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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Supreme Court Case No.

Related to Nevada Supreme Court Case No. 81344

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 X of XIX

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Docket 83794 Document 2021-33126

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] Consolidated 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

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will apply in excess of the greater amount of valid and collectible insurance; or (2) less than the amount shown in such schedule, the National Union Policy will apply in excess of the amount shown in the Schedule of Underlying Insurance. Section IV. Limits of Insurance, paragraph G. provides that, if the total applicable limits of Scheduled Underlying Insurance are reduced or exhausted by the payment of Loss to which the National Union Policy applies and the total applicable limits of applicable Other Insurance are reduced or exhausted, National Union will, in the event of reduction, pay excess of the remaining total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance and, in the event of exhaustion, continue in force as underlying insurance.

Further, Section IV. Limits of Insurance, paragraph H. provides that expenses incurred to defend any Suit or to investigate any claim will be in addition to the applicable Limits of Insurance of the National Union Policy. Provided, however, that if such expenses reduce the applicable limits of Scheduled Underlying Insurance, then such expenses will reduce the applicable Limits of Insurance of this policy. Finally, Section IV. Limits of Insurance, paragraph M. provides that National Union will not make any payment under the National Union Policy unless and until the total applicable limits of Scheduled Underlying Insurance have been exhausted by the payment of Loss to which the National Union Policy applies and any applicable Other Insurance have been exhausted by the payment of Loss, or the total applicable Self-Insured Retention has been satisfied by the payment of Loss to which the Policy applies. Pursuant to Section VII. Definitions, Loss means "those sums actually paid as judgments or settlements, provided, however, that if expenses incurred to defend a Suit or to investigate a claim reduce the applicable limits of Scheduled Underlying Insurance, then Loss shall include such expenses."

We understand that all applicable Scheduled Underlying Insurance, including the Aspen Policy and any renewals, and all Other Insurance, as defined by the National Union Policy, has not exhausted by payment of claims or loss to which the National Union Policy applies and therefore coverage under the National Union Policy has not yet attached.

Please also be advised that, pursuant to Section III. Defense Provisions, paragraph A., National Union has the right and duty to defend any Suit against the Insured seeking damages for covered Bodily Injury or Personal Injury and Advertising Injury only after the total applicable limits of Scheduled Underlying Insurance have been exhausted by payment of Loss to which the National Union Policy applies and the total applicable limits of Other Insurance have been exhausted; or the damages sought because of Bodily Injury or Personal Injury and Advertising Injury would not be covered by Scheduled Underlying

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Insurance or any applicable Other Insurance, even if the total applicable limits of either the Scheduled Underlying Insurance or any applicable Other Insurance had not been exhausted by the payment of Loss. National Union has no duty to defend the Insured against any Suit seeking damages with respect to which the National Union Policy does not apply. Notwithstanding the above, also pursuant to Section III. Defense Provisions, paragraph D., National Union has the right, but not the duty, to participate in the defense of any Suit and the investigation of any claim to which the National Union Policy may apply. Please be advised that, although National Union has no present duty to defend Roof Deck because the National Union Policy has not attached given the Scheduled Underlying Insurance and applicable Other Insurance have not exhausted, National Union is exercising its right to participate in the defense of Roof Deck in this matter subject to a reservation of rights, and has retained the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial to defend Roof Deck.

Please be advised that if the National Union Policy were to attach in this matter, coverage may be limited and/or precluded and/or excluded pursuant to the terms, conditions, exclusions, limitations and/or endorsements to the National Union Policy and/or the Aspen Policy as discussed in detail below.

The National Union Policy only provides coverage for "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 . . . or Personal Injury and Advertising Injury to which this insurance applies or because of Bodily Injury . . . to which this insurance applies assumed by the Insured under an Insured Contract." With regard to bodily injury coverage, the bodily injury must be caused by an Occurrence and the bodily injury must occur during the policy period. As respects bodily injury, the National Union Policy defines Occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one Occurrence."

In his claims for assault and battery, intentional infliction of emotional distress, and false imprisonment, Plaintiff alleges intentional, willful and malicious conduct by Defendants. Accordingly, to the extent that any of the claims asserted in this matter (a) do not constitute damages because of bodily injury; (b) do not constitute bodily injury (as defined by the National Union Policy); (c) involve bodily injury which did not take place during the policy period; and/or (d) involve bodily injury which was not caused by an occurrence (as defined by the National Union Policy), coverage for such claims would be precluded. Coverage may also be precluded to the extent that, prior to the policy period, any

insured or employee of an insured knew that bodily injury had occurred in whole or in part.

With regard to personal injury and advertising injury coverage, the personal injury and advertising injury must be caused by an Occurrence arising out of your business, but only if the Occurrence was committed during the policy period. The National Union Policy defines Personal Injury and Advertising Injury as "injury arising out of your business, including consequential Bodily Injury, arising out of one or more of the following offenses: 1. false arrest, detention or imprisonment; . . .". As respects Personal Injury and Advertising Injury, the National Union Policy defines Occurrence as "an offense arising out of your business that causes Personal Injury and Advertising Injury. All damages that arise from the same, related or repeated injurious material or act will be deemed to arise out of one Occurrence, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants."

As noted above, Plaintiff has asserted a claim for false imprisonment against Defendants alleging he was physically abused by Marquee personnel and/or employees of The Cosmopolitan who refused to allow him to leave and unlawfully detained him. Accordingly, to the extent that any of the claims asserted in this matter (a) do not constitute damages because of personal injury and advertising injury; (b) do not constitute personal injury and advertising injury (as defined by the National Union Policy); (c) involve personal injury and advertising injury, if any, which did not arise out of your business; (d) involve personal injury and advertising injury, if any, which was not caused by an occurrence (as defined by the National Union Policy); and/or (e) involve personal injury and advertising injury, if any, caused by an occurrence which was not committed during the policy period, coverage for such claims would be precluded.

The National Union Policy contains a Commercial General Liability Limitation Endorsement (Endorsement No. 10) which excludes coverage for commercial general liability. However, if insurance for commercial general liability is provided by a policy listed in Scheduled Underlying Insurance, this exclusion will not apply and coverage under the National Union Policy will follow the terms, definitions, conditions and exclusions of Scheduled Underlying Insurance, subject to the policy period, limits of insurance, premium and all other terms, definitions, conditions and exclusions of the National Union Policy. Provided, however, that coverage provided by the National Union Policy will be no broader than the coverage provided by Scheduled Underlying Insurance. As noted above, the Schedule of Underlying Insurance identifies the Aspen Policy. Accordingly, coverage under the National Union Policy will follow the terms,

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definitions, conditions and exclusions of the Aspen Policy, subject to the policy period, limits of insurance, premium and all other terms, definitions, conditions and exclusions of the National Union Policy. Further, the coverage provided by the National Union Policy will be no broader than the coverage provided by the Aspen Policy.

The Aspen Policy contains a Limitation of Coverage to Designated Premises or Project which provides that the policy applies only to bodily injury or personal and advertising injury and medical expenses arising out of the ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or the project shown in the Schedule. The Schedule to the endorsement identifies various premises, including "Marquee Las Vegas – 3708 Las Vegas Blvd South, Las Vegas, NV 89109 (inside The Cosmopolitan of Las Vegas)". To the extent the premises identified in Plaintiff's complaint is not the premise shown in the Schedule to the Limitation of Coverage to Designated Premises or Project endorsement, coverage would be precluded.

Please be advised that Exclusion K. to the National Union Policy and Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion a. to the Aspen Policy exclude coverage for bodily injury expected or intended from the standpoint of the Insured. However, the exclusion does not apply to bodily injury resulting from the use of reasonable force to protect persons or property. Here, Plaintiff has asserted a claim against Roof Deck for assault and battery alleging he was willfully, maliciously, and without just cause or provocation assaulted and battered by security guards, employees and/or agents of the Marquee Nightclub. Plaintiff also asserts a claim for intentional infliction of emotional distress alleging Defendants' acts, conduct and behavior were performed intentionally and recklessly, and Defendants' actions were extreme and outrageous causing Plaintiff to suffer severe emotional distress. Additionally, in his claim for false imprisonment, Plaintiff alleges that he was physically abused by Marquee personnel and/or employees of Cosmopolitan who refused to allow him to leave and unlawfully detained him by forcing him into a room and pool area and refused to let him go. To the extent the alleged damages in this matter were expected or intended from the standpoint of the Insured, coverage for the same would be excluded.

Exclusion C. to the National Union Policy and Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion b. to the Aspen Policy are substantially the same and exclude coverage for any liability for which the Insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. However, such exclusion does not apply to liability for damages that the Insured would have in the absence of a contract or

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agreement or assumed in an Insured Contract as defined in the National Union Policy and more fully described in Exclusion C., provided the Bodily Injury occurs subsequent to the execution of the Insured Contract. Solely for the purposes of liability assumed in an Insured Contract, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" and included in the Limits of Insurance of the National Union Policy, provided liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. Accordingly, to the extent there are any claims in this matter for liability for which Roof Deck is obligated to pay damages by reason of the assumption of liability in a contract or agreement, coverage would be excluded, except to the extent Roof Deck would have liability for damages in the absence of the contract or agreement or liability for damages was assumed by Roof Deck in a contract or agreement that is an insured contract as defined by the National Union Policy and/or Aspen Policy. National Union reserves all rights in this regard.

The Aspen Policy also contains a Contractual Liability – Amendments endorsement which excludes coverage for any claim for damages resulting from the sole negligence of the indemnitee arising out of any liability assumed under any "insured contract" as defined by the Aspen Policy. Accordingly, to the extent any claim for damages results from the sole negligence of an indemnitee arising out of any liability assumed under any insured contract, no coverage would be available for such claim.

Exclusion M. in the National Union Policy (as deleted and replaced by Endorsement No. 17 to the National Union Policy) provides in pertinent part as follows:

> This insurance does not apply to Bodily Injury or Property Damage for which any Insured may be held liable by reason of:
>
> 1. causing or contributing to the intoxication of any person;
>
> 2. the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> 3. any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

However, if insurance for such Bodily Injury or Property Damage is provided by a policy listed in the Scheduled Underlying Insurance:

1. This exclusion shall not apply; and

2. Coverage under this policy for such Bodily Injury or Property Damage will follow the terms, definitions, conditions and exclusions of Scheduled Underlying Insurance, subject to the Policy Period, Limits of Insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by Scheduled Underlying Insurance.

To the extent any Insured under the National Union Policy may be held liable for the damages by reason of causing or contributing to the intoxication of any person; the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages, coverage for such claims may be limited and/or excluded and/or precluded pursuant to Exclusion M. unless coverage for such claims is provided by a policy listed in the Scheduled Underlying Insurance and, in such case, coverage under the Policy for such claims will follow the terms, definitions, conditions and exclusions of the Scheduled Underlying Insurance with the exceptions discussed above and as set forth in greater detail in Exclusion M. National Union reserves all rights in this regard.

Section I, Coverage A Bodily Injury and Property Damage Liability, paragraph 2., Exclusion o. to the Aspen Policy excludes coverage for bodily injury arising out of "personal and advertising injury". The Aspen Policy defines "personal and advertising injury" as "injury, including consequential 'bodily injury', arising out of one or more of the following offenses: . . . false arrest, detention or imprisonment . . .". Plaintiff asserts a claim for false imprisonment against Roof Deck. Therefore, to the extent any bodily injury arose out of "personal and advertising injury" as defined by the Aspen Policy, coverage for the same would be excluded.

Please be advised that Exclusion U.1. of the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion a. of the Aspen Policy exclude coverage for personal injury and advertising injury caused by or at the direction of the insured with the knowledge that the act

would violate the rights of another and would inflict personal injury and advertising injury. In his claim for false imprisonment, Plaintiff alleges he was physically abused by Marquee personnel and/or employees of The Cosmopolitan who refused to allow him to leave and unlawfully detained him without any probable or reasonable cause by forcing him into a room and pool area, then refusing to let him leave. Plaintiff alleges Defendants' actions were done willfully, with malice and oppression and with conscious disregard for Plaintiff's rights. Accordingly, to the extent alleged personal injury was caused by or at the direction of the insured with knowledge that the act would violate the rights of Plaintiff and would inflict personal injury, coverage for the same would be excluded.

Exclusion U.4. in the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion d. in the Aspen Policy exclude coverage for personal injury and advertising injury arising out of a criminal act committed by or at the direction of the insured. As noted above, Plaintiff asserts claims for assault and battery and false imprisonment. Accordingly, to the extent any personal injury arose out of a criminal act committed by or at the direction of the insured, coverage for the same would be excluded.

Exclusion U.5. in the National Union Policy and Section I, Coverage B Personal and Advertising Injury Liability, paragraph 2., Exclusion e. in the Aspen Policy exclude coverage for personal injury and advertising injury for which the insured has assumed liability in a contract or agreement. However, the exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement. Accordingly, to the extent there are any claims in this matter for liability for personal injury and advertising injury for which Roof Deck is obligated to pay damages by reason of the assumption of liability in a contract or agreement, that Roof Deck would not have in the absence of the contract or agreement, no coverage would be available for such claims.

The National Union Policy contains a Professional Liability Exclusion Endorsement which excludes coverage for any liability arising out of any act, error, omission, malpractice or mistake of a professional nature committed by the Insured or any person for whom the Insured is legally responsible. This exclusion applies even if the claims against any Insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that Insured. Therefore, to the extent that any claimed damages arise out of any act, error, omission, malpractice or mistake of a professional nature committed by the Insured or any person for whom the Insured is legally responsible, coverage for same would be excluded, even if the claims against any

insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured.

The Aspen Policy contains an Exclusion – Designated Professional Services endorsement which provides that, with respect to any professional services shown in the Schedule, this insurance does not apply to bodily injury or personal and advertising injury due to the rendering of or failure to render any professional service. The Description of Professional Services identified in the Schedule to the endorsement identifies "all professional services". Therefore, to the extent any of the claimed damages are due to the rendering of or failure to render any professional service, coverage would be excluded.

Further, please be advised that to the extent any of the damages alleged in this matter are preventative in nature or constitute economic loss, there may be no coverage for such damages under the National Union Policy. In addition, it appears that Plaintiff is seeking punitive damages. Please be advised that such damages may not be covered by the National Union Policy because they are not caused by an occurrence as defined by the National Union Policy and applicable law, and/or pursuant to the Expected or Intended Injury Exclusion (Exclusion K. to the National Union Policy and Exclusion a. to the Aspen Policy), and/or public policy and/or applicable law.

Finally, it appears that the claims do not involve, and Roof Deck is not seeking coverage for damages for property damage under the National Union Policy and, accordingly, this correspondence only addresses issues pertinent to coverage for bodily injury and personal injury and advertising injury under the National Union Policy. If our understanding in that regard is inaccurate, please let us know and we will supplement this correspondence with regard to property damage coverage.

Please be advised that all actions to date have been, and any further action taken by National Union with respect to this matter shall be, under a full and complete reservation of rights, including, but not limited to, paying reasonable and necessary fees and costs subject to any deductible, self-insured retention, or other funding arrangement required under the National Union Policy and/or set forth herein and/or pursuant to applicable law, the right to decline coverage, the right to join in and/or withdraw from the defense of this matter, the right to seek reimbursement and/or apportionment of any and all defense fees and costs paid and/or indemnity payments made, if any, if appropriate pursuant to the language of any and all applicable policies, applicable exclusions and endorsements, as well as applicable law, the right to dispute any and all fees and costs incurred to the extent such fees and costs are not reasonable and necessary in terms of amount and need, the right to seek reimbursement for any attorneys' fees and

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costs incurred with regard to claims and/or causes of action and/or damages which are not covered in any coverage action or otherwise if appropriate pursuant to the language of the National Union Policy, applicable exclusions and endorsements, and applicable law, the right to disclaim coverage in its entirety, the right to seek a judicial determination of its rights and duties, the right to investigate this matter further, and the right to add to, delete from and/or modify the position at a later date.

National Union's coverage position is based on the information presently available to us. This letter is not, and should not be construed as, a waiver of any terms, conditions, exclusions or other provisions of the National Union Policy, or any other policies of insurance issued by National Union or any of its affiliates. National Union expressly reserves all of its rights under the National Union Policy, including the right to assert additional defenses to any claims for coverage, if subsequent information indicates that such action is warranted.

Should you have any additional information that you feel would either cause us to review our position or would assist us in our investigation or determination, we ask that you advise us as soon as possible. Also, if Roof Deck is served with any additional demands or amended complaints or pleadings, please forward them to us immediately, so that we can review our coverage position. Please continue to keep us advised of the status, claims, defenses and all pertinent events with respect to this matter. If Roof Deck wishes to have its own personal counsel become involved in this matter, at its own expense, please feel free to do so, and we will cooperate fully with such counsel.

If Roof Deck has any other insurance policies which may respond to this claim, you should notify that carrier immediately.

Thank you for your cooperation in this matter.

Very truly yours,
/s/Robin T. Green
Robin T. Green
Complex Director
AIG Claims, Inc.

Enclosures: Exhibit A and Exhibit B

Cc: janet_roome@cohenins.com
Janet Roome
Elias B. Cohen & Associates

Exhibit N

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ROOF DECK ENTERTAINMENT, LLC
d/b/a "Marquee Nightclub"

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, an individual,

Plaintiff,

vs.

