul also claims that National Union’s failure to do so resulted
23 in an excess verdict against Cosmopolitan which ultimately required St. Paul’s settlement
24 contribution. (*Id.* ¶ 92.) However, St. Paul owed an independent duty to Cosmopolitan to settle the
25 Underlying Action under its own policy. St. Paul had the opportunity to settle the case prior to the
26 verdict but chose not to do so. Accordingly, St. Paul cannot now assert superior equity to National
27 Union and, as result, its claim for equitable subrogation for failure to settle fails as a matter of law.

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VII.

**NATIONAL UNION IS ALSO ENTITLED TO SUMMARY JUDGMENT ON THE
FOURTH CAUSE OF ACTION BECAUSE COSMOPOLITAN
HAS SUFFERED NO DAMAGES**

In the FAC, St. Paul's Fourth Cause of Action asserts that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy by failing to provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan's interests, failing to pay all available limits under the National Union Excess Policy to resolve Cosmopolitan's liability when it had the opportunity, and failing to pay any amount of settlement on behalf of Cosmopolitan. (FAC ¶ 105.) As a result of National Union's alleged breaches, St. Paul seeks the amount it contributed towards settlement of the Underlying Action. (FAC ¶¶ 108, 111.) However, St. Paul is not a party to the National Union Excess Policy under which Marquee is a named insured and Cosmopolitan is an additional insured. St. Paul is pursuing its breach of contract claim as an alleged subrogee of Cosmopolitan. As noted above, subrogation allows an insurer to step into the shoes of its insured, but the insurer has no greater rights than the insured and is subject to all of the same defenses that can be asserted against the insured. *State Farm*, 143 Cal.App.4th at 1107.

A breach of contract claim requires (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *See Contreras v. American Family Mut. Ins. Co.*, 135 F.Supp.3d 1208, 1224 (D. Nevada 2015) *citing Richardson v. Jones*, 1 Nev. 405, 409 (1865). A claim for breach of contract is not actionable without damage. *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815, at *4 (Cal.Ct.App. May 18, 2018) (unpublished); *Bramalea California, Inc. v. Reliable Interiors, Inc.*, 119 Cal.App.4th 468, 473 (2004). Here, St. Paul alleges that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy, however, the claimed damage sought by St. Paul is based on the amount St. Paul paid in settlement of the Underlying Action rather than any damages suffered by Cosmopolitan. Notably absent is any allegation that Cosmopolitan directly contributed towards settlement of the Underlying Action. It is undisputed that Cosmopolitan was fully indemnified by National Union, St. Paul, and the other insurers who paid the settlement in the Underlying Action. Further, Cosmopolitan's defense in the Underlying Action was fully paid by Aspen and National Union.

1 Accordingly, Cosmopolitan suffered no damage as a matter of law as a result of any alleged breach
2 by National Union with regard to its defense of Cosmopolitan in the Underlying Action.

3 The facts of this case are similar to *California Capital* in which an insurer sued another
4 insurer to recover amounts it paid in settlement (and defense) of its named insureds in an underlying
5 bodily injury action. Like St. Paul, plaintiff insurer, California Capital, asserted causes of action for
6 breach of contract and breach of the covenant of good faith and fair dealing, among others, alleging
7 its named insureds were additional insureds under the defendant insurer's policy and that its named
8 insureds had expressly assigned all of their rights under the defendant insurer's policy to California
9 Capital. *Id.* at *2-4. In its complaint, California Capital alleged the defendant insurer breached its
10 policy by refusing to provide the additional insureds the benefits due under the policy and also
11 alleged defendant insurer breached its obligations of good faith by failing to defend and indemnify
12 the insureds when it knew they were entitled to overage under the policy, withholding payments
13 under the policy when defendant insurer knew plaintiff's claim was valid, failing to properly
14 investigate the insureds' request for policy benefits, and failing to provide a reasonable explanation
15 of the factual basis for denial of the insureds' claim for benefits under the policy. *Id.* at *4. The trial
16 court held that California Capital had no cause of action for breach of contract or breach of the
17 covenant of good faith and fair dealing because the insureds had sustained no damage as a result of
18 defendant insurer's alleged failure to defend and indemnify them or its failure to settle the claim
19 within its policy limit. *Id.* Given the insureds' defense and post-judgment settlement had been fully
20 paid by California Capital, the trial court found the essential element of damages was absent from
21 the breach of contract and breach of the covenant of good faith and fair dealing causes of action and
22 the insureds had no viable claims to assign to California Capital. *Id.* The trial court further found
23 that California Capital had no direct cause of action against defendant insurer because it was not a
24 party to defendant insurer's policy. *Id.* at *6.