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 CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-14-698824-C
Dept. No. XX

DEFENDANTS NEVADA PROPERTY 1, LLC d/b/a "THE COSMOPOLITAN OF LAS VEGAS," AND ROOF DECK ENTERTAINMENT, LLC d/b/a "MARQUEE NIGHTCLUB'S" TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141

COMES NOW, Defendants NEVADA PROPERTY 1, LLC d/b/a "The Cosmopolitan of Las Vegas," ("COSMOPOLITAN"), ROOF DECK ENTERTAINMENT, LLC d/b/a "Marquee Nightclub," ("MARQUEE") (hereby collectively known as "DEFENDANTS"), by and through their attorneys of record, Josh Cole Aicklen, Esq. David B. Avakian, Esq.,

LEWIS BRISBOIS

and Paul A. Shpirt, Esq., of the law firm of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and submit the following Trial Brief, pursuant to EDCR 7.27.

DATED this 15th day of March, 2017.

Respectfully Submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

JOSH COLE AICKLEN
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises out of an alleged physical altercation at the MARQUEE nightclub located in the COSMOPOLITAN between DAVID MORADI ("Plaintiff") and MARQUEE'S security officers. Plaintiff was a guest at MARQUEE during the early morning hours of April 8, 2012. At the end of the evening, Plaintiff was asked to produce his ID to compare his signature to that on his American Express Black card. He refused. MARQUEE security along with the club's general manager requested that Plaintiff step away from his table to discuss this matter. Plaintiff, instead, chose to try to leave. He was re-directed by the club security in the area where General Manager Ramon Mata was waiting for him to discuss his signature requirements.

Plaintiff was discussing this requirement for approximately 8-9 seconds, when he became belligerent and verbally abusive, and head-butted Mr. Mata. Consequently, MARQUEE staff restrained Plaintiff and escorted him to the outside area of the club.

II. LEGAL ARGUMENT

A. EDCR 7.27 Allows Filing of Civil Trial Briefs

EDCR 7.27 governs the ability of parties to file trial briefs with the Court in civil cases on any topic which affects the trial:

> Filing of civil trial memoranda. Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memoranda of points and authorities at any time prior to the close of trial. The original trial memoranda of points and authorities must be filed and a copy of the memoranda must be served upon opposing counsel at the time of or before submission of the memoranda to the court.

See, EDCR 7.27

Here, because NRS 41.141 directly affects Plaintiff's remedies, the Court should rule on this Trial Brief before the jury is brought in for *Voir Dire* and Plaintiff begins addressing the case.

///

B. The Express Terms of NRS 41.141 Provide that each Defendant Is *Severally Liable* to the Plaintiff only for that Portion of the Judgment Which Represents the Percentage of Negligence Attributable to that Defendant.

Under the traditional doctrine of joint and several liability, courts allowed plaintiffs to seek the entirety of their damages from a single tortfeasor. Humphries v. Eighth Judicial Dist. Court of State, 312 P.3d 484, 487 (Nev. 2013).

However, the Nevada Legislature supplanted the traditional, common-law functioning of joint and several liability by enacting NRS 41.141, which helps prevent plaintiffs, whether residents or visitors, in tort cases from obtaining "deep-pocket" judgments against Nevada hotels and casinos. Id.; Kawamura v. Boyd Gaming Corp., No. 2:13-CV-203 JCM (GWF), 2014 U.S. Dist. LEXIS 17727, at *14 (D. Nev. Feb. 12, 2014).

> (1) In any action to recover damages for injury to persons in which ***comparative negligence is asserted as a defense***, the comparative negligence of the plaintiff does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.
>
> (4) ***Where recovery is allowed against more than one defendant*** in such an action, except as otherwise provided in NRS 41.141(5), ***each defendant is severally liable*** to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.

NRS 41.141(1) and (4) (emphasis added).

The Nevada Supreme Court has clarified that in a case alleging comparative negligence, an intentional tortfeasor's liability is joint and several, but a merely negligent co-tortfeasor's liability is only several, even if the injured party is not ultimately found to be comparatively negligent. Humphries v. Eighth Judicial Dist. Court of State, 312 P.3d 484, 486 (Nev. 2013) (citing to Café Moda, LLC v. Palma, 128 Nev. 78, 272 P.3d 137 (2012)). Clearly, several liability schemes are designed to protect individual defendants from liability exceeding the defendant's fault. Piroozi v. Eighth Judicial Dist. Court, 363 P.3d 1168, 1171 (Nev. 2015)

Here, Plaintiff has asserted multiple tort claims against DEFENDANTS, including both intentional and negligence torts. Undeniably, joint and several liability attaches to intentional torts. However, COSMOPOLITAN, being at most an alleged passive

tortfeasor, is ***only exposed to several liability*** as to Plaintiff's negligence claim. Because Plaintiff may recover against more than one defendant, NRS 41.141 provides several liability protection for COSMOPOLITAN. Thus, applying Humphries, in the event the jury finds that COSMOPOLITAN was negligent, the Court should hold COSMOPOLITAN severally liable ***only*** for the portion of the judgment which represents the percentage of negligence attributable directly to COSMOPOLITAN – nothing more.

III. CONCLUSION

Based upon the foregoing, DEFENDANTS respectfully request a judicial determination that DEFENDANTS are entitled to several liability under the express terms of NRS 41.141.

DATED this 15th day of March, 2017.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 15th day of March, 2017, I did cause a true copy of DEFENDANTS NEVADA PROPERTY 1, LLC d/b/a "THE COSMOPOLITAN OF LAS VEGAS," AND ROOF DECK ENTERTAINMENT, LLC d/b/a "MARQUEE NIGHTCLUB'S" TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141 placed in the United States Mail, with first class postage prepaid thereon, and addressed as follows:

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Exhibit O

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, an individual, Plaintiff, vs. 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 CORPORATIONS I through X, inclusive, Defendants.	Case No. A-14-698824-C Dept. No. XX DEFENDANTS NEVADA PROPERTY 1, LLC D/B/A THE COSMOPOLITAN OF LAS VEGAS AND ROOF DECK ENTERTAINMENT, LLC D/B/A MARQUEE NIGHTCLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO THEIR TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141 DATE: TIME:

DEFENDANTS NEVADA PROPERTY 1, LLC D/B/A THE COSMOPOLITAN OF LAS VEGAS AND ROOF DECK ENTERTAINMENT, LLC D/B/A MARQUEE NIGHTCLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO THEIR TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141

COME NOW, Defendants NEVADA PROPERTY 1, LLC d/b/a "The Cosmopolitan of Las Vegas," ROOF DECK ENTERTAINMENT, LLC d/b/a "Marquee Nightclub" (Hereby known as "Defendants"), by and through their attorneys of record, Josh Cole

Aicklen, Esq., David B. Avakian, Esq., and Paul A. Shpirt, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and hereby reply to Plaintiff's Opposition to their Trial Brief for Determination of Several Liability Under NRS 41.141.

This Reply is based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument allowed by the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

This case arises out of an alleged physical altercation at the MARQUEE nightclub between Plaintiff DAVID MORADI and MARQUEE's Security Officers. Plaintiff was a guest at the Marquee nightclub during the early morning hours of April 8, 2012. At the end of the evening, Plaintiff was asked to produce his ID to compare his signature to that on his American Express Black card. He refused. MARQUEE security along with the club's General manager requested that Plaintiff step away from his table to discuss this matter. Plaintiff, instead, chose to try to leave. He was re-directed by the club security in the area where the General Manager, Ramon Mata, was waiting for him to discuss his signature requirements.

Plaintiff was discussing this requirement for 8-9 seconds, when he became belligerent and verbally abusive, and head-butted Mr. Mata. The alleged altercation occurred shortly after Plaintiff physically assaulted MARQUEE's General Manager and was restrained and taken to the outside area of the club.

II. LEGAL ARGUMENT

A. Because COSMOPOLITAN Never Exercised Control over MARQUEE's Staff, COSMOPOLITAN Is not Vicariously Liable for any of Plaintiff's Alleged Intentional Torts.

"Respondeat superior liability attaches only when the employee is *under the control of the employer* and when the act is within the scope of employment." Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996). Therefore, an actionable claim on a theory of respondeat superior requires proof that (1) the actor at

issue was an employee, and (2) the action complained of occurred within the scope of the actor's employment. Id.

"The employer can be vicariously responsible only for the acts of his employees not someone else, and one way of establishing the employment relationship is to determine when the 'employee' is under the control of the 'employer.'" Id. "This element of control requires that the employer 'have control and direction not only of the employment to which the contract relates but also of all of its details and the method of performing the work. . . .'" Id.

Here, the Nightclub Management Agreement ("NMA") executed between COSMOPOLITAN and MARQUEE, provides that MARQUEE shall be responsible for "the recruiting, hiring, training, compensation, supervision, and discharge of the staff." Furthermore, the NMA states COSMOPOLITAN "***shall not have express or implied authority whatsoever to control*** any aspect of the employment relationship between [MARQUEE] and its employees..." NMA Section 3.1.1 (emphasis added).

In reviewing the subject NMA, this Court found that "Marquee staff were not employed by Cosmopolitan." See Order Denying Defendant Nevada Property 1, LLC's Motion for Summary Judgment, at 3:2-13. The Court additionally held that "Cosmopolitan could not have exercised control over [MARQUEE's security staff] and therefore been subject to *respondeat superior* liability." Id.

Thus, applying the NMA and this Court's holding, COSMOPOLITAN did not have any control or direction over MARQUEE's staff, including MARQUEE's security officers, at the time of the alleged incident. Accordingly, as COSMOPLITAN ***did not have any control*** over the subject security officers involved in the alleged tortious conduct, Plaintiff's allegation that COSMOPLITAN is vicariously liable is meritless.

In sum, Plaintiff cannot establish that COSMOPOLITAN engaged in any intentional tortious conduct, let alone wanton or willful conduct, because, without the necessary element of control, COSMOPLITAN is not vicariously liable for the intentional tortious acts Plaintiff alleged against MARQUEE.

B. Because COSMOPOLITAN Is not Subject to Vicarious Liability, COSMOPOLITAN Is at most Liable for a Negligence Claim and, Therefore, the Express Terms of NRS 41.141 Limit COSMOPOLITAN's Liability only to the Negligence Attributable to COSMOPOLITAN.

As addressed in Defendants' Trial Brief, under the traditional doctrine of joint and several liability, courts allowed plaintiffs to seek the entirety of their damages from a single tortfeasor. Humphries v. Eighth Judicial Dist. Court of State, 312 P.3d 484, 487 (Nev. 2013).

However, the Nevada Legislature supplanted the traditional, common-law functioning of joint and several liability by enacting NRS 41.141, which limits plaintiffs, whether residents or visitors, in tort cases from obtaining "deep-pocket" judgments against Nevada hotels and casinos. Id.; Kawamura v. Boyd Gaming Corp., No. 2:13-CV-203 JCM (GWF), 2014 U.S. Dist. LEXIS 17727, at *14 (D. Nev. Feb. 12, 2014).

> (1) In any action to recover damages for injury to persons in which *comparative negligence is asserted as a defense*, the comparative negligence of the plaintiff does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.
>
> (4) *Where recovery is allowed against more than one defendant* in such an action, except as otherwise provided in NRS 41.141(5), *each defendant is severally liable* to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.

NRS 41.141(1) and (4) (emphasis added).

The Nevada Supreme Court clarified that in a case alleging comparative negligence, an intentional tortfeasor's liability is joint and several, while a merely negligent co-tortfeasor's liability is only several, even if the injured party is not ultimately found to be comparatively negligent. Humphries v. Eighth Judicial Dist. Court of State, 312 P.3d 484, 486 (Nev. 2013) (citing to Café Moda, LLC v. Palma, 128 Nev. 78, 272 P.3d 137 (2012)). Clearly, several liability schemes are designed to protect individual defendants from liability exceeding the defendant's fault. Piroozi v. Eighth Judicial Dist. Court, 363 P.3d 1168, 1171 (Nev. 2015)

Here, Plaintiff asserted multiple tort claims against Defendants, including both intentional and negligence torts. Undeniably, joint and several liability attaches to

intentional torts. However, *since Plaintiff's vicarious liability claim fails*, COSMOPOLITAN is at most an alleged passive tortfeasor and, therefore, is *only exposed to several liability* as to Plaintiff's negligence claim. Because Plaintiff may recover against more than one defendant, NRS 41.141 provides several liability protection for COSMOPOLITAN. Thus, applying Humphries, in the event the jury finds that COSMOPOLITAN was negligent, the Court should hold COSMOPOLITAN severally liable *only* for the portion of the judgment which represents the percentage of negligence attributable directly to COSMOPOLITAN - nothing more.

III. CONCLUSION

Based upon the foregoing, DEFENDANTS respectfully request a judicial determination that DEFENDANTS are entitled to several liability under the express terms of NRS 41.141.

DATED this 23rd of March, 2017

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9 and NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 23rd day of March, 2017, a true copy of DEFENDANTS NEVADA PROPERTY 1, LLC D/B/A THE COSMOPOLITAN OF LAS VEGAS AND ROOF DECK ENTERTAINMENT, LLC D/B/A MARQUEE NIGHTCLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO THEIR TRIAL BRIEF FOR DETERMINATION OF SEVERAL LIABILITY UNDER NRS 41.141 was served electronically with the Court using the Wiznet Electronic Service system and addressed as follows:

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Exhibit P

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, an individual, Plaintiff, vs. NEVADA PROPERTY 1, LLC, d/b/a "The Cosmopolitan of Las Vegas", ROOF DECK ENTERTAINMENT, LLC d/b/a "Marquee Nightclub", and DOES 1 through X, inclusive; through X, inclusive [sic], Defendants.	Case No.: A-14-698824-C Dept. No.: XX **DEFENDANTS' OPPOSITION TO PLAINTIFF'S TRIAL BRIEF REGARDING JURY INSTRUCTION CONCERNING DEFENDANT NEVADA PROPERTY 1, LLC'S NON-DELEGABLE DUTY**

Defendants Nevada Property 1, LLC, d/b/a "The Cosmopolitan of Las Vegas" (hereinafter "the Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a "Marquee Nightclub" (hereinafter "Marquee") (collectively, "Defendants") by and through their attorneys of record, hereby submit *DEFENDANTS' OPPOSITION TO PLAINTIFF'S TRIAL BRIEF REGARDING JURY INSTRUCTION CONCERNING DEFENDANT NEVADA PROPERTY 1, LLC'S NON-DELEGABLE DUTY.* This *Brief* is supported by the accompanying Memorandum of Points and Authorities, the papers and pleadings on file herein, and any oral argument the Court may allow.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff seeks to have this Court issue a single jury instruction on non-delegable duty before they have rested their case in chief. Defendants oppose this request because a request to settle jury instructions is premature, and the proposed instruction is not supported by the evidence, the orders of this court, or Nevada law.

"A party is entitled to have the jury instructed on all of his theories of the case that are supported by the evidence".[1] *Beattie v. Thomas*, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983)(citations omitted). "In addition to being supported by evidence, the requested instruction must be consistent with existing law". *Id.* ***"If ... there is no proof in the record to support the instruction, the trial court should not give it.*** *Id.* at 583-584 (emphasis added).

Because instructions must be supported by the evidence ("proof in the record"), it is premature to finally settle instructions until the close of the evidence. This is the custom and practice in this District. *See, e.g.* Effective Using Jury Instruction in a Civil Trial by Judge Mark Denton, ("My practice has been to initially confer with counsel, in chambers, with the court clerk present after the evidence is closed; there we identify the instructions that will likely be given and those that will be refused, and make a full record of the instructions and verdicts to be used, allowing for objections and formal proffers of instructions that are refused, during a formal conference in the courtroom").[2]

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[1] *See also J.A. Jones Constr. v. Lehrer McGovern Bovis*, 120 Nev. 277, 284-85, 89 P.3d 1009, 1014 (2004)("A party has the right to have the jury instructed on all theories of the party's case that are supported by the evidence if the instructions are correct statements of the law") and *Johnson v. Egtedar*, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996)("It is well established that a party is entitled to jury instructions on every theory of her case that is supported by the evidence").

[2] http://www.nvbar.org/wp-content/uploads/NevLawyer_June_2014_Effectively_Using_JI.pdf (last accessed on April 12, 2017).

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Prior to the start of trial, Plaintiff provided proposed jury instructions to the defense. The parties met and conferred, and Defendants provided Plaintiff with an integrated set of instructions which contained the Defendants' objections to Plaintiff's proposed instructions and proposed additional and alternative instructions. A copy of this integrated set is attached as Exhibit "A". The new instruction now proposed by Plaintiff is not included in Plaintiff's proposed instructions, but the Defendants did propose a related (and much different) instruction based on NRS 651.015. We appreciate the reasons why the Plaintiff wants to have certainty on its new proposed instruction, but final settlement of any instruction is premature. Defendants object to the final settlement of any instruction prior to the close of the evidence. The issuance of an instruction at this stage of the trial, that is not supported by any evidence in the record before the jury, would be reversible error.

The proposed instruction should also be refused because it is inconsistent with the written orders of this Court. In denying summary judgment to Nevada Property 1, LLC, the Court found that "... Cosmopolitan does not hire, train, fire, or compensate employees of the Marquee". *See* Order filed on February 28, 2017 at page 3, attached for the Court's convenience as Exhibit "B". The Court also found that Section 3.1.1 of the NMA states that Cosmopolitan "shall not have express or implied authority whatsoever to control any aspect of the employment relationship between [Marquee and its employees ...". *Id.* Based on these facts and other recited findings, the "Court finds Marquee security staff were not employed by Cosmopolitan." The Court concluded that "[a]s a consequence, the Cosmopolitan could not have exercised control over these individuals and therefore been subject to respondeat superior liability." *Id.*

Notwithstanding this written order finding that Marquee security staff are not employees of Cosmopolitan, Plaintiff now proposes an instruction that finds the exact opposite; "that the security staff at Marquee are deemed to be employees of both defendants in this case".

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Defendants recognize that the Court explained that Marquee security staff were "in the nature of employees" under the *Rockwell* decision in open court on March 24, 2017. This oral pronouncement from the bench was ineffective to modify the written order of this Court. Under Nevada law, "an order is not effective until the district court enters it." *Division of Child and Family Services, Dept. of Human Resources, State of Nevada v. Dist. Ct.*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004). "Entry involves the filing of a signed written order with the court clerk." *Id.* (citing NRAP 4(a)(3)). Prior to the court reducing "its decision to writing, sign[ing] it, and fil[ing] it with the clerk, the nature of the judicial decision is impermanent." *Id.* (citing *Canterino v. The Mirage Casino-Hotel*, 118 Nev. 191, 194, 42 P.3d 808, 810 (2002)). "The court remains free to reconsider the decision and issue a different written judgment." *Id.* (citing *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987)). Consequently, ***a "'[c]ourt's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order [is] ineffective for any purpose.'"*** *Id.* (quoting *Rust*, at 689, 747 P.2d at 1382)(emphasis added). As of today, the security staff at Marquee are not employees of the Cosmopolitan, and it would be error to approve an instruction directing the jury to find the opposite.

Moreover, the original findings of the Court were correct as a matter of fact and law. NRS 41.745 codifies the legal doctrine of *respondeat superior* liability. In Nevada, "*respondeat superior* liability attaches only when the employee is ***under the control*** of the employer."[3] *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) (quoting *Molino v. Asher*, 96 Nev. 814, 817, 618 P.2d 878, 879 (1980)) (emphasis added). Indeed, "[t]he employer can be vicariously responsible ***only for the acts of his employees*** not someone else." *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978) (emphasis added).

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[3] Plaintiff did not allege *respondeat superior* in the Complaint, nor has Plaintiff presented any evidence to support a finding of *respondeat superior* liability under NRS 41.745.

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At trial, no evidence has yet been submitted to support Plaintiff's claim that he was assaulted by an ***employee under the control*** of the Cosmopolitan. *See, e.g., Complaint*, ¶¶ 23-26, docketed (4/4/14) (First Cause of Action: Assault and Battery). To the contrary, as quoted above, the Court has issued a written order expressly finding that Marquee security who allegedly assaulted Plaintiff are not under the control of the Cosmopolitan. This finding contrasts with the findings in *Rockwell*, where the court found there was evidence that "Sun Harbor actively supervised the security guards and controlled both the details and methods of performing the guards' work". *See Rockwell*, 925 P.2d at 1182.

Defendants also object to the first two sentences of the proposed instruction as incorrectly stating Nevada law. Defendants have extensively briefed these issues and will not repeat all of their arguments here. Defendants would point out, in addition to their prior arguments in support of summary judgment, that Plaintiffs are now asking for a finding that "The law imposes a non-delegable duty upon Cosmopolitan to provide responsible security and personnel on its property." This proposed instruction mischaracterizes the *Rockwell* decision. *Rockwell* found instead that "in the situation where a property owner hires security personnel to protect his or her premises and patrons, that property owner has a personal and nondelegable duty to provide responsible security personnel".[4]

In other words, *Rockwell* found that if an owner in possession and control of property *chooses* to hire security to protect its own property, it must hire responsible security. The evidence does not justify such a finding. The Cosmopolitan did not hire

[4] Moreover, the duty in *Rockwell* is based on theories of premises liability. It is part of a premises owner's duty to its business invitees to ensure that its premises are reasonably safe. For this reason, the non-delegable duty claimed in this case can only arise in the context of a claim for premises liability. *See Konar v. PFL Life Ins. Co.*, 840 A.2d 1115, 111 (R.I. 2004)("Based on the text of § 425 of the Restatement, it is clear that this section applies only to premises liability claims"). There is no corresponding non-delegable duty in the context of a negligence claim. Id. at 1121 ("Because § 425 of the Restatement does not affect the independent contractor rule as it pertains to a general negligence claim, our decision to adopt that section would have no bearing on plaintiff's appeal in this case"). In the instant case, the Plaintiff has not plead a case for premises liability and there is no applicable exception to the independent contractor rule.

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security through a third party, which it then controlled and directed, like the owner in *Rockwell*. The Cosmopolitan leased the premises to another legal entity which then delegated and the entire nightclub operation and management to the Marquee. The patrons of the Marquee were not the business invitees of the Cosmopolitan. Indeed, the Marquee premises are separated from the premises controlled by the Cosmopolitan by "velvet ropes", which guests of the Cosmopolitan cannot pass without the consent of the Marquee.

Relief Requested

For these reasons, and the reasons set forth in connection with its summary judgment briefing, Cosmopolitan requests that the Court refuse the proposed instruction on non-delegable duty.

Dated this 12th day of April, 2017.

/s/ D. Lee Roberts, Jr.

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WEINBERG WHEELER HUDGINS GUNN & DIAL

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2017, a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S TRIAL BRIEF REGARDING JURY INSTRUCTION CONCERNING DEFENDANT NEVADA PROPERTY 1, LLC'S NON-DELEGABLE DUTY** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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dba Marquee Nightclub and
NEVADA PROPERTY 1, LLC, dba
The Cosmopolitan of Las Vegas

Esther Ibarra

An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

WEINBERG WHEELER HUDGINS GUNN & DIAL

Exhibit Q

TRAN

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DISTRICT COURT

CLARK COUNTY, NEVADA

CLERK OF THE COURT

DAVID MORADI, Individually,

Plaintiff,

vs.

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.

CASE NO.: A-14-698824-C
DEPT. NO.: XX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JUDGE ERIC JOHNSON

DEPARTMENT XX

TUESDAY, APRIL 18, 2017

1:00 P.M.

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

APPEARANCES:

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BY: TOM SCHULTZ, ESQ.
BY: MATTHEW STUMPF, ESQ.
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* * * * *

INDEX

EXHIBITS

* * * * *

LAS VEGAS, NEVADA; TUESDAY, APRIL 18, 2017
1:00 P.M.
*** * * * ***
P R O C E E D I N G S
*** * * * * * ***

(The following proceedings were held outside the presence of the jury.)

THE COURT: Let's do the formalities here. Calling David Moradi v. Nevada Property 1, LLC, et al., Case No. A-698824.

Counsel, go ahead and note your appearances for the record.

MR. RAVIPUDI: Rahul Ravipudi for the plaintiff.

MR. SCHULTZ: Tom Schultz for the plaintiff.

MR. STUMPF: Matthew Stumpf for the plaintiff.

MR. DIAL: Dave Dial for the defendants.

MR. AICKLEN: Josh Aicklen for the defense.

MR. ROBERTS: Lee Roberts for the defendants.

THE COURT: Okay.

MR. STUMPF: And, Your Honor, we have Mr. Long in the courtroom right now. So I'm not sure what we're going to be discussing.

THE COURT: Well, I don't know what we're going to be discussing either. Do we need to ask

goes to The Cosmopolitan under your agreement?

A. In terms of the -- I'm not sure I understand the question.

Q. Do you pay The Cosmopolitan rent?

A. Yes.

Q. Okay.

A. Yes.

Q. And do you pay them just one kind of rent or more than one kind?

A. We pay them rent plus a percentage rent.

Q. Okay. What's a percentage rent?

A. It's a percentage over a certain -- it's a percentage of rent over a fixed amount, all based on sales.

Q. Is it your understanding that The Cosmopolitan owns the physical premises upon which the Marquee is located?

A. Yes.

Q. Is the rent -- percentage rent intended to compensate them for the use of that physical premises?

A. Yes.

Q. Who controls the day-to-day operations at the Marquee?

A. Roof Deck Entertainment, LLC.

Q. Who exercises actual control over hiring,

training, and supervising the employees, including the security staff?

A. Roof Deck Entertainment, LLC.

Q. Are there parts of the agreement that would seem to allow The Cosmopolitan to dictate standards with regard to your operations, including security?

MR. SCHULTZ: I think it goes beyond the scope. I'm happy that he opens the --

THE COURT: Hold on a second.

MR. ROBERTS: Well, I'm --

THE COURT: Hold on. It does go beyond, but if counsel isn't objecting, I'll --

MR. SCHULTZ: I'm just --

MR. ROBERTS: I'll withdraw.

THE COURT: It's up to you.

MR. ROBERTS: I'll withdraw. If they aren't going to go into it, I don't need to go into it.

THE COURT: All right.

Q. (By Mr. Roberts) Let me close by just allowing the jury to get a little bit more background.

You told the jury that you're one of the owners of the Marquee; is that correct?

A. Yes.

Q. Okay. And how many other owners are there?

A. Four.

Exhibit R

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
APR 26 2017

BY Linda Skinner
LINDA SKINNER, DEPUTY
3:48 pm

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID MORADI, Plaintiff, vs. NEVADA PROPERTY 1, LLC, doing business as "The Cosmopolitan of Las Vegas" and ROOF DECK ENTERTAINMENT, LLC doing business as "Marquee Nightclub" Defendants.	Case No.: A698824 Dept. No.: XX **SPECIAL VERDICT FOR PLAINTIFF**

We, the jury in the above-entitled action, find the following special verdict on the following questions submitted to us.

Question 1: Did Mr. Moradi establish his claim for assault?

Yes ✓ No ____

Question 2: Did Mr. Moradi establish his claim for battery?

Yes ✓ No ____

Question 3: Did Mr. Moradi establish his claim for false imprisonment?

Yes ✓ No ____

Question 4: Did Mr. Moradi establish his claim for negligence?

Yes ✓ No ____

If you answered "Yes" to any of the Questions 1 through 4, please proceed to Question No. 5. If you answered "No" to all Questions 1 through 4, please sign and return the "General Verdict for Defendant" and do not answer any further questions.

A-14-698824-C
SJV
Special Jury Verdict
4844031

4

Question 5: Were the actions of the employees of the Marquee Nightclub a legal cause of injury or damage to David Moradi?

Yes ✓ No ____

If your answer to Question 5 is "Yes," please proceed to Question No. 6. If your answer to Question 5 is "No," please sign and return the "General Verdict for Defendants" and do not answer any further questions.

Question 6: We find Plaintiff's damages as follows (include only damages arising out of the specific acts for which you answered "Yes" in Questions 1-4 above):

Past Loss of Earnings/Earning Capacity	$ 23 million
Future Loss of Earnings/Earning Capacity	$ 79.5 million
Past pain, suffering, anguish and disability	$ 20 million
Future pain, suffering, anguish and disability	$ 38 million

If your answer to Question 4 is "Yes," please proceed to Question 7. If your answer to Question 4 is "No," please proceed to Question 10.

Question 7: Do you find that David Moradi was comparatively negligent?

Yes ✓ No ____

If your answer to Question 7 is "Yes," please proceed to Question 8. If your answer to Question 7 is "No," please proceed to Question 10.

Question 8: Was David Moradi's negligent conduct a legal cause of any injury or damage to himself?

Yes ____ No ✓

If your answer to Question 8 is "Yes," please proceed to Question 9. If your answer to Question 8 is "No," please proceed to Question 10.

Question 9: Using one hundred percent (100%) as the total combined negligence that acted as a legal cause of damage to David Moradi, allocate the percentage of the total combined negligence that you find to be attributable to David Moradi, the Cosmopolitan and the Marquee:

The Cosmopolitan and the Marquee	_____%
David Moradi	_____%
Total	100 %

Question 10: Do you find that an officer or managing agent of the Marquee acted with oppression or malice in the conduct that caused David Moradi's damages?

Yes ✓ No _____

Question 11: Do you find that an officer or managing agent of the Marquee expressly authorized or ratified an employee's malicious or oppressive conduct that caused David Moradi's damages?

Yes ✓ No _____

If you answered "Yes" to either Question 10 or 11, please also answer Question 12. If you answered "No" to both Questions 10 and 11, please sign and return this special verdict, and do not answer the last question.

Question 12: Do you choose to allow David Moradi to recover punitive damages?

Yes ✓ No_____

If you answer to Question 12 is "Yes," there will be another phase of trial where you will hear additional evidence and instruction and then deliberate to decide the amount of punitive damages to be assessed. Do not award punitive damages now.

THIS IS OUR VERDICT.

Dated this 26 day of April, 2017.

FOREPERSON

Exhibit S

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Steven D. Grierson
CLERK OF THE COURT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT

Case Number: A-17-758902-C

Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub, by and through its attorneys of record, hereby submits the following Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's First Amended Complaint. This Motion is made and based upon the Memorandum of Points and Authorities, Request for Judicial Notice, Declaration of Bill Bonbrest, Supplemental Declaration of Bill Bonbrest, all papers and pleadings on file herein, and any argument that may be heard.

DATED: June 25, 2018

HEROLD & SAGER

By: _____

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

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub. will bring the foregoing Motion to Dismiss for hearing on the 31 day of July, 2018 at the hour of 9:30 a.m. ~~p.m.~~ of said day, or as soon thereafter as counsel can be heard, in Department 26 of the District Court for Clark County, Nevada, located at the _____, Las Vegas, Nevada.

DATED: June 25, 2018

HEROLD & SAGER

By: _____ (11333) FOR

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I.

INTRODUCTION

Similar to its original complaint, in its first amended complaint ("FAC"), St. Paul Fire & Marine Insurance Company's ("St. Paul") seeks to step into shoes that are not available to pursue claims for subrogation and statutory subrogation against Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") as part of an attempt to recoup a settlement contribution, which it had an independent obligation to fund. While the Nightclub Management Agreement ("NMA") relied on by St. Paul to support its claims is again referenced in the FAC and was raised as a point of contention in Marquee's first motion to dismiss, St. Paul continues to refuse to attach a copy of the agreement to its FAC or set forth verbatim the provisions it relies upon in support of its claims despite Marquee's requests to do so. Instead, St. Paul paraphrases the provisions of the agreement in a misleading and incomplete manner, omitting the crucial portions of the agreement that are fatal to its claims. As discussed herein, the NMA contains a "waiver of subrogation" provision and an indemnity provision limited to uninsured losses. Pursuant to these provisions, St. Paul is precluded from bringing its subrogation and statutory subrogation claims against Marquee. Accordingly, St. Paul has no legal or equitable basis to pursue subrogation against Marquee and the causes of action against Marquee in the FAC should be dismissed with prejudice.

II.

FACTUAL ALLEGATIONS RELEVANT TO THIS MOTION

The allegations contained in St. Paul's FAC are accepted as true for the purposes of this motion. *Seput v. Lacayo*, 122 Nev. 499, 501 (2006). Marquee does not accept or admit the truth of any of the allegations and restates the allegations as "fact" only for purposes of this motion.

A. Underlying Action

This action arises out of an underlying bodily injury action captioned *David Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al.*, District Court Clark County, Nevada, Case No. A-14-698824-C ("Underlying Action"). (FAC ¶ 6.) Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he went to the Marquee Nightclub located within The Cosmopolitan Hotel and Casino to socialize with friends, when he was attacked by Marquee employees resulting

in personal injuries. (FAC ¶¶ 6-7.) Moradi filed a complaint against Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas ("Cosmopolitan") and Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") on April 4, 2014, asserting causes of action for Assault and Battery, Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment. (*Id.* ¶¶ 8-10, Exhibit A.) Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id.* ¶ 9, Exhibit A.)

As noted above, Marquee Nightclub is a fictitious business name of Roof Deck Entertainment, LLC. The Cosmopolitan of Las Vegas is a fictitious business name of Nevada Property 1, LLC. (FAC ¶¶ 4, 10.) In their Motions for Summary Judgment filed in the Underlying Action, Cosmopolitan and Marquee confirmed both that Marquee and Roof Deck Entertainment, LLC are the same entity and that Nevada Property 1, LLC and Cosmopolitan are the same entity. (Request for Judicial Notice ("RJN"), Ex. 1-2.) Cosmopolitan is the owner of the subject property where the Marquee Nightclub is located and leases the nightclub location to its subsidiary, Nevada Restaurant Venture 1, LLC ("NRV1"). (FAC ¶ 10.) NRV1 entered into a written agreement with Marquee to manage the nightclub. (*Id.*) Marquee is a named insured under the National Union policy. (FAC ¶ 30.) Cosmopolitan is an insured under the St. Paul's policy. (FAC ¶ 40.)[1]

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 breach of the non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.) The Court in the Underlying Action agreed with Moradi's position and imposed vicarious liability on Cosmopolitan for Marquee's actions. (*Id.*) The Court also found that Marquee and Cosmopolitan were jointly and severally liable for Moradi's damages claim. (FAC ¶ 14.)