25 Like the plaintiff insurer in *California Capital*, St. Paul is not a party to the National Union
26 Excess Policy and has no direct cause of action against National Union for breach of contract or
27 breach of the covenant of good faith and fair dealing. Given Cosmopolitan's post-verdict settlement

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1 was paid by the insurers, Cosmopolitan has no damages and therefore no viable claim for breach of
2 contract or breach of the covenant of good faith and fair dealing.

3 **VIII.**

4 **NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE EIGHTH**
5 **CAUSE OF ACTION BECAUSE EQUITABLE CONTRIBUTION IS NOT**
6 **AN AVAILABLE REMEDY AS A MATTER OF LAW**

7 **A. Contribution Claims Between Insurers is Not An Established Right Under Nevada**
8 **Law**

9 Similar to equitable subrogation, Nevada has not established an insurer's right to pursue a
10 claim for equitable contribution against another insurer. Given equitable contribution against other
11 insurers is not an established right for insurers in Nevada, St. Paul has no legal basis to assert an
12 equitable contribution claim against National Union.

13 **B. Contribution is Not An Available Remedy to Seek Damages Beyond Policy Limits**

14 St. Paul's claim for equitable contribution against National Union also fails because
15 National Union exhausted its policy limit when it contributed to the settlement in the Underlying
16 Action. Notably, the National Union Excess Policy provides that the "Limits of Insurance" as set
17 forth in the declarations is the most that National Union will pay regardless of the number of
18 insureds, claims or suits brought, persons or organizations making claims or bringing suits, or
19 coverages provided under the policy. (Perkins Decl., Ex. 1.) The National Union Excess Policy
20 further provides the most National Union will pay for damages on behalf of any person or
21 organization to whom the named insured is obligated to provide insurance is the lesser of the limits
22 shown in the declarations or the minimum limits of insurance the named insured agrees to procure
23 in a written insured contract. (*Id.*) Here, National Union contributed towards the settlement of the
24 Underlying Action and the policy is exhausted. Given the policy is exhausted, National Union has
25 no further obligation under the policy. *See Everest Indem. Ins. Co. v. Aventine-Tramonti*
26 *Homeowners Ass'n*, 2012 WL 870289 at *3 (D. Nev. Mar. 14, 2012) ("... once the [limits are]
27 reached, the insurer's duties under the policy are extinguished."); *Deere & Co. v. Allstate Ins. Co.*,
28 32 Cal.App.5th 499, 515 (Cal.Ct.App. 2019) (holding "[a] 'policy limit' or 'limit of liability' 'is the

1 maximum amount the insurer is obligated to pay in contract benefits on a covered loss.'"). Just as
2 Cosmopolitan could not sue National Union under a cause of action for contribution to seek policy
3 benefits beyond the National Union Excess Policy limits, neither can St. Paul. Accordingly, St.
4 Paul's claim for equitable contribution against National Union fails as a matter of law.