On April 28, 2017, the jury returned a verdict in Moradi's favor against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. (FAC ¶ 60.)

---

[1] Based on information and belief, Marquee asserts that NRV1 also qualifies as an insured under the St. Paul policy, however, this fact is not relevant to the Court's determination of this motion.

During the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66) National Union, St. Paul and other insurers accepted the settlement demand and resolved the Underlying Action with the confidential contributions set out in the non-public FAC filed under seal. (FAC ¶¶ 67-70.)

B. St. Paul's Claims Against Marquee

In its Fifth Cause of Action for Statutory Subrogation – Contribution Per NRS § 17.225, St. Paul asserts a subrogation right against Marquee under NRS § 17.225 for contribution to recoup a share of St. Paul's settlement payment. (FAC ¶ 113.) St. Paul alleges that Moradi's injuries and damages were caused solely by Marquee's actions and unreasonable conduct rather than any affirmative actions or unreasonable conduct on the part of Cosmopolitan. (FAC ¶¶ 117-118.) St. Paul further asserts that Cosmopolitan was held merely vicariously liable for Marquee's actions and Moradi's resulting damages. (FAC ¶ 118.) St. Paul alleges that its settlement payment on behalf of Cosmopolitan was in excess of Cosmopolitan's equitable share of this common liability such that St. Paul is entitled to subrogate to Cosmopolitan's contribution rights against Marquee pursuant to NRS §§ 17.225 and 17.275 for all sums paid by St. Paul as part of the settlement of the Underlying Action. (FAC ¶¶ 119-120.)

St. Paul's Sixth Cause of Action for Subrogation – Express Indemnity is nearly identical to the cause of action brought in the original complaint for which the Court requested clarification with regard to the relationship of the parties and their insurance coverages, which Marquee addresses further herein. In the FAC, St. Paul asserts that "[p]er written agreement," Marquee was obligated to "indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (*Id.* ¶ 122.) St. Paul further alleges that Marquee did not provide indemnification to Cosmopolitan for the claims asserted in the Underlying Action and that, as a result, St. Paul was forced to contribute to the settlement of the Underlying Action to protect Cosmopolitan's interests as well as its own. (*Id.* ¶¶ 125, 127.) St. Paul also alleges that "[p]er the terms of the written agreement", Marquee is liable to St. Paul for its attorneys' fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (*Id.* ¶ 129.)

///

As discussed below, both of these causes of action fail as a matter of law because the NMA includes subrogation waiver provisions that preclude its subrogation claims for express indemnity and contribution against Marquee. Accordingly, St. Paul has no legal basis to pursue subrogation for express indemnity or statutory subrogation against Marquee.

C. Nightclub Management Agreement

As noted above, St. Paul's FAC expressly references a written agreement as the basis for its subrogation claim for express indemnity, but tellingly St. Paul again fails to identify or attach the NMA beyond generalized references. (FAC ¶¶ 122, 124-125, 129.) St. Paul's complaint asserts that "[p]er written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (FAC ¶ 122.) St. Paul also alleges that "[p]er the terms of the written agreement, Marquee is also liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement." (FAC ¶ 129.)

St. Paul's refusal to attach the referenced written agreement as an exhibit to the FAC, or otherwise set forth the operative provisions of the alleged agreement, is telling, but is of no moment because the Court can take judicial notice of the NMA as set forth herein. The April 21, 2010 NMA was entered into between Marquee and NRV1 with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (FAC ¶ 10.) (Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Appendix of Exhibits in Support of its Motion to Dismiss Plaintiff St. Paul Fire & Marine Insurance Company's Complaint ("Appendix"), Exhibit A (previously filed under seal in support of Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion to Dismiss Complaint)[2]; Declaration of Bill Bonbrest ("Bonbrest Decl."), ¶ 3; Supplemental Declaration of Bill Bonbrest ("Supp. Bonbrest Decl."), ¶6.) Despite counsel's attempts to separate Cosmopolitan from the NMA at the hearing on Marquee's first motion to dismiss, Cosmopolitan is identified as the Project Owner in the Recitals section of the NMA and is also a signatory to the agreement both on

[2] As the NMA was previously filed under seal in support of Marquee's Motion to Dismiss St. Paul's Complaint, Marquee will not file the NMA again for purposes of this motion, but will refer to the document already filed under seal. However, Marquee will deliver a courtesy copy of the NMA to the Court as part of its filing of this motion.

behalf of itself and NRV1, for which it is the Managing Member. (NMA, pg. 27, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.)

While Cosmopolitan and NRV1 are related entities, Cosmopolitan and Marquee are separate and unrelated entities. Further, Marquee and Cosmopolitan have separate towers of insurance. National Union and Aspen Specialty Insurance Company are the direct insurers of Marquee while Zurich American Insurance Company and St. Paul are the direct insurers of Cosmopolitan. (FAC ¶¶ 15, 30, 40, 69; RJN, Ex. 3.) As set forth in the Nightclub Management Agreement, Cosmopolitan is the Project Owner of the hotel casino and resort premises, including the Marquee Nightclub venue. (NMA, pg. 1, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.) Cosmopolitan leased the premises to its related entity, NRV1. (FAC ¶ 10.) In turn, NRV1 entered into the NMA in which Marquee agreed to manage and operate the Marquee nightclub in the Cosmopolitan hotel. (NMA, pgs. 1, 24-32, Appendix, Ex. A.; Bonbrest Decl., ¶ 3; Supp. Bonbrest Decl., ¶ 6.) Accordingly, the Court's consideration of the NMA and its terms is appropriate in ruling upon this motion.

The NMA contains the following pertinent provisions:

> **1. Definitions**
>
> ...
>
> **"Losses"** shall mean any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance, including, without limitation, all reasonable attorneys' fees and all other reasonable professional or consultants' expenses incurred in investigating, preparing for, serving as a witness in, or defending against any action or proceeding, whether actually commenced or threatened.
>
> ...
>
> **12. Insurance**
>
> 12.1 [NRV1's] Insurance. During the Term of this Agreement, [NRV1] shall provide and maintain the following insurance coverage, at its sole cost and expense . . .:
>
> . . .
>
> 12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage, with a combined single limit of not less than Two Million Dollars ($2,000,000) for each occurrence, and at

least Four Million Dollars ($4,000,000) in the aggregate, including excess coverage; and

12.1.3 Any coverage required under the terms of the Lease to the extent such coverage is not the responsibility of [Marquee] to provide pursuant to Section 12.2 below.

12.2 [Marquee's] Insurance.

12.2.1 During the Term of this Agreement, [Marquee] shall provide and maintain the following insurance coverage (the "[Marquee] Policies"), the cost of which shall be an Operating Expense:

12.2.1.1 Commercial general liability insurance (occurrence form), including broad form contractual liability coverage, with minimum coverages as follows: general aggregate - $4,000,000; products-completed operations aggregate - $4,000,000 personal and advertising injury - $5,000,000; liquor liability - $1,000,000 with $4,000,000 liquor liability annual aggregate each occurrence - $2,000,000; . . . and medical expense (any one person) - $5,000;

12.2.1.2 Excess liability insurance (follow form excess or umbrella), liquor liability, commercial general liability, automobile liability and employers liability), with minimum coverages as follows: each occurrence - $25,000,000; aggregate - $25,000,000;

. . .

12.2.3 Except with respect to workers compensation and the employee practices liability insurance, [NRV1], [Cosmopolitan], the landlord and tenant under the Lease, Hotel Operator, their respective parents, subsidiaries and Affiliates, and their respective officers, directors, officials, managers, employees and agents (collectively "Owner Insured Parties"), shall all be named as additional insureds on all other [Marquee] Policies.

. . .

12.2.5 All insurance coverages maintained by [Marquee] shall be primary to any insurance coverage maintained by any Owner Insured Parties (the "Owner Policies"), and any such Owner Policies shall be in excess of, and not contribute towards, [Marquee] Policies. The [Marquee] Policies shall apply separately to each insured against whom a claim is made, except with respect to the limits of the insurer's liability.

12.2.6 **All Owner Policies and [Marquee] Policies shall contain a waiver of subrogation against the Owner Insured Parties and [Marquee] and its officers, directors, officials, managers, employees and agents and the [Marquee] Principals.** The coverages provided by [NRV1] and [Marquee] shall not be limited to the liability assumed under the indemnification provisions of this Agreement.

13. Indemnity

13.1 By [Marquee]. [Marquee] shall indemnify, hold harmless and defend [NRV1] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members,

managers, representatives, successors and assigns ("Owner Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [Marquee] of any term or condition of this Agreement, or (ii) the negligence or willful misconduct of [Marquee] or any of its owners, principals, officers, directors, agents, employees, Staff, members, or managers ("[Marquee] Representatives") **and not otherwise covered by the insurance required to be maintained hereunder.** [Marquee's] indemnification obligation hereunder shall include liability for any deductibles and/or self retained insurance retentions to the extent permitted hereunder, and shall terminate on the termination of the Term; provided however that such indemnification obligation shall continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

13.2 By [NRV1]. [NRV1] shall indemnify, hold harmless and defend [Marquee] and its respective parents, subsidiaries and Affiliates and all of each of their respective officers, directors, shareholders, employees, agents, members, managers, representatives, successors and assigns ("[Marquee] Indemnitees") from and against any and all Losses to the extent incurred as a result of (i) the breach or default by [NRV1] of any term or condition of this Agreement or (ii) the negligence or willful misconduct of [NRV1] or any of its owners, principals, officers, directors, agents, employees, members, or managers **and not otherwise covered by the insurance required to be maintained hereunder.** [NRV1's] indemnification obligation hereunder shall terminate on the termination of the Term; provided, however, that such indemnification obligation shall continue in effect for a period of three (3) years following the termination of the Term with respect to any events or occurrences occurring prior to the termination of the Term.

. . .

20. Third Party Beneficiary

Except as otherwise expressly provided herein, the Parties acknowledge and agree that [NRV1] may assign, delegate or jointly exercise any or all of its rights and obligations hereunder to or with any one or more of the following: [Cosmopolitan], Hotel Operator, Casino Operator and/or their Affiliates, or any successors thereto (collectively "Beneficiary Parties"). All such Beneficiary Parties to whom certain rights and obligations of [NRV1] have been assigned shall, to the extent of such assigned, delegated or shared rights and obligations, be an express and intended third-party beneficiary of this Agreement. Without limiting the generality of the foregoing, Beneficiary Parties shall have the right to enforce the obligations of [NRV1] to the extent of the rights and obligations assigned to, delegated to or shared with the Beneficiary Party by [NRV1]. Except as provided above, nothing in this Agreement, express or implied, shall confer upon any person or entity, other than the Parties, their authorized successors and assigns, any rights or remedies under or by reason of this Agreement.

...

28. Attorneys' Fees

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.

(Emphasis added.)

III.

LEGAL STANDARDS

A complaint may be dismissed under NRCP 12(b)(5) where it appears beyond a doubt that the complaint could prove no set of facts, which, if true, would entitle the plaintiff to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008). While courts must accept as true all material factual allegations in a complaint for purposes of a motion to dismiss, the factual grounds for plaintiff's entitlement to relief "require more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("on a motion to dismiss, courts are not bound to accept as true legal conclusions couched as factual allegations") (internal quotations omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth"); *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) ("if allegations are indeed more conclusory than factual, then the court does not have to assume their truth.") Further, a Plaintiff may not disguise insufficient claims with vague allegations so as to avoid dismissal as St. Paul attempts to do here with its refusal to identify the NMA. *See Clarendon American Ins. Co. v. Nev. Yellow Cab Corp.*, 2012 WL 786270, *3 (D. Nev. 2012) (dismissing breach of contract claim because Plaintiff neglected to cite the pertinent policy provisions which allegedly imposed a duty on the insurer).

While courts are generally limited to considering the complaint and materials that are submitted with and attached to the complaint, "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim," the "defendant may offer such document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *U.S. v. Ritchie*, 342

F.3d 903, 908 (9th Cir. 2003) (for example, "when a plaintiff's claim about insurance coverage is based on the contents of a coverage plan"); *see also United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153, fn. 3 (2nd Cir. 2002); *Martinez v. Victoria Partners*, 2014 WL 1268705 at *1, fn. 3 (D. Nev., Mar. 27, 2014); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998) (superseded by statute on other grounds); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

The court may also properly consider judicially noticeable documents in context of a motion to dismiss. *Intri-Plex Technologies, Inc. v. Crest Group*, 499 F.3d 1048, 1052 (9th Cir. 2007); *Van Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010); *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847 (1993). For example, courts may take judicial notice of the contents of court files in other lawsuits, including transcripts of proceedings. *See Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388, fn. 9 (9th Cir. 1987); *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1075 (9th Cir. 2010); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 (1981); *Sheriff, Clark Cnty. v. Kravetz*, 96 Nev. 919, 920 (1980) (relying upon a preliminary hearing transcript as basis for judicial notice).

Further, given the Nevada Rules of Civil Procedure are "based in large part upon their federal counterparts," Nevada courts consider the federal courts' interpretation of the corresponding federal rule(s) as "strong persuasive authority" when interpreting the Nevada Rules of Civil Procedure. *See Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002) (citing *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119 (1990); *Nelson v. Heer*, 121 Nev. 832, 834 (2005); *Moseley v. Eight Judicial Dist. Court ex rel County of Clark*, 124 Nev. 654, 662-663 (2008). As discussed herein, the NMA is integral to St. Paul's claims against Marquee and, based on St. Paul's failure to attach the agreement to its complaint, Marquee is permitted to attach the agreement to the instant motion to show that St. Paul has failed to state a claim against Marquee for which relief can be granted pursuant to NRCP 12(b)(5). This "incorporation by reference" doctrine allows the Court to consider the NMA without converting the motion into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076-1077 (9th Cir. 2005). Similarly, Marquee may attach various portions of the court file from the Underlying Action, which may similarly be

considered for purposes of the instant motion. *Intri-Plex Technologies, Inc.*, 499 F.3d at 1052; *Van Saher*, 592 F.3d at 960.

IV.

POINTS AND AUTHORITIES

A. St. Paul's Claim for Subrogation Based On Express Indemnity Against Marquee Is Barred By The NMA and St. Paul's Policy

St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated by its policy, law and principles of equity to the rights of Cosmopolitan for claims for express indemnity against Marquee. (FAC ¶ 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 against Cosmopolitan, Marquee and NRV1. Specifically, Section 12.2.6 states that the waiver of subrogation requirements applies to both "Operator Policies" and "Owner Policies." "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance coverage maintained by any "Owner Insured Party." Section 12.2.3 defines "Owner Insured Parties" as including NRV1, Cosmopolitan, their respective parents, subsidiaries, affiliates, and other related persons and entities. Accordingly, despite St. Paul's contentions otherwise, the waiver of subrogation clause in the NMA expressly applies to Cosmopolitan's insurance policies, including the policy issued by St. Paul.

Upon information and belief, although not necessary to support this motion to dismiss, the St. Paul policy contains an endorsement in which St. Paul agrees to waive its right to recovery for any payment it makes if Cosmopolitan agreed to waive its rights of recovery in a written contract. Marquee anticipates that St. Paul will take issue with Marquee's inability to quote the exact language from the St. Paul policy. However, as noted in Marquee's first motion to dismiss, Marquee is not an insured under the St. Paul policy and accordingly does not have a copy of the policy. Rather, St. Paul has a copy of the policy and can easily admit or refute Marquee's description of the waiver of subrogation language in the policy. St. Paul's failure to also attach the policy to its FAC and its failure to reference the waiver of subrogation language in its policy is again telling, especially where the issue of the policy language was raised in Marquee's prior

motion to dismiss and the Court requested clarification of these details. St. Paul's ongoing strategy to submit vague pleadings in this regard is not sufficient to avoid dismissal of the claims against Marquee. *See Clarendon American Ins. Co.*, 2012 WL 786270 at *3 (D. Nev. 2012).

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

Marquee anticipates that St. Paul will again argue that the NMA does not have sufficient subrogation waiver language and that Marquee cannot show that the subrogation waiver provision contained in the St. Paul Policy applies to the settlement payments made in the Underlying Action (essentially due to St. Paul's refusal to provide the court with its policy.). However, the intent to waive subrogation rights for losses covered by insurance is clear as a matter of law. Pursuant to Section 12.2.6 of the NMA, Cosmopolitan and Marquee mutually agreed that all insurance policies issued to them would contain a waiver of subrogation of the insurers' rights against Cosmopolitan and Marquee. The NMA further provides that express indemnity only applies to claims that are not paid by insurance proceeds. So, the intent of Cosmopolitan and Marquee waive subrogation rights is clear. To find otherwise would be inconsistent with the terms of the NMA. Accordingly, St.

Paul's subrogation claim for express indemnity fails as a matter of law given it steps into Cosmopolitan's shoes, who waived any subrogation rights where, as here, the Underlying Action was resolved with insurance proceeds.