5
6 **IX.**

7 **NATIONAL UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE SEVENTH**
8 **CAUSE OF ACTION WHERE AS HERE ST. PAUL HAS NO LEGAL**
9 **BASIS TO ASSERT CLAIMS FOR SUBROGATION**
10 **AND EQUITABLE CONTRIBUTION**

11 In the FAC, St. Paul asserts the Seventh Cause of Action seeking to preclude National
12 Union from asserting that: (1) National Union's policies were not primarily responsible for the
13 defense and resolution of the Underlying Action; and (2) St. Paul, a non-defending carrier, had the
14 same obligation to resolve the Underlying Action as Aspen and National Union. (FAC ¶ 135.)² St.
15 Paul is asserting equitable estoppel as a prophylactic defense to an anticipated defense of National
16 Union. *See Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597 (1984). However, St. Paul's
17 equitable estoppel claim is dependent on the legal viability of its other causes of action for
18 subrogation and equitable contribution. Given St. Paul's causes of action for subrogation and
19 equitable contribution fail as a matter of law, St. Paul's cause of action for equitable estoppel
20 similarly fails as a matter of law.

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25 ² Typically, equitable estoppel is raised as an affirmative defense. However, under Nevada Law, equitable
26 estoppel can be treated as an affirmative claim. To establish equitable estoppel, the plaintiff must prove the
27 following: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct
28 shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended;
(3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must have relied to
his detriment on the conduct of the party to be estopped. *See Cheger, Inc. v. Painters & Decorators*, 98 Nev.
609, 614 (1982); *In re Harrison Living Trust*, 112 P.3d 1058, 1061-1062 (Nev. 2005). While equitable
estoppel may be asserted as an affirmative claim, the claim does not seek monetary damages but rather
serves to "prevent the assertion of legal rights that in equity and good conscience should not be available due
to a party's conduct." *Viets v. Wachovia Mortg., FSB*, 2012 WL 6720617 at *2 (D. Nevada Dec. 26, 2012)
(citing *In re Harrison Living Trust*, 112 P.3d 1058, 1061-62 (Nev. 2005)).

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CONCLUSION

For the foregoing reasons, St. Paul has no legal basis to pursue its claims against National Union and National Union is entitled to judgment as a matter of law. Therefore, National Union requests that the Court grant this Motion for Summary Judgment.

DATED: September 12, 2019

HEROLD & SAGER

By:



Andrew D. Herold, Esq.
Nevada Bar No. 7378
Nicholas B. Salerno, Esq.
Nevada Bar No. 6118
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

KELLER/ANDERLE LLP
Jennifer Lynn Keller, Esq. (Pro Hac Vice)
Jeremy Stamelman, Esq. (Pro Hac Vice)
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

Attorneys for Defendant NATIONAL
UNION FIRE INSURANCE COMPANY
OF PITTSBURGH PA. and ROOF DECK
ENTERTAINMENT, LLC dba
MARQUEE NIGHTCLUB

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

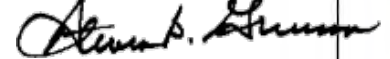
That on September 13, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 **DECL**

ANDREW D. HEROLD, ESQ.

2 Nevada Bar No. 7378

NICHOLAS B. SALERNO, ESQ.

3 Nevada Bar No. 6118

4 **HEROLD & SAGER**

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5 Las Vegas, NV 89169

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7 aherold@heroldsagerlaw.com

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8 JENNIFER LYNN KELLER, ESQ. (Pro Hac Vice)

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10 18300 Von Karman Ave., Suite 930

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Telephone: (949) 476-8700

12 Facsimile: (949) 476-0900

jkeller@kelleranderle.com

13 jstamelman@kelleranderle.com

14 Attorneys for Defendant NATIONAL UNION FIRE INSURANCE

15 COMPANY OF PITTSBURGH, PA. & ROOF DECK ENTERTAINMENT, LLC

16 d/b/a MARQUEE NIGHTCLUB

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 ST. PAUL FIRE & MARINE INSURANCE
20 COMPANY,

21 Plaintiffs,

22 vs.

23 ASPEN SPECIALTY INSURANCE
24 COMPANY; NATIONAL UNION FIRE
25 INSURANCE COMPANY OF
26 PITTSBURGH PA.; ROOF DECK
27 ENTERTAINMENT, LLC d/b/a MARQUEE
28 NIGHTCLUB; and DOES 1 through 25,
inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT. XXVI

**DECLARATION OF NICHOLAS B.
SALERNO IN SUPPORT OF NATIONAL
UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA'S MOTION FOR
SUMMARY JUDGMENT**

1 I, Nicholas B. Salerno, declare as follows:

2 1. I am an attorney with the law firm of Herold & Sager, counsel for Defendant
3 National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). I have personal
4 knowledge of the facts stated herein and, if called as a witness, I could competently testify thereto.

5 2. Attached as Exhibit 2 to National Union's Appendix of Exhibits in support of
6 Motion for Summary Judgment is a true and correct copy of Zurich Policy No. PRA 9829242-01,
7 produced in this action by Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul") as part
8 of its initial disclosures.

9 3. Attached hereto as Exhibit 3 to National Union's Appendix of Exhibits in support of
10 Motion for Summary Judgment is a true and correct copy of St. Paul Policy No. QK 06503290,
11 produced in this action by St. Paul as part of its initial disclosures.

12 4. Attached hereto as Exhibit 4 to National Union's Appendix of Exhibits in support of
13 Motion for Summary Judgment is a true and correct copy of Aspen Policy No. CRA8XYD11,
14 produced in this action by Defendant Aspen Specialty Insurance Company as part of its initial
15 disclosures.

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

18 Dated this 12th day of September, 2019.

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Nicholas B. Salerno

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the State of Nevada that the following is true and correct:

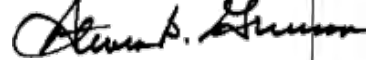
That on September 13, 2019, service of DECLARATION OF NICHOLAS B. SALERNO IN SUPPORT OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

☒ Via Electronic Service, in accordance with the Master Service List, pursuant to NEFCR9, to:

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (<i>Pro Hac Vice</i>) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (<i>Pro Hac Vice</i>) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 13th day of September, 2019.


JuRee A. Bloedel



1 **DECL**

2 ANDREW D. HEROLD, ESQ.

3 Nevada Bar No. 7378

4 NICHOLAS B. SALERNO, ESQ.

5 Nevada Bar No. 6118

6 HEROLD & SAGER

7 3960 Howard Hughes Parkway, Suite 500

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14 JEREMY STAMELMAN, ESQ. (Pro Hac Vice)

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19 Facsimile: (949) 476-0900

20 jkeller@kelleranderle.com

21 jstamelman@kelleranderle.com

22 Attorneys for Defendant NATIONAL UNION FIRE INSURANCE

23 COMPANY OF PITTSBURGH, PA. & ROOF DECK ENTERTAINMENT, LLC

24 d/b/a MARQUEE NIGHTCLUB

25 **DISTRICT COURT**

26 **CLARK COUNTY, NEVADA**

27 ST. PAUL FIRE & MARINE INSURANCE
28 COMPANY,

Plaintiffs,

vs.

29 ASPEN SPECIALTY INSURANCE
30 COMPANY; NATIONAL UNION FIRE
31 INSURANCE COMPANY OF
32 PITTSBURGH PA.; ROOF DECK
33 ENTERTAINMENT, LLC d/b/a MARQUEE
34 NIGHTCLUB; and DOES 1 through 25,
35 inclusive,

Defendants.

CASE NO.: A-17-758902-C
DEPT. XXVI

**DECLARATION OF RICHARD C.
PERKINS IN SUPPORT OF NATIONAL
UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA'S MOTION FOR
SUMMARY JUDGMENT**

DECLARATION OF RICHARD C. PERKINS IN SUPPORT OF NATIONAL UNION'S
MOTION FOR SUMMARY JUDGMENT

1 I, Richard C. Perkins, declare as follows:

2 1. I am the Head of Operations, Environmental for North America General Insurance.
3 In or around February 6, 2018, I was the Global Operations Executive, Liability and Financial
4 Lines, for Risk Specialists Companies Insurance Agency, Inc., a wholly-owned entity of AIG, Inc. I
5 have personal knowledge of the facts stated herein and, if called as a witness, I could competently
6 testify thereto.