B. St. Paul's New Allegations Against Marquee Based On The Alleged Acceptance of Cosmopolitan's Defense Is Not Sufficient To Avoid Dismissal Because It Does Not Alter That Marquee's Indemnity Obligation, If Any, Only Applies to Losses Not Covered By Insurance

As noted above, St. Paul's subrogation claim for express indemnity in the FAC is substantially similar to the original complaint except St. Paul has added allegations in the FAC that Marquee accepted Cosmopolitan's contractual indemnity tender, which has no known legal support. (FAC ¶ 25.) Nonetheless, even if this allegation is accepted as true, it does not save St. Paul's deficient pleading because Marquee's acceptance of Cosmopolitan's tender does not change the fact that, pursuant to the terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan only applies to losses not covered by insurance. It is undisputed that the settlement in the Underlying Action was paid by Marquee and Cosmopolitan's insurers. As Cosmopolitan did not sustain any uninsured losses, Marquee owes no indemnity to Cosmopolitan and by extension, St. Paul, whose rights are no greater than Cosmopolitan.

St. Paul alleges that, per written agreement, Marquee was obligated to indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action. (FAC ¶ 122.) However, St. Paul's limited paraphrasing of the indemnity provision in the NMA is inaccurate and misleading. Specifically, pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify, hold harmless and defend NRV1 and its parents, subsidiaries and affiliates (including Cosmopolitan), from and against losses to the extent incurred as a result of the breach or default by Marquee of any term or condition of the Agreement, or the negligence or willful misconduct of Marquee that is not otherwise covered by the insurance required to be maintained under the Agreement. (Emphasis added.) The NMA further defines "losses", in pertinent part, as "liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance." (Emphasis added.) St. Paul's failure to accurately cite the indemnity

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provision in the NMA, including the underlined portion of the provision, is crucial as it clearly defeats St. Paul's claim.

As noted above, in considering Marquee's motion to dismiss, the Court is not bound by St. Paul's self-serving and limited paraphrasing of the agreement set forth in the FAC. *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). Rather, the actual language of the indemnity provision in the NMA may be properly considered by the Court for purposes of ruling on the instant motion, as this provision is the foundation for St. Paul's cause of action for subrogation based upon express indemnity.

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

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

Id. at 229.

The exclusion of insurance payments from the definition of "losses" in Section 1 of the NMA and the inclusion of the phrase "and not otherwise covered by the insurance required to be maintained hereunder" in the indemnity provision set out in Section 13.1 expressly limit any purported indemnity obligation by Marquee to uninsured losses. Further, construing the waiver of subrogation provision in Section 12.2.6 with the mutual indemnity provisions in Section 13 of the NMA, it is clear that it was the intent of the parties to the agreement to limit their respective indemnity obligations to losses paid out-of-pocket by the respective indemnitees and not losses paid

by their insurers. Cosmopolitan's defense in the underlying action and its joint and several liability for the verdict and resulting settlement were paid for by insurance. (FAC ¶¶ 13-14, 27, 32, 35-36, 68-70.) In short, the indemnity provision only applies to uninsured losses. Here, insurance provided by National Union and St. Paul, among others, paid for the entire settlement of the Underlying Action. Thus, there is no uninsured loss for which Marquee could indemnify Cosmopolitan. Stated another way, as Cosmopolitan has no losses that were not reimbursed by insurance, Cosmopolitan has no right to indemnity from Marquee. Given Cosmopolitan has no right to indemnity from Marquee, St. Paul has no shoes to step into to pursue Marquee. Accordingly, given the expressed intent of the indemnity provision, the waiver of subrogation provision and the fact Cosmopolitan's insurers paid the settlement in the Underlying Action, not Cosmopolitan, St. Paul has no valid claim for express indemnity and, therefore, its claim against Marquee fails on this basis as well.

C. St. Paul's Claim for Statutory Subrogation for Contribution Against Marquee Pursuant to NRS 17.225 (Uniform Contribution Act) Fails As a Matter of Law

As with St. Paul's subrogation claim based on express indemnity, its subrogation claim for contribution under the Uniform Contribution Act is similarly barred by the waiver of subrogation provision in the NMA as well as the waiver of subrogation endorsement to the St. Paul policy, which St. Paul apparently refuses to provide to the Court.[3] In addition, St. Paul's statutory subrogation claim for contribution fails as there is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death. NRS 17.255. In the Underlying Action, Cosmopolitan was found jointly and severally liable with Marquee on all of Moradi's asserted claims, including the intentional tort claims for assault, battery, and false imprisonment. (FAC ¶¶ 13-14, Ex. B.) Given Cosmopolitan was found by the jury to be jointly liable with Marquee for the intentional tort claims that allegedly contributed to Moradi's injury, such findings preclude Cosmopolitan (and St. Paul) from pursuing contribution from Marquee.

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

In addition, pursuant to NRS 17.265, when a tortfeasor has a right to indemnity from another tortfeasor, his claim is for indemnity and he has no right to contribution under the Uniform Contribution Act. 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 right to contribution under the Uniform Contribution Act pursuant to NRS 17.265. Further, although St. Paul asserts a claim against Marquee under NRS 17.275, that statute is of no benefit to St. Paul as it only allows the insurer to be subrogated to the tortfeasor's right of contribution. If the tortfeasor has no right of contribution, then neither does its insurer. As discussed above, Cosmopolitan has no right to contribution from Marquee as it has a contractual right to indemnity from Marquee pursuant to the NMA. Given this right (or entitlement) to indemnity, Cosmopolitan has no statutory claim for contribution under NRS 17.265 as a matter of law. *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.") Where, as here, Cosmopolitan has no statutory right of contribution against Marquee, St. Paul also has no statutory right of contribution against Marquee.

D. Marquee Is Entitled to Recover Attorneys' Fees from St. Paul

St. Paul claims that, pursuant to the written agreement, Marquee is liable to St. Paul for its attorney fees in prosecuting this action and enforcing the terms of the express indemnity agreement. (FAC ¶ 129.) St. Paul is likely referring to Section 28 of the NMA which 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. However, for the reasons discussed above, St. Paul's claims against Marquee fail as a matter of law. Marquee previously advised St. Paul of its position and the baseless nature of its claims, but St. Paul decided to file its frivolous complaint anyway. Given St. Paul's complaint fails to state a claim against Marquee upon which relief can be granted pursuant to NRCP 12(b)(5), this motion to dismiss 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), the Court may make an allowance of attorneys' fees to a prevailing party "when the court finds that a claim...of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." *See, Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348 (1998) (holding that a claim is groundless if the allegations in the complaint are not supported by any credible evidence); *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089 (1995); *Bergmann v. Boyce*, 109 Nev. 670 (1993) (finding that sanctions are properly imposed when claim is baseless and made without reasonably competent inquiry). St. Paul's claims against Marquee are clearly baseless, made without (or despite) competent inquiry, and not supported by any credible evidence. Despite Marquee's prior notice to St. Paul that it had no viable claim against Marquee, St. Paul nonetheless went forward with the instant action without reasonable grounds. Accordingly, the Court may properly award Marquee its attorneys' fees pursuant to NRS 18.010(2)(b).

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V.

CONCLUSION

For foregoing reasons, St. Paul's FAC against Marquee should be dismissed with prejudice without leave to amend and Marquee should be awarded its attorneys' fees and costs.

DATED: June 25, 2018

HEROLD & SAGER

By: _____ (11333) FOR

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CERTIFICATE OF SERVICE

I hereby certify that the **DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S FIRST AMENDED COMPLAINT** was submitted electronically for filing and/or service with the Eighth Judicial District Court's Odyssey E-File and Serve System on **June 25, 2018.** Electronic service of the foregoing document shall be made in accordance with the E-Service List[1] as follows:

COUNSEL OF RECORD	EMAIL ADDRESS(ES)	PARTY
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JuRee A. Bloedel
Employee of HEROLD & SAGER

[1] Pursuant to EDCR 8.05(a), each party who submits an E-filed document through the E-Filing System consents to electronic service pursuant to NRCP 5(b)(2)(D).

Exhibit T

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff, vs. ASPEN SPECIALTY INSURANCE COMPANY, ET AL, Defendant.	CASE#: A-17-758902-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE
TUESDAY, OCTOBER 30, 2018

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

For the Plaintiff:	WILLIAM C. REEVES, ESQ. MARC J. DEREWETZKY, ESQ.
For Aspen Specialty Insurance Company:	RYAN A. LOOSVELT, ESQ.
For National Union Fire Insurance Company of Pittsburgh PA:	NICHOLAS B. SALERNO, ESQ. JENNIFER L. KELLER, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, October 30, 2018

[Case called at 11:20 a.m.]

THE COURT: And that is page 14. St. Paul Fire & Marine, Aspen Specialty Insurance Company, 758902. All of these and all of these. And notebooks, notebooks, notebooks. Everybody else, come on up. It's nice to see everybody. Let's see what we can get through here. And then I do have a question. I need to confirm with you guys, once you get all your appearances, because I think there's some confidentiality issues that we may have. So I want to make sure I don't violate whatever confidentiality agreement's out there.

MR. REEVES: Makes sense, Your Honor.

THE COURT: So if we can get appearances then? Case 758902. And start over here and work our way across the room.

MR. REEVES: All right. Wayne Reeves, on behalf of the Plaintiff.

MR. DEREWETZKY: Mark Derewetzky, on behalf of the Plaintiff as well.

THE COURT: Thank you.

MS. KELLER: Good morning, Your Honor. Jennifer Keller, appearing pro hoc vice on behalf of National Union --

THE COURT: Welcome.

MS. KELLER: -- and Roof Deck Entertainment.

THE COURT: Thank you.

MR. SALERNO: Good morning, Your Honor. Nick Salerno,

also for National Union and Marquee.

THE COURT: Okay.

MR. LOOSVELT: Good morning, Your Honor. Ryan Loosvelt for Defendant, Aspen.

THE COURT: Oh, okay. I think you're the only one who hadn't yet shown up previously, so welcome.

MR. LOOSVELT: Correct.

THE COURT: All right. So as I said, I just want to make sure I understand, because some of these terms are confidential, some of them aren't. As far as I know, the individual policy limits of each of the policies; that's not confidential. The only thing that's confidential is how much was paid to the underlying Plaintiff to resolve his claim, because it was a compromise of the jury verdict. And so the amount paid to him is confidential; am I correct?

MR. REEVES: That --

THE COURT: So I just --

MR. SALERNO: That's correct, Your Honor. And it's --

THE COURT: What do I have to avoid talking about?

MR. SALERNO: And the Nightclub Management Agreement is confidential.

THE COURT: Okay. Okay.

MR. REEVES: At least portions of it are.

MR. SALERNO: But there's --

MR. REEVES: We've made --

MR. SALERNO: -- nobody in court, so I think we're free to

talk about --

THE COURT: Right. Again --

MR. SALERNO: -- this, yeah.

THE COURT: But there'll be a record, and I just want to make sure I don't say something inadvertently that means we have to seal a transcript.

MR. SALERNO: Fair enough.

THE COURT: Okay. Great. Thank you. All right. So we've got all these motions. And we start with the -- Aspen's got a motion to dismiss. Roof Deck, which is Marquee. We've got National Union, AIG, and Aspen's, motion to dismiss. I guess they're kind of overlapping. Then we've got a National Union motion. And then I've got, as I said, a bunch of other documents that -- I think they're sealed, but we're hanging onto that we've kept from all of the prior appearances to make sure we've got them.

So I just want to make sure, so that Ms. Shell can indicate in her minutes, a disposition, if any, on specifically what's on.

So Defendant, Aspen Specialty Insurance Company's motion to dismiss Plaintiff St. Paul Fire and Marine Insurance Company's redacted first amendment complaint.

Defendant Roof Deck Entertainment LLC's motion to dismiss St. Paul Fire and Marine's first amendment complaint.

And National Union's motion to dismiss Plaintiff's complaint.

MR. REEVES: That's right, Your Honor. Three motions. We truncated National Union and refer to them as AIG. We truncated --

THE COURT: Yeah.

MR. REEVES: -- Roof Deck and refer to them as Marquee, so --

THE COURT: So does it make more sense -- rather than argue these one at a time, because it's basically all the same issues, should we just have all of the three motions argued by the respective parties who brought them, and then you could oppose all three of them, and then we could hear the rebuttal?

MR. REEVES: It's at your discretion.

THE COURT: It's pretty much -- they're all the same issues.

MR. REEVES: And certainly, that's one way to do it. From where I sit, from Plaintiff's perspective, there's a clean division between insurance companies --

THE COURT: The ending?

MR. REEVES: -- versus an operator --

THE COURT: Yeah.

MR. REEVES: -- versus an insured. And so for purposes of how we had divided it internally --

THE COURT: Right. Okay. Certainly.

MR. REEVES: -- Mr. Derewetzky is going to handle the insurance issues. I'm here --

THE COURT: Okay. And like we said we just have to make sure, for Ms. Shell's purposes in Odyssey, that whatever happens, there's an outcome linked to each separate motion.

MR. REEVES: Agreed.

THE COURT: But it just seemed like arguing all of the motions at one time, and then arguing the oppositions -- and even if it's different counsel arguing, I have no problem with that. But it just seemed it would be easier to just argue the motions, argue the oppositions, and then you do the replies --

MR. SALERNO: Your Honor, I --

THE COURT: -- rather than one and one, one and one. It's just going to take forever.

MR. SALERNO: Your Honor, I do think the issues are distinct enough. It might get confusing to do that. The Marquee issues are really quite different than the insurance issues. The --

THE COURT: So you you're suggesting the two insurance motions be argued, and the Marquee motion be argued separate?

MR. SALERNO: At a minimum.

THE COURT: Okay.

MR. SALERNO: And there is --

THE COURT: Great. Okay. That's what we'll do then.

MR. SALERNO: I mean, there are notable differences.

THE COURT: We will separate out the Marquee motion. We'll do that one on its own, because it's the issue of this entity. The two insurance motions, which are Aspen and National Union -- or AIG, we'll do those two together.

So who do you want to start with? As between the insurance issue and the operating entity issue, does it make more sense to take one of those first? I don't think that the outcome of one is dependent on

the --

MR. SALERNO: I think it's your call. We've got a lot of briefing before this Court, so I'm --

THE COURT: Yeah. So I'm just trying to figure it out. I don't think there's anything with respect to specifically Marquee. I mean, do we need to have that decided before we can get to the insurance issue?

MR. REEVES: No. They're distinct and separate --

THE COURT: Yeah. I didn't --

MR. REEVES: -- and separate tracks.

THE COURT: -- think so. Okay. So I sort of think that it doesn't really matter which direction we take them in. So we'll start with Marquee then and do that one, and then we'll move on to the insurance issues after that.

MR. SALERNO: Thank you, Your Honor. Your Honor, this is similar to the prior motion. And Your Honor, at the last motion to dismiss hearing, wanted to better understand the relationship --

THE COURT: Yeah.

MR. SALERNO: -- of the various parties. At the time, if you recall, St. Paul was not acknowledging that the Nightclub Manager Agreement that we had attached to our papers, was the operative agreement. They seem to have acknowledged that now. So hopefully, we can get past what are the relationships and what is the agreement. Because those relationships are pretty fairly -- and in detail, set out in the Nightclub Management Agreement and the attached lease.

And we also then went through in detail in these renewed

papers, what those relationships are, to set that out for the Court. And be happy to answer any questions. But the crux of the argument is that the Nightclub Management Agreement includes subrogation waiver provision 1 that applies to all owner-insured policies, which St. Paul is an owner-insured policy, and I'll explain why. And that the cause of action that St Paul's attempting to subrogate to, for expressed indemnity under the Nightclub Management, only applies to claims that are not reimbursed by insurance, which we don't have here.

St. Paul is pursuing, under theory of subrogation, the claims that it paid under its policy. So those are insurance-funded claims that they expressed indemnity provision, by its expressed terms does not apply to. What St. Paul has now come forward and said, is that, well, wait a minute. My client, Cosmo, that I'm -- or, you know, my insured Cosmo who I'm subrogating to, they didn't agree to that subrogation waiver provision.

And so I'll address that first and separately, then the express indemnity aspect of that argument. That fails at several levels. First of all, the subrogation waiver provision applies to all owner policies which are defined as all owner-insured policies. And so the Nightclub Management Agreement defines what is an owner-insured policy at provision 12.3. And that includes -- I don't know if Your Honor tracked all that from our moving papers, because it's a little bit confusing. But when you look at provision 12.2.5, which is page 63 of the Nightclub Management Agreement --

THE COURT: Page 65?

MR. SALERNO: Page 63, Your Honor.

THE COURT: Sorry. It took me a little while to get that. It was very securely delivered in a sealed document envelope.

MR. SALERNO: Yes.

MR. REEVES: Do you have a copy of the agreement there, Your Honor?

THE COURT: Yeah. It was sealed. So, yeah, I've got it.

MR. SALERNO: I have an extra copy --

THE COURT: I managed to --

MR. SALERNO: -- if you want to reference it.

THE COURT: -- get it out. No, I managed to get it out my sealed copy that's all in my sleeve, got sealed.

MR. REEVES: When was it delivered to you, Your Honor?

THE COURT: I think it was the last time; wasn't it?

MR. SALERNO: Yeah. It was probably first, Your Honor. There was a stipulation to seal it.

MR. REEVES: Yeah. I saw that it was sealed, it just was unclear.

THE COURT: Yeah. This is as of February 2018.

MR. REEVES: I see.

THE COURT: We've kept it --

MR. REEVES: Okay.

THE COURT: -- in its sealed envelope ever since.