7 2. I am the Manager of a group that is responsible for issuance and maintenance of
8 insurance policies (including the fulfillment of post-binder servicing requests) for underwriting
9 companies that are subsidiaries and/or affiliates of AIG, Inc., including but not limited to, National
10 Union Fire Insurance Company of Pittsburgh, PA ("National Union").

11 3. Pursuant to a request from the underwriting department, National Union policy
12 number 25414413 issued to The Restaurant Group, et al., with an effective date of October 6, 2011,
13 and all endorsements thereto, were retrieved from the electronic filing system, reviewed for
14 completeness and certified by me on December 1, 2017 to be a true and correct copy of National
15 Union policy number 25414413, including all endorsements thereto, as determined from the records
16 of National Union.

17 4. Attached hereto as Exhibit 1 is a true and correct copy of National Union policy
18 number 25414413, including all endorsements thereto, issued to The Restaurant Group, et al.,
19 which I certified on December 1, 2017.

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

22 Dated this 12th day of September, 2019.

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Richard C. Perkins

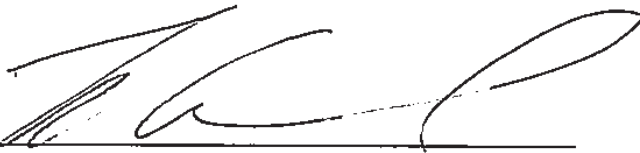
EXHIBIT 1

EXHIBIT 1

POLICY CERTIFICATION

The undersigned is a Manager of Risk Specialists Companies Insurance Agency, Inc. and hereby certifies that the attached material is a true and correct copy of National Union Fire Insurance Company of Pittsburgh, PA Policy No. 25414413, including all endorsements thereto, as determined from the records of National Union Fire Insurance Company of Pittsburgh, PA, issued to, The Restaurant Group, ETAL 888 7th Ave, 34th Floor, New York, NY 10106 with an effective date of October 6, 2011.

I have hereunto subscribed my name this December 1, 2017.

A handwritten signature in black ink, appearing to read 'RCP', is written over a horizontal line.

Richard C Perkins
Global Operations Executive
Risk Specialists Companies Insurance Agency, Inc.

POLICYHOLDER NOTICE

Thank you for purchasing insurance from the Chartis companies. Chartis insurance companies generally pay compensation to brokers and independent agents, and may have paid compensation in connection with your policy. You can review and obtain information about the nature and range of compensation paid by Chartis insurance companies to brokers and independent agents in the United States by visiting our website at www.chartisinsurance.com/producercompensation or by calling 1-800-706-3102.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

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Product Profile

Value-Added Policyholder Advantages

At Excess Casualty, our ongoing commitment is to deliver innovative and value-enriching solutions alongside our insurance coverages to help you further address your risk management challenges. As an Excess Casualty policyholder, don't forget to take advantage of the following enhancements and services available to you free of charge!

Did you know that?...

Since the inception of the CrisisResponse program, we've responded to over 325 reported incidents helping policyholders during their time of crisis.

Each day, more than 10,000 companies are utilizing the RiskToo System to better understand, manage and reduce health and safety risk in their workplace.

The Claims Archive is evidence of our unmatched claims intelligence and the thousands of high-limit liability claims we see and manage on a yearly basis.

CrisisResponse®

CrisisResponse® is a crisis management enhancement built-in to our commercial policies, providing professional support, including a 24-hour hotline with access to claims specialists, and immediate first dollar coverage outside of the umbrella limit in the event of a catastrophic casualty crisis.

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- An additional \$50,000 limit to retain the services of some of the nation's leading public relations and crisis management firms.
- An optional coverage enhancement that amends the definition of CrisisResponse costs to include expenses incurred by the recall, inspection or disposal of a product that results in a crisis event.