MR. SALERNO: Yes.

THE COURT: So, yeah.

MR. SALERNO: Okay.

THE COURT: I mean, portions of it were excerpted, but this is the actual full thing. I've opened it.

MR. SALERNO: Very good.

THE COURT: I got it.

MR. SALERNO: Thank you, Your Honor.

So, page 63, provision 12.2.5. That provision talks about the insurance coverage maintained by the owner-insured parties. It says, all insurance coverages maintained by operators shall be primary to any insurance coverage maintained by any owner-insured parties. And then it refers and defines that term as the owner policies. So that is what defines the owner policies, as the owner-insured parties. The owner-insured parties is defined above, on that same page, on 12.2.3.

And you'll see that the owner-insured parties is defined to include the owner, which is Nevada Restaurant, one, a related affiliate, the project owner, which is Cosmo. And the landlord and the tenant under the lease, et cetera, parents, subsidiaries, affiliates. So the owner-insured parties under the express terms of the Nightclub Management Agreement is not just Nevada Restaurant, it's also, Cosmo, by the interaction of these two provisions.

So the insurance maintained by The Cosmo is an owner's policy under the terms of the Nightclub Agreement, to which the subrogation waiver provision applies. If there are any doubts, just by the definition of the parties and the relationships of them, the lease agreement, which is attached as Exhibit D to the Nightclub Management

Agreement, requires that The Cosmo, who is the landlord -- we lay this out in our papers -- at page 15 of Exhibit D, Your Honor, section 17.2, all right -- I know it's a little difficult to follow, my apology -- there's the insurance requirement between the landlord -- essentially between Cosmo and Nevada Restaurant.

And it says that tenant will carry and maintain all insurance required under section 12.1 of the RMA and will cause operator to carry and maintain all insurance required under section 12.2. So here, the tenant is required to carry the 12.1 provision, which is the Nevada Restaurant requirement. Then it goes on and says, landlord covenants and agrees that from and after the date of delivery of the premises from landlord to tenant, and during the term, landlord will carry and maintain all insurance required under paragraph 1H. So the landlord here, is Cosmo.

If you go to paragraph 1H of the lease agreement, which is on page 4 of the lease, it says, landlord insurance. And it says, all insurance required to be obtained by owner under section 12.1 of the RMA. So you've got multiple layers where that argument fails, because they're within the definition of owner-insured policies, and that's owner policies. And then when you go to the lease agreement, The Cosmo is required to maintain the insurance that Nevada Restaurant was required to maintain.

So this is clearly the policy that Nevada Restaurants was required to procure and maintain under the Nightclub Management Agreement. So despite attempting to split hairs between these various

provisions, their argument lacks merit. Plus, they're claiming, as an intended-third-party beneficiary -- and an intended-third-party beneficiary is subject to the same terms and conditions to the contracting parties. So it fails at multiple levels.

Then when you get to the claim itself, beyond the subrogation waiver provision, under the expressed indemnity provision, the expressed indemnity only applies to unreimbursed losses. And they again try to split that same hair there and say, but that's only as to policies which the owner is required to maintain.

And I've already explained why the St. Paul policy is a policy that the owner is required to maintain. So under the express terms of the agreement by which they're subrogating, subrogation rights have been waived, and the indemnity rights themselves expressly only apply to non-reimbursed losses, which we don't have here.

They next try to bring a cause of action for contribution against Marquee, by stepping into the shoes of their insured, Cosmo. There's several problems with that, Your Honor. Contribution; first of all, Your Honor, is not allowed in the State of Nevada when there is an expressed indemnity provision governing the parties' rights. And we cited to the provisions in 17.245 that say that. It's also in the case law, in Calloway and other cases cited, that when the parties have expressly contracted for indemnity rights, there is no equitable contribution right available. So that's under case law and statute.

The Uniform Contribution Act also provides that when a party has engaged in intentional conduct, they cannot pursue

contribution against another third party. And we clearly have a situation here, where the verdict found that Cosmo is jointly and severally liable for intentional conduct. St. Paul's tried to, again, split those hairs, and said, yeah, but it was for a non-delegable duty. It was for vicarious liability. There's no such exception. And there's no such support for that finding. The jury verdict clearly says they're jointly and severally liable for intentional conduct. And that's a binding finding.

THE COURT: Okay. And that was --

MR. SALERNO: In the underlying action.

THE COURT: The jury didn't decide that. The Court ruled that. And the jury verdict reflected that Court ruling?

MR. REEVES: I think it's --

MR. SALERNO: I don't think so, Your Honor.

THE COURT: I thought that was a --

MR. SALERNO: They tried to get out by way of motion, which was denied. But it all went to the jury, and the jury found joint and several liability for both negligence and intentional conduct.

MR. REEVES: I don't -- I'll let you speak.

THE COURT: Yeah. Okay. I'm not sure.

MR. SALERNO: I'm not 100 percent --

THE COURT: Oh, yeah.

MR. SALERNO: -- but I don't think that's --

THE COURT: None of us were there, so --

MR. SALERNO: -- relevant anyways. But that's my understanding of what occurred. There's a binding finding of intentional

conduct on the part of Cosmo, which prevents a right to contribution.

THE COURT: That part, I don't think, is disputed.

MR. SALERNO: Okay.

THE COURT: I think my question is just, how we got there and if that matters.

MR. SALERNO: I don't think it matters.

THE COURT: Okay.

MR. SALERNO: And I don't know why it would.

THE COURT: Okay.

MR. SALERNO: And at a third level, Your Honor, contribution in Nevada requires that you extinguish a third party's liability for that. And there's nothing even close that's come to that in this matter. So the cause of action for expressed indemnity fails, under subrogation rights. Contribution simply is not available.

MR. SALERNO: Thank you, Your Honor.

THE COURT: Okay. Thank you. And who's taking that one?

MR. REEVES: I'll argue, Your Honor.

THE COURT: Okay.

MR. REEVES: Can you hear me from here --

THE COURT: Yes.

MR. REEVES: -- or do you want me to come --

THE COURT: Yeah. No problem.

MR. REEVES: All right. Our argument is quite simple. The Cosmopolitan is not a party to this agreement. Not a signatory. And so that's where everything flows from that. And that's the sleight of hand.

That's why Counsel had to walk you through all these different parts and provisions, and things like that, because if you go to page 1 -- and we provided the excerpt --

THE COURT: All right.

MR. REEVES: -- different times, and you have the whole agreement in front of you. And obviously, we had invited you to review the agreement. And bear in mind, this is a pre-answer motion. And it feels a lot like a motion for summary judgment, relative to what's going on here.

THE COURT: Yeah. And we didn't actually talk about that, so we'll give Counsel a chance to address. Just, that was a question. I mean, because when we start with Nevada law on motions to dismiss, somebody else earlier -- you may have been in here -- talked about the distinction between federal laws on motion to dismiss and state law on motion to dismiss, and they vary, at this time. It may change under the new rules, but at this time, very different.

MR. REEVES: Understood. And when we're getting into all these things outside of the pleadings --

THE COURT: Yeah.

MR. REEVES: -- and where we're not dignifying the pleadings, we assume the truth of them. We assume the veracity of the allegations. It gets very cumbersome. You've got --

THE COURT: And one of the initial arguments was, you haven't given us all the entire agreements, so how can your complaint go forward, because you don't even have the agreements attached.

MR. REEVES: Well --

THE COURT: So we had them in their sealed form by stipulation of the parties, both of the entire agreements.

MR. REEVES: Agreed.

THE COURT: Okay.

MR. REEVES: Agreed.

THE COURT: So we got it.

MR. REEVES: And so you'll see on the face page of the agreement, it'll identify the parties. You won't see Cosmopolitan there. And that is the driver of everything, because if Cosmopolitan is not a party to this agreement, then why are we talking about obligations that it owes. It may be beneficiary of things, under this agreement, and the indemnity provision, in particular. But as to duties and obligations that it brings, it owes, it's not present.

And so that's why Counsel is walking you through all these different provisions, because he's trying to cobble together a scenario where Cosmopolitan, who is a silent party to all this, relative to the trial, certainly non-delegable duty. Certainly heard that. And certainly, the Court reached that issue.

THE COURT: And as we're talking about parties, can we talk -- maybe clarify one other thing? Because --

MR. REEVES: Yes, Your Honor.

THE COURT: -- for example, affidavits; they're all signed by Tao (phonetic), but whoever is the representative --

MR. REEVES: It's a managing member.

THE COURT: -- Tao. On the management. So again just to clarify --

MR. REEVES: Yes.

THE COURT: That's why they're in here, and why we're seeing affidavits signed by some executive, a Tao.

MR. REEVES: Tao speaks to Marquee speaks to the operator. That's accurate, Your Honor.

THE COURT: Okay.

MR. REEVES: So Tao doesn't speak to Cosmopolitan. It has a separate controlling group.

THE COURT: But even though Tao doesn't appear anywhere on here, technically, they are -- because you're saying, well, Cosmo is not anywhere on this document?

MR. REEVES: Correct.

THE COURT: Okay. But since Tao is purporting to have all the information for Roof Deck, Roof Deck --

MR. REEVES: Roof Deck, being Marquee.

THE COURT: -- is Marquee.

MR. REEVES: Not Cosmopolitan. That's where --

THE COURT: Yeah. Roof Deck is Marquee and also, ultimately, Tao.

MR. REEVES: Correct.

THE COURT: That's how we get there.

MR. REEVES: Marquee, Roof Deck, and Tao, we can almost collapse them all together. Cosmopolitan being completely separate.

THE COURT: Okay.

MR. REEVES: And so that's the thrust of everything. We're not distancing ourself from the agreement. We found it odd that we're dealing with it, in terms of introduction of it, vis-a-vis, a pre-answer motion. And so for purposes of what we're doing here, respectfully, pre-answer motion, this is a motion for summary judgment, when we're going -- poring through agreement. Set that issue to the side. If we're going to introduce the agreement and we're going to consider it, core issue; Cosmopolitan is not a party to it. It is a signatory at the end where it says, we will be bound as to a few provisions. And that's on --

THE COURT: Yeah.

MR. REEVES: -- page -- one of the things -- the lease is not signed, you'll note, that Counsel relies on, so it's -- that's a little cumbersome. This thing is paginated at the bottom --

THE COURT: Right.

MR. REEVES: -- 89.

THE COURT: 89?

MR. REEVES: 89.

THE COURT: Is 89 -- I think it's page 90 -- Bates-stamped down in the lower --

MR. REEVES: See, I don't have a Bates-stamped copy.

THE COURT: -- right-hand --

MR. REEVES: So there, in --

THE COURT: -- corner.

MR. REEVES: -- and of itself, creates a [indiscernible] and

that's why I wanted to ask you --

THE COURT: Right. It's 89.

MR. REEVES: -- because I don't have a Bates-stamped copy. So you're looking at something I don't have.

THE COURT: Okay. Page 89 of the agreement itself.

MR. REEVES: Page 89 of the agreement.

THE COURT: Yeah. It's the project owner in that paragraph.

MR. REEVES: Fair enough. And I don't mean to suggest that you're looking at something that isn't the same as mine, but I'm not able to refer you to Bates stamp.

THE COURT: Okay.

MR. REEVES: But you will see, we're not -- Cosmopolitan, it's not a signatory. Didn't obligate itself to the insurance requirements, the waiver of subrogation. And so if they're outside of the agreement, how on earth are we going to bind them to it? And so, respectfully, that's the thrust of the argument. We don't need to get, frankly, any more complex than that.

Contribution, well, if we're not a party to the agreement, then we get contribution. So either we're in, relative to enforcing the expressed indemnity, or we don't get to enforce the expressed indemnity and then we get contribution. It's kind of an either/or scenario. We pled in the alternative, which you do when you're at the pleading stage, so --

THE COURT: And so counsel's argument that you don't get express indemnity -- and you pled that but you're not going to get it -- so you can't -- obviously then, you can't claim contribution because you're

trying -- at least that's what I understand, but --

MR. REEVES: If I don't get the indemnity, I get the contribution.

THE COURT: It seemed like he --

MR. REEVES: So either I get the indemnity --

THE COURT: -- was arguing the opposite.

MR. REEVES: -- or I get the contribution. He's trying to say I don't get either.

THE COURT: Exactly. Yeah.

MR. REEVES: Understood. Relative to alternate pleading, relative to the ability to plead in almost the disjunctive, what we've done here is we seek to enforce the indemnity as a third-party beneficiary of it, the terms of it, alternatively, contribution. So if we don't get the benefit of enforcing it, if we're held to be outside of the agreement so we don't get the benefit of the indemnity, then we want contribution.

And bear in mind, Your Honor, and this is just to provide context, how did we get here? One way that we got here is, Cosmo and Marquee were jointly defended, same lawyer. And there's a lot of side issues relative to that. Same lawyer -- they never tested one another. They never looked to each other and said, well, what portion is yours versus what portion is mine? I represent to this Court that Cosmo was the silent one in all this, didn't have a footprint there, wasn't doing anything. It was Marquee that was running the show.

THE COURT: Right.

MR. REEVES: Running the operation.

THE COURT: And that was my question about, who actually found, and what did they find?

MR. REEVES: Who actually what, Your Honor?

THE COURT: Who actually made the finding, and what did they actually find --

MR. REEVES: There was no ---

THE COURT: -- with respect to

MR. REEVES: -- findings between them.

THE COURT: Yeah. Between the --

MR. REEVES: And that's what we're trying to do.

THE COURT: Yeah.

MR. REEVES: See, this was joint defense, one lawyer, never tested. So of course we're entitled to go and test the proportionate share between them, and I suggest to you, it's going to be zero to Cosmo and a hundred percent to Marquee.

THE COURT: So that's, then, my next question.

MR. REEVES: Yes, Your Honor.

THE COURT: Because as I said, I forgot to talk to Mr. Salerno about this. Which is, standard on a motion to dismiss Buzz Stew, any likelihood that you can find the facts? What is there factual, or is this just entirely, purely legal?

MR. REEVES: No. It's --

THE COURT: I mean, is there really --

MR. REEVES: -- certainly factual.

THE COURT: -- any discovery --

MR. REEVES: It was never tested.
THE COURT: -- to be done?
MR. REEVES: It was never tested in the underlying case.
THE COURT: Yeah.
MR. REEVES: I'm representing to you that Cosmopolitan was the silent one, didn't have a presence there. Counsel wants to say they're joint and several. That begs the question. To be joint and several doesn't bear out your internal exposures between two parties that are held joint and several. So yes, factual issues predominate relative to --
THE COURT: Is that only contribution, or would there also be factual issues to determine; is it an enforceable indemnity agreement, which is one result? Or is that purely legal?
MR. REEVES: The enforceability --
THE COURT: The contribution, it seems like, would be the stature.
MR. REEVES: -- whether the parties are bound by it, legal. The net effect of being bound it, factual.
THE COURT: Okay.
MR. REEVES: So on the front end, in terms of whether it's in play, that's a legal issue.
THE COURT: But at this point, do we determine -- you can proceed on your contribution claim, you're not going to be able to proceed on your indemnity claim because, you know, whatever. The Court makes that finding. That's seems to me like that would be a purely

legal finding, expressed indemnity --

MR. REEVES: Right. To the extent this Court held that Cosmopolitan doesn't get the benefit to enforce it, I suppose that would be a legal issue. To the extent this Court held that the indemnity provision does not respond to the claims, that's factual.

THE COURT: Because, again, I'm trying to get to, what if any discovery is there on that issue, for the Court to determine between enforceable expressed indemnity versus contribution. Are there factual issues there?

MR. REEVES: yes. Your Honor.

THE COURT: Okay.

MR. REEVES: So we would first go to the trial transcripts and ascertain what was litigated relative to that. Those transcripts not being before this Court, the evidence. My suspicion is, because of a joint defense, that the respective roles of the parties was never developed in the underlying case.

THE COURT: Okay.

MR. REEVES: So we would depose representatives from Marquee to confirm they were in sole control, that they dictated everything, that they didn't look to Cosmopolitan relative to their operation of the club. With that information, then we would come to this Court and say, with this factual information, we're now making our prima facie showing as to why we're entitled to indemnity, so --

THE COURT: Thank you.

MR. REEVES: -- to answer your question.

THE COURT: Thank you.

MR. SALERNO: Thank you, Your Honor.

THE COURT: Sorry about that. We didn't talk about -- this is a motion to dismiss, so --

MR. SALERNO: Sure. Your Honor, Counsel attempts to compilate several legal concepts. So I'll try to make these clear. When they say they're not a party to the contract and then they say they signed it, I think that's somewhat tongue-in-cheek. At page 89 of the Nightclub Management Agreement, they are the project owner. The project owner is defined throughout this agreement, and so are their insurance requirements and the relationship to those, as I went through.

THE COURT: But there's -- project owner, I appreciate, and it's defined all the way through. But they didn't agree to the whole contract. They only agreed to put -- acknowledged and agreed to be bound, solely with respect to the provisions of blah, blah, blah.

MR. SALERNO: They agreed to procure the insurance required under this agreement. And that's why we went through the lease requirements, which are attached and referenced to this agreement. And that's why we're here, because of the insurance they procured. They claimed it's not subject to the subrogation requirements of this agreement. Which, under the requirements of this agreement, require that subrogation rights are waived. And these are pure legal issues.

This is not a motion for summary judgment. It's a motion to dismiss. We've cited the legal authority of why it's appropriate when a

complaint fails to include, for the second time, the actual operative agreement that they're basing their subrogation right on. We can come forward with that agreement, and that's what we've done. And Your Honor can and should decide these types of legal issues up front, to avoid the waste of resources that it would cost to develop discovery on simply irrelevant issues. And that's why we're bringing it forward now.

To say that they're entitled to test the allocation because it wasn't done in the underlying action, is simply wrong. Under this agreement, the allocation of liability is only responsible to the extent it's not reimbursed by insurance. That's what these parties contracted for. So they're not entitled to test it now, because it was all paid by insurance. The parties, by agreement, only agreed to allocate liability in a certain way if it wasn't paid by insurance. And that's the whole point here.

And so the Uniform Contribution Act and the *Calloway* decision, the case law in Nevada that says it's not one or the other. It's not expressed indemnity, and then if I'm wrong for some reason and it fails because it doesn't apply, I get to do contribution; it's we contracted for the allocation of liability in a certain way, in an express agreement, under the Nightclub Management Agreement here. And under this express indemnity provision, we contracted and provided for it. We don't get the other one, too, in case it doesn't apply, or fails. That's not how it works.

So if you look at the *Calloway* decision, it says that, and in the other cases we cited, and you look at the Uniform Contribution Act, it

says that. When they've contracted for how to allocate, it's the contract that applies. You don't get the contribution claim when that fails because of the manner in which it was allocated. That's what we have here.

Here, the parties expressly agreed that they would allocate it in a certain way, and the key to that is that it had to not be reimbursed by insurance. And otherwise, everybody walks away. And so whether you think they're a party to the agreement because of the way the insurance was set up and the way it references a project owner, and there's owner-insured policies, is really not important. Because they're claiming they're coming forward as a beneficiary. Well, as a beneficiary, they don't obtain greater rights. They're still stepping into the contract to obtain the rights bargained for between the contracting parties. So they don't obtain greater rights than the contracting parties because they're coming in as a third party beneficiary. That's black letter law in Nevada.

So, Your Honor, it's just not an either-or thing. And it's appropriate for motion-to-dismiss matters, because this should've been pled in the complaint. And because it wasn't, it's before Your Honor now. So we would ask that we take the time to sort out these important legal distinctions that had to be addressed as a threshold matter before they can move forward. And try to -- what they're saying relitigate the underlying case? They want to call everybody and relitigate contribution and indemnity when those rights have been waived?

THE COURT: Okay. So your position would be that this is purely legal, whether we call this a motion to dismiss or a motion for

summary judgment?

MR. SALERNO: Yeah.

THE COURT: Ultimately, it's a purely legal issue. There is nothing to be done. I mean, the Court either says, you've got a claim under express indemnity because you're bound by this contract, or you're not bound by this contract. You're not a party. You didn't sign it, saying you would be bound by those provisions, so you're not bound. Therefore, you're claimant's contribution, wouldn't you then have --

MR. SALERNO: Well, no. It's not --

THE COURT: -- to do discovery?

MR. SALERNO: -- that you're not bound, they're claiming beneficiary status then. So they obtain no greater rights. They are claiming entitlement to express indemnity, because they're referenced in the indemnity provision. So they're bound by what that indemnity provides for. And they don't also get contribution when that indemnity doesn't provide for it, because that's what they contracted for. And these are pure legal issues.

There's no statement of undisputed facts or disputed facts here for Your Honor to decide and weigh. It's simply, this is the contract. And what are the parties' legal standings under these contracts and under the law when it comes to contribution, and under the law when it comes to subrogation waiver?

THE COURT: Thanks.

MR. REEVES: Briefly respond, Your Honor?

THE COURT: No. I mean -- no.

MR. SALERNO: Thank you, Your Honor.

THE COURT: So now we have the other issues which are the St. Paul and the Aspen -- wait a minute -- the Aspen and the AIG motions. So these are the insurance motions. Who's going to go first, AIG?

MS. KELLER: Your Honor, if we could? I'd like to speak on behalf of National Union.

THE COURT: Okay.

MS. KELLER: So what Plaintiff is asking the Court to do here is create judge-made law in Nevada, since the Nevada Supreme Court has not recognized equitable subrogation between insurers. And even the jurisdictions that do, like California, have never recognized a right to equitable subrogation as between excess carriers in different towers. In other words, excess carriers standing on the same footing. The Plaintiff knows this, and so it's now asserting that its coverage is excess to that which we've provided. Because it wants to say, if our coverage is excess, then we have the same right to go after you, that, say, in California, an excess would have to go after a primary.

But it's not. It's not. They are both excess in different towers. And the Marquee tower, Aspen was primary, National Union is excess. The Cosmopolitan tower, Zurich is primary, St. Paul is excess. And all the Court has to do is look at the fact that Cosmo was a named insured under the St. Paul policy, and Marquee was the named insured under National Union.

There's no court anywhere, that's held that those excess

carriers can go after one another for subrogation. There just isn't. So what the Court is being asked to do is make two big leaps. One, to establish the principle that the Nevada Supreme Court has not, and they can only find one case to cite to the Court, an unpublished opinion -- not of the 9th Circuit, but of a district court here in Nevada -- which seemed to recognize the right of equitable contribution, but not between excess carriers.

In that case, as the Court can see, in California -- and in fact the district court here cited a California case on it, the Fireman's Fund case -- it was an excess carrier asking for equitable subrogation from a primary. And you can see why that is, the primary essentially can hold excess carriers hostage, but not the other way around when it comes to settlement, so -- but that's been the rule. That's been the rule nationwide. They can't cite you one case standing for the proposition that they're asking the Court to do now.

And even the one case they cite, while it seems to support the right of equitable subrogation at least, if an excess is going after a primary it puts the kibosh on their other claim for contractual subrogation -- for conventional subrogation. The Court says, no, that's not recognized. And they don't like that part, so they say, well, the Court should ignore that part. So based on an unpublished decision of a district court citing California law, they're asking this Court to blaze this new path. It seems to me that in a case like this where they're asking for two bodies of judgment law, it shouldn't be the trail court doing it.

Since they haven't stated a claim that is currently cognizable

under Nevada Law, I think this Court should grant our motion. And then, if the Nevada Supreme Court wants to establish that new right of equitable subrogation between insurers, it can do so. And it could also consider, at the same time, whether it will become the only court in the land to allow equitable subrogation between excess carriers in separate towers with coextensive responsibilities. It should not be for this Court to do it. Plaintiff simply has not gotten there. And it is consistently asking this Court to make these leaps. Now, this is, of course, purely a question of law. If the --

THE COURT: Okay. Well, what I don't understand is, is if you and Mr. Salerno are both representing National Union and Marquee, how are you doing that?

MS. KELLER: They have --

THE COURT: Because it seems to me, and this is Mr. Salerno's argument, is that these are totally separate legal theories.

MS. KELLER: They're separate legal theories, but they're not in conflict with one another.

THE COURT: Okay.

MS. KELLER: Marquee has not suffered a loss, neither has Cosmo, because they were compensated by insurance. So they have no underlying bad faith action against the carriers. The carriers paid the money. They're not out anything. So we're not in conflict. But there were separate theories pled by Plaintiff. And we think, as a matter of law, those theories fail. And it is a matter of law for this Court to decide. If Counsel wants to continue to argue that they're excess, Counsel

should, at minimum, be required to give this Court a copy of its proxy, which it keeps hiding.

And the reason that it hasn't produced it -- I think the inference is clear, that if it does produce it, that'll be the end of the case. Because it will clearly show that it is excess to Zurich in the Cosmopolitan tower, not standing above National Union in the Marquee tower. And we've diagrammed that on page 10 of our motion to dismiss. It isn't refuted. And in a statement, a legal conclusion in the complaint doesn't bind this Court. If it were a factual assertion, it would. But it's a legal conclusion, whether somebody is excess to another carrier, and the Court decides that by looking at the policies. That's how the Court always decides that.

THE COURT: Well, how do I --

MS. KELLER: So I think --

THE COURT: -- decide it in your client's favor then, when I haven't seen a policy, and I don't know if you're right or you're wrong?

MS. KELLER: Well, we have provided ours. Now, I think the Defendant should be required to provide its own. Because the reason that they haven't is because the case would fail. This Court should not be expending a huge amount of judicial resources on a case where the threshold issue could kill the case.

THE COURT: Right. But my --

MS. KELLER: Because it's a legal issue.

THE COURT: -- question is, don't -- I mean, how can I do this on a motion to dismiss? Don't I have to say, put them to test your

theory, that, you know, you're -- produce sure policy and show us where it is clear that you're not excess in The Cosmo tower?

MS. KELLER: Then I think a simple way to do that would be, just continue this motion to dismiss, order the Plaintiffs to provide a copy of the policy so the Court can make that determination. Because otherwise, what happens is, all this litigation is kicked up for God knows how long, when it should be probably aborted at this stage. And if not aborted, it should be deferred to the Nevada Supreme Court to decide.

THE COURT: Right. And again, I understand that. This is why again, on a motion to dismiss standard in Nevada that we have as it currently stands, what is there to be litigated versus what is just purely an issue of law? I mean, what would we -- if we don't grant this as a motion to dismiss, you always have the right to bring a summary judgment motion at a later date. I mean, that's always been the law. I mean, denying a motion to dismiss doesn't mean there isn't going to ultimately be no facts out there that can support their case and they lose as a matter of law in a summary judgment.

MS. KELLER: That's true.

THE COURT: So --

MS. KELLER: We could proceed with litigation, and proceed to incur expense, and proceed to use up Court's resources. And then the Court could grant a summary judgment motion, and then it will go to the Nevada Supreme Court.

THE COURT: But --

MS. KELLER: But there isn't any real reason to do that when

this really is a pure question of law.

THE COURT: Okay. All right. Thank you.

Now, yeah, ask.

MR. LOOSVELT: A lot it applies to Aspen as well, that Aspen's a primary. But in addition to these not being recognized as causes of action in Nevada State Court here, it is purely questionable. And that's what Your Honor keeps saying as to what Aspen's policy limits are. And that's really what a lot of the claims are based on. So setting aside that these aren't recognized in Nevada, you'd be making judge-made law.

THE COURT: Okay.

MR. LOOSVELT: Outside of that, it's all based on largely whether or not Aspen refused settlements within policy limits. And the law's pretty clear on how each occurrence, when it applies in the CGL coverage, that that's the limit. There's been one occurrence here. St. Paul has not argued that there's been two occurrences. They just argue that there's two injuries. There's a bodily injury and then there's a false advertising, because of the false imprisonment claim falls under there. That's not how policies are construed, and that's not the purpose of this policy. Each occurrence, the limit is $1 million, regardless of the amount of injuries and those things that fall under that CGL coverage.

And we think the law is pretty clear. And we do believe that is a purely legal question. And based on that, in addition to the other things that the claims do fail, it's Aspen because it's largely what they're all based on, if not --

THE COURT: So we've got the issue on, was Aspen really exposed to one million or two million? It may be a purely legal question in the end. But the issue about, were there opportunities to settle this thing within policy limits?

MR. LOOSVELT: Well, that's --

THE COURT: Do we have to do discovery on, were there opportunities to settle, before we decide, was it one or two?

MR. LOOSVELT: Well, whether there's one or two, is a legal question based on the policy and based on the case law.

THE COURT: But doesn't that control whether or not it was reasonable? Like, say you got an offer -- this is hypothetically speaking, I don't know anything about this case, if another judge tried this thing. So hypothetically speaking, maybe there was an offer to settle for $1,999,000.

MR. LOOSVELT: Well, there was an offer, and it's alleged that there was an offer to settle for one and a half million.

THE COURT: Right.

MR. LOOSVELT: But nothing within Aspen's actual --

THE COURT: There -- one.

MR. LOOSVELT: -- policy limits. And that's the issue here. And this is what magically appeared in the amended complaint that was absent in the first complaint. They were talking about the $26 million -- the 1 million primary and the 25 million excess that was made. And then we filed a motion that Your Honor ordered amendment. And then they saw it. Wait, we've got to come up with something else. And

that's when this whole theory of aggregate limits apply.

But that is a legal question. That is not a factual one. It's a legal determination Your Honor can and should make. Because the law is pretty clear that the $1-million-occurrence limit applies. And if that is true, as we believe the case law shows, then there is no failure to settle within policy limits, because there is no fact, alleged or otherwise, that there was a settlement offer within that $1 million. And that's why this aggregate-limit theory has appeared in the second round. And, you know -- so --

THE COURT: And so need -- again, motion to dismiss stage where the question is, is there anything they could possibly go out there and discover on any legal theory --

MR. LOOSVELT: Well --

THE COURT: -- that might give rise to a potential for recovery? And ultimately, you may be right, and summary judgment is appropriate.

MR. LOOSVELT: But --

THE COURT: But --

MR. LOOSVELT: So --

THE COURT: So you're saying at this point with --

MR. LOOSVELT: $1 million --

THE COURT: -- your client, no.

MR. LOOSVELT: -- is the policy limit is illegal question.

THE COURT: Uh-huh.

MR. LOOSVELT: There is no fact alleged that there is a

settlement offer within that $1 million. So that can be determined, yes.

THE COURT: Okay. Okay. Thank you.

MS. KELLER: And Your Honor, could I just add one thing --

THE COURT: Sure.

MS. KELLER: -- to clarify --

THE COURT: And then -- well --

MS. KELLER: The complaint does plead that National Union insures Marquee as its named insured, and that St. Paul insures Cosmo as its named insured on an excess policy. So the complaint does establish the two towers right there, even without the Court seeing the policy.

THE COURT: Okay. Okay, thanks. Thanks. Thanks for confirming. Now Mr. Derewetzky.

MR. DEREWETZKY: Thank you, Your Honor. When Mr. Salerno was arguing the Marquee motion, he cited the management agreement. And one of the provisions he cited was 12.2.5 on page 63.

THE COURT: Yes.

MR. DEREWETZKY: And I may be mistaken, but I think this goes to the heart of the question that Counsel just raised about who is excess to whom, because this provision states, all insurance coverages maintained by operator shall be primary to insurance coverage maintained by owner. Cosmo, owner. Marquee, operator. Our insurance, whatever that insurance is, whoever it insures; excess to their insurance.

THE COURT: But don't we have to first determine whether or

not your client's bound by this agreement? Because Mr. Salerno was already -- I mean -- the argument is that they're not bound. That they expressly, in their acceptance provisions, said nothing in paragraph 12.

MR. DEREWETZKY: Whether who's bound by it?

THE COURT: Back here on the signature page, it's Cosmo --

MR. DEREWETZKY: I think the question, Your Honor, is whether Marquee is bound by it, because --

THE COURT: Okay.

MR. DEREWETZKY: -- this is a provision that deals with insurance that's going to benefit Marquee.

THE COURT: So then when we get -- for the purposes between Marquee and St. Paul, if the argument is, wait a minute, we might still have a cause of action here because when Cosmo signed, they said, very specifically in there and cherry-picked the sections which they agreed to be bound by. Their signature line is really specific and really limited. So therefore, Mr. Salerno's argument's going to fail because the owner never agreed to be bound by section 12.

MR. REEVES: But Marquee did, and the key is, Marquee is the signatory to it. Marquee agreed its -

THE COURT: Okay. But --

MR. REEVES: -- coverage is primary --

THE COURT: Okay, yeah.

MR. REEVES: -- Marquee.

THE COURT: So that's what I'm trying to ---

MR. REEVES: Yes.

THE COURT: -- get to. So that does not defeat your argument because Counsel has said, look, it is separate towers. Very clearly, within the policies, the language of the policies is going to say, we assume. Nobody's seen your policy, so we don't know. But the policy is going to say, it is excess. And so therefore, there's two separate towers. And that's the legal theory that's out there, which is, when you've got separate towers, can you subrogate?

Your point being, it doesn't matter if we were not signatories to the insurance section; the operator was. And the operator, being Marquee, says, right in there, any other insurance is going to be excess. We're up front. We're number one. Anything else, we don't care. That's between them and their insurance carrier whether they're excess or not. That's between us. It's been, our insurance carriers and their insurance carriers we agreed will be excess. It doesn't matter.

MR. DEREWETZKY: Will be excess?

THE COURT: Correct. Exactly.

MR. DEREWETZKY: Yes.

THE COURT: A bit important. That Marquee specifically says, we don't care what -- that's between Cosmo and its insurance carriers, who's excessive and who's primary. We don't care. That doesn't matter to us. Always, as between us and them, we're going to be primary. They're going to be excess.

MR. DEREWETZKY: Yes. And --

THE COURT: They simply said that. It doesn't matter if your clients signed on that or not.

MR. DEREWETZKY: And we addressed this issue, I think at length, in our brief, Your Honor. And there are other reasons why we argue that we're excess and they're primary. But I'd like to take a minute to address --

THE COURT: Yeah.

MR. DEREWETZKY: -- the threshold issue --

THE COURT: Yeah.

MR. DEREWETZKY: -- of whether there can be a claim for subrogation under these circumstances. Assuming that we prevail on the argument that we're excess, Counsel has acknowledged that there are cases where excess carriers subrogate against primary carriers. And that would be our situation here. There isn't a specific case by the Nevada Supreme Court under those facts.