Call the 24-hour, toll-free hotline to trigger CrisisResponse coverage:
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The RiskToo System is a comprehensive loss prevention and risk management solution that allows users to identify, analyze and manage their operational exposures. Designed exclusively for Chartis, this web-based system provides a customizable platform to:

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- Build and manage risk management programs such as safety policies and audits;
- Standardize loss control practices across an organization;
- Access extensive training resources and global risk information;
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Visit www.risktool.com to activate your account.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.
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Product Profile

Value-Added Policyholder Advantages

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Claims Archive

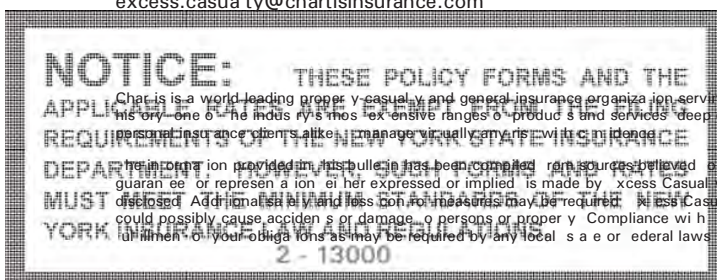
The Claims Archive is a comprehensive online database including hundreds of real-world excess casualty claim scenarios. Searchable by liability or cause of loss, industry, or facility type, these examples help facilitate assessment and benchmarking of liability insurance limits.

Visit www.chartisinsurance.com/claimsarchive to search the archive.

For more information about Excess Casualty or any of these services, please visit www.chartisinsurance.com or contact us at excess.casualty@chartisinsurance.com.

Contact

Excess Casualty
175 Water Street, 20th Floor
New York, NY 10038
excess.casualty@chartisinsurance.com



062210 A 6/10

FORMS SCHEDULE

Named Insured: THE RESTAURANT GROUP, ETAL

Policy Number: BE 25414413

Effective 12:01 AM: October 6, 2011

End't. No.	Form Name	Form Number/ Edition Date	
	UMB PRIME DEC	80518	(11/09)
	POLICYHOLDER DISC - NOTICE OF TERRORISM INS COVG	96556	(01/08)
	UMB PRIME JACKET	80517	(11/09)
	SCHEDULE OF UNDERLYING	UNDSCH	(05/99)
1	CRISISRESPONSE COVERAGE ENHANCEMENT ENDORSEMENT	94621	(05/07)
2	COVERAGE TERRITORY ENDT.	89644	(07/05)
3	VIOLATION OF ECONOMIC OR TRADE SANCTIONS COND. AM	99497	(06/08)
4	Duties in the Event of an Occurrence, Claim, or Su	83687	(01/10)
5	ACT OF TERRORISM SIR ENDORSEMENT	83049	(03/06)
6	NEW YORK AMENDATORY ENDORSEMENT	69898	(09/06)
7	AUTOMOBILE LIABILITY EXCLUSION	80399	(07/02)
8	Employee Benefits Liability Follow Form Endorsemen	95124	(07/07)
9	GARAGE KEEPERS LEGAL LIAB EXCL	83080	(09/03)
10	COMMERCIAL GENERAL LIABILITY LIMIT. ENDT	87043	(11/04)
11	LEAD EXCLUSION ENDORSEMENT	86471	(02/06)
12	PROFESSIONAL LIABILITY EXCLUSION ENDORSEMENT	83093	(05/05)
13	FUNGUS EXCLUSION ENDT	82449	(06/03)
14	FOREIGN LIABILITY EXCLUSION	80431	(07/02)
15	BROAD FORM NAMED INSURED AMENDATORY ENDORSEMENT	95581	(09/07)
16	EMPLOYERS LIABILITY EXCLUSION	83070	(09/03)
17	LIQUOR LIABILITY LIMITATION ENDT	83085	(09/03)

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

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