But we lay out in our briefing, at length, the history of subrogation in the State of Nevada, starting with a case in 1915, called *Laffranchini v. Clark*, at 39 Nevada 48, which says, subrogation is simply a means by which equity works out justice between man and man. It is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties; and the courts incline rather to extend than restrict the principle, and the doctrine has been steadily growing and expanding in importance. This is 1915, Your Honor.

And the court went on to say, subrogation applies to a great variety of cases, and is broad enough to include every instance in which one party pays a debt for which another party is primarily liable. Our argument here, Your Honor, is that we are paying it. We have paid a

debt for which National Union is primarily liable. And for which -- well, and for which National Union is primarily liable. This has been the law in the State of Nevada for over 100 years. And if there's any question about that, you know, cases that were decided in 2010 hold the same.

The court has expressly stated the district courts have full discretion to fashion and grant equitable remedies. You have the authority to do this, even if no other court in Nevada has ever done it. But there have been equitable subrogation cases in Nevada for years. We cite, in our brief -- and I have to mention this because Counsel raised the issue of the Maxwell decision. As Counsel noted, there are recent federal trial court decisions which have enforced the right of equitable subrogation in the insurance context, in this situation; excess vs. primary, and those are the *Colony* cases. There are two of them. I refer to them as "Colony 1" and "Colony 2". In one of the decisions, the court rejected the claim of contractual subrogation based on *Maxwell*.

And let me go back to the *Canfora* case. The *Canfora* case was a contractual subrogation case, in the context of medical benefits, where insurer for the employer compensated the injured insured. Who then went and sued the tortfeasor, got a big recovery. And the insurer wanted to get the amount back of their medical lien.

The beneficiary cited Maxwell for the proposition that you don't have the right to contractual indemnity. And here's what the Nevada Supreme Court said about Maxwell in the *Canfora* case, we have previously prohibited an insurer from asserting a subrogation lien against medical payments of its insured as a matter of public policy. In

Maxwell v. Allstate Insurance, we were concerned about the injured party recovering less than their full damages. However, we have held that where an insured receives a full and total recovery, Maxwell and its public policy concerns are inapplicable.

In this case, there is no dispute that the insureds, Marquee and Cosmo, have been fully protected. They are -- benefits were paid on their behalf. Certainly, Maxwell does not apply under these circumstances. And the federal district court cases are well reasoned that equitable subrogation applies, and there's no reason not to extend that to contractual subrogation.

THE COURT: Okay. So Counsel's argument that we really can't know until we've seen your policy, which we don't have, is what? Because of your argument that it doesn't matter? Because of 12.2.5, it's always going to be excess?

MR. DEREWETZKY: Counsel said they need the policy, to show that we insured Cosmo, and that we were excess to the Zurich policy. Your Honor said that that was the case, based on what you read. What do we need the policy for? Plus, we have the management agreement that says that we're excess regardless.

THE COURT: So then what? What is there to discover? Because aren't you essentially saying, purely legal issue. Go ahead and decide it today. We don't need to do anything. It's purely legal. Give everybody the contracts that are here. I guess, technically outside the scope of the initial pleading. So I'm just trying to figure out; what's left? What are we going to do under a Buzz Stew analysis? What are we

going to do?

MR. DEREWETZKY: In terms, Your Honor, of equitable subrogation, there is a dispute, in the papers in the case, about who has the superior equities.

THE COURT: Right. And this is the whole thing we talked about very early on, which is, well, who actually made that determination that it was joint and several? I thought it was, the court instructed the jury. I could be wrong. Like I said, none of us were there. Somebody else tried this case. So I may be wrong about my understanding of how the jury got to -- because how do you get a jury to decide what joint and several is?

MR. DEREWETZKY: I'm --

THE COURT: How would a jury understand?

MR. DEREWETZKY: I don't have that information at hand, Your Honor. But I do know --

THE COURT: So that's something we have to discover.

MR. DEREWETZKY: Yes. But I do know that there are allegations in the complaint, and there's argument in the papers, about superior equities. And at least in the very recently decided, again, federal district court opinion, Fidelity and Deposit Company of Maryland vs. Travelers Casualty, which is at 2018 Westlaw 4550397, the court said it could not make a determination on summary judgment as to who has the superior equities because it involves questions of fact and questions of disputed fact.

So at the very minimum, if the cause of action for equitable

contribution survives, the case must go forward to determine, at a minimum, who had the superior equities.

THE COURT: Okay. Got it. Thank you.

MS. KELLER: Your Honor, the --

THE COURT: Yes?

MS. KELLER: The argument that somehow the lease agreement could control who is excess, fails. It's a matter of black letter law that in actions between insurers, regarding priority of coverage issues such as here, courts have found the provisions of an insurance policy control, over the terms in an insured's contract. And that's -- we cited the *Travelers Casualty Surety Company vs. American Equity Insurance Company*, 93 Cal. App. 4th 1142. And we cited a couple of other cases for that proposition. You simply can't take an insurance policy and convert it into a different kind of policy via a lease agreement with someone else. You can't do it. And so that fails.

So we're back to, Plaintiff pled that they insure Cosmo as the named insured, and that they have an excess policy. And they pled that National Union insures Marquee as its named insured, excess policy. So you have two towers, and you have two excess carriers going after each other. The idea that we've had equitable subrogation in Nevada for years, not between insurance companies ever. It's always a third party tortfeasor and the insurance company.

So it's a completely different situation. It really would open up, I think, the courts, to endless food fights between excess carriers. Everybody in every tower going after every other carrier, saying, well,

you're the reason it didn't settle. No, you are. And if somebody is going to do that, again, it should be the Nevada Supreme Court.

And one reason is, the same reason that whenever you have judge-made law, you want it to be done by the highest court, because they can get briefing from everyone. Including, many amici curiae can come in and say, we've researched this extensively and here's what we've found. They're in a position to really seriously consider the pros and cons from everybody who might have an interest in it, because it would be making new policy. It's a policy decision.

And in this case, for the Court to grant our motion to dismiss and defer that to the Nevada Supreme Court, would make sense for another reason. There's no one here who's going to be injured in the interim. These are two insurance carriers fighting it out. There's not a paraplegic person who's going without medical care. We're not in a situation where witnesses could die or memories fade. This is a situation that is a legal issue only.

And so that's another reason why I think the fact that Plaintiff has not been able to state a claim under current Nevada law, means that we should prevail.

THE COURT: Thank you.

Aspen?

MR. LOOSVELT: There was no opposition that the one-million limit applies. And that's notable, because that's -- even if we were going to recognize these new causes of action, that's failed to all the claims. So the initial complaint stated equitable subrogation, and

then the amended complaint just did away with equitable. It sounds like that's what the focus is, or maybe there being -- alleging an alternative. It's hard to tell. But under either, they fail because of the purely legal question Your Honor cold make, based on the facts and what the settlement offers were. And they were not within the policy limits.

Even where Your Honor is going to recognize an equitable subrogation claim, just looking at some of the elements, they're just lacking here. And this is, it's an equitable thing. It's to do equity and, you know, do fairness to people. And this is rights emanating from the insured. And one of the prominent elements is that the insured suffered a loss. And they're trying to subrogate it to that loss. But the insured here didn't suffer a loss. The insured was fully indemnified in the post-verdict settlement. Based on all the limits, by the way, which included the one with another policy limit.

THE COURT: Okay. But how can we say they didn't suffer a loss? There's a big judgment against them that was compromised, and insurance did pay that.

MR. LOOSVELT: So there's --

THE COURT: But don't they stand in the shoes of Cosmo? I mean --

MR. LOOSVELT: So they --

THE COURT: -- they did that to protect their insured.

MR. LOOSVELT: There's a different element that kind of addresses that, up under that, and that element is, the insured had an existing signable cause of action against the defendant, that they could

have asserted had they not been compensated. So that's a completely separate element. One of the other elements is whether or not the insured itself actually suffered a loss. So after everything is done here and they've been paid, where is their loss? There is none. They're not out-of-pocket on --

THE COURT: I think Counsel's standing up because I don't think he addressed the Aspen issues. So hang on.

MR. LOOSVELT: Sure.

THE COURT: You'll get the last word. And we'll let Counsel address the Aspen issues, because I --

MR. DEREWETZKY: I'm sorry, Your Honor.

THE COURT: -- think you -- yeah.

MR. DEREWETZKY: I got all excited and sat down.

THE COURT: Yeah. I think you're correct.

MR. DEREWETZKY: Yes.

THE COURT: We --

MR. DEREWETZKY: Thank you very much. First of all -- I'm just trying to collect my thoughts really quickly, Your Honor -- on this issue of whether any of the insureds suffered a loss, it's basic to subrogation law that the insured is not going to have been damaged, because the insurance company will have paid on its behalf. And under the law of subrogation, which we go into in great detail --

THE COURT: Yeah.

MR. DEREWETZKY: -- and the history and the evolution of subrogation, it's this fact that allows the insurance company to go and

pursue the tortfeasor to get recovery. The insurance company's out of pocket. They get the rights from the insured to pursue the tortfeasor to get reimbursed. If there was actually a requirement that the insured had to be out of pocket, we'd never have a subrogation claim because the insured's company wouldn't have paid. And I think that puts to rest that particular argument.

But let me address the policy limits issue in the Aspen policy, because I think this is actually pretty clear. What Aspen is trying to argue is that they have an endorsement amending the common policy conditions, that says, if this policy contains two or more coverage parts providing coverage for the same occurrence, accident, cause of loss, loss, or offense, the maximum limit of insurance, under all coverage parts, shall not exceed the highest limit of insurance under any one coverage part. I think we have to assume that the insurance company knew what it was doing when it drafted its policy and use the term coverage part as opposed to some other term.

THE COURT: So the mere fact --

MR. DEREWETZKY: We think --

THE COURT: -- that ultimately in the settlement, if Aspen paid -- hypothetically speaking, if Aspen only paid one million out of the ultimate settlement, that's not controlling, because you still have to determine -- not controlling on the issue of, did they have a settlement offer within their policy limits which they could've taken. The mere fact that when they negotiated a settlement, their contribution to that settlement may have been one million; that's not controlling on the

question of whether or not they did in fact have an offer to settle they could've settled for within their policy limits.

MR. DEREWETZKY: That's correct, Your Honor. But what I think is controlling is, and the issue is whether there's a $1 million limit or a $2 million limit.

And we get down to this question of, what's a coverage part? There are several coverage parts in the Aspen policy. There's a general liability coverage part. There's a liquor liability coverage part. And there are other coverage parts referred to within the policy. In the general liability coverage part, there are two distinct coverages. There is bodily injury and property damage coverage, and there's personal and advertising injury coverage. Under bodily injury coverage, you have to have an occurrence for there to be coverage, an occurrence defined as an accident.

THE COURT: Okay. So I understand this. And so -- but how do we need discovery on that?

MR. DEREWETZKY: I'm sorry?

THE COURT: Why would be need discovery on that? I mean, is -- again, is that just something the Court can say, I think you're wrong. It's $2 million because he had both his injury -- because that was a big part of this thing, was his damages, the financial loss due to his reputation of his inability to run his hedge fund, allegedly. So the Court could just say, I think that's 2 million and you've already said there was an offer for 1.75. Therefore, as a matter of law, you blew it.

MR. DEREWETZKY: Yes. But I think it's important for us --

THE COURT: So --

MR. DEREWETZKY: -- to argue the legal question.

THE COURT: So but what would we look for in -- because, again, motion to dismiss; what would we be looking for at this stage of the litigation, to say, can you prove that?

MR. DEREWETZKY: Well --

THE COURT: Is there anything out there?

MR. DEREWETZKY: -- I think it's --

THE COURT: Or it's just a legal issue?

MR. DEREWETZKY: -- a legal question, Your Honor.

THE COURT: Okay.

MR. DEREWETZKY: And I think you have to look at the policy and look at it closely in terms of what it is the policy says.

THE COURT: Then can it be determined on a motion-to-dismiss standard, or does it need discovery?

MR. REEVES: If he's going to concede a $1.5 million offer and you find $2 million, then the answer would be yes. You have what you need.

THE COURT: Okay.

MR. REEVES: They failed to settle the case --

THE COURT: Okay.

MR. REEVES: -- I mean, to your point, or relative to that concession.

THE COURT: Okay.

MR. REEVES: It's an allegation. And if we're going to say in

open court that that concession is binding, then --

THE COURT: Okay. Thanks.

MR. LOOSVELT: I agree it is a legal question as to what the limit is. And so he just talked about an endorsement for different coverage parts, all right? But when we look at the CGL coverage part, there's A, B. You have a section of bodily injury and you have a section of this personal and advertising injury. All these CGL coverage parts are subject to the each occurrence limit of $1 million. It doesn't matter the amount of injuries that result under that. And that's what the case law shows and says.

So what you have here is a legal question of what applies. Is it the one million or is it the two million? Anything under the CGL, we have an each-occurrence limit of $1 million. It doesn't matter, like in the *Bisch* case, when the Nevada Supreme Court recognized that it was this causal approach to when an occurrence applies, that it was this horrible thing where this little girl was being backed over, back and forth, back and forth. It wasn't multiple injuries that determined multiple occurrences. It was one causal common event. And that's this incident that happened at Moro [phonetic] Peak.

Whether that resulted in him being falsely imprisoned and being beat up by the security guard -- if that's kind of what the allegations parse out -- but it's that one common cause, is that one occurrence, and it's that $1 million policy limit that applies to the CGL coverage of which the bodily injury and the personal and false advertising.

THE COURT: Okay. All right. Great. Thanks. Fine.

MR. DEREWETZKY: Your Honor, I didn't get a chance to actually finish my argument, because it has to do with this question that he just raised, where they argue about occurrences and there are two different types of coverage under the CGL coverage part; one that doesn't require an occurrence, one that requires an offense. And the offense in this case is false imprisonment. We have an offense of false imprisonment for which there's a $1 million limit, and we have an accident that caused bodily injury, for which there's $1 million limit, hence, $2 million.

THE COURT: Okay.

MS. KELLER: Sorry.

THE COURT: I'll take a look at this because this -- again, we're at the motion-to-dismiss stage. So now that we've opened the official envelope, there is arguably one thing that -- I mean, Ms. Keller may be right, that we may need the St. Paul policy, either for summary judgment purposes or as a supplement to the motion to dismiss, to make the legal determination. Because on that one, I'm having a hard time understanding what's left. Why can't we do this at this stage? What do we need to litigate over?

Same thing with Aspen. Again, for motion-to -dismiss stage, I see those -- Mr. Salerno's correct. The two insurance issues, although very different -- very different -- are distinct from the Marquee issue. So the question on the insurance policies is, what do we need? If not granting a motion to dismiss, what are we proceeding on? Granting?

Denying? Are we making a determination in their favor in the case that they win at this point in time? The Marquee issue is, to me, it's very different. And that's why I asked, you know, why are we having one set of Counsel argue this? Because I appreciate Counsel saying, but these are not inconsistent. Really? Really?

MR. REEVES: One observation, Your Honor --

THE COURT: Okay. So I'll take it under consideration.

MR. REEVES: Okay.

THE COURT: I'll let you know.

MR. REEVES: May I make one observation?

THE COURT: Sure. And they can have their closing --

MR. REEVES: Well, we didn't --

THE COURT: -- word, too.

MR. REEVES: -- file a motion, so when, you know --

THE COURT: All right.

MR. REEVES: -- ordinarily when we adjudicate issues like this, we have cross-motions --

THE COURT: Right. And that's why --

MR. REEVES: -- and each side is seeking relief, and --

THE COURT: That's why I'm saying, are we essentially saying, then, at this stage, if we're all agreeing, it's a purely legal issue?

MR. REEVES: Yeah. I mean, I -- we'd almost like to be characterized as the moving party relative to -- you know, co-moving party --

THE COURT: Yeah.

MR. REEVES: So, understood.
THE COURT: And so --
MR. REEVES: Thank you, Your Honor.
THE COURT: There is no motion for a summary judgment pending on any of this.
MR. REEVES: Understood. I'm --
THE COURT: It's all a motion to dismiss --
MR. REEVES: -- just pointing out a procedural irregularity --
THE COURT: It's --
MR. REEVES: -- that we're --
MR. SALERNO: Your Honor --
THE COURT: Yeah.
MR. SALERNO: -- briefly? I'm not sure if Your Honor wants to entertain supplemental briefing, if you feel like you need St. Paul's policy, we'd be happy to do that.
THE COURT: I'll let you know.
MR. SALERNO: Okay.
THE COURT: If I think that that's going to be a critical factor --
MR. SALERNO: Yes.
THE COURT: -- such that it would be --
MR. SALERNO: Yeah.
THE COURT: -- deciding thing and there wouldn't be any other facts.
MR. SALERNO: To the extent Your Honor is prepared to rule,

I would like to have the record reflect that we did object to the sur reply --

THE COURT: Okay.

MR. SALERNO: -- and requested to strike that --

THE COURT: Uh-huh.

MR. SALERNO: So for the record, we would ask for your ruling on that as well.

MR. DEREWETZKY: And we objected to the two-month-late-filed reply brief of Aspen and ask that it be stricken.

THE COURT: Okay.

MR. LOOSVELT: And we oppose that, and counter move for approval of the reply, so --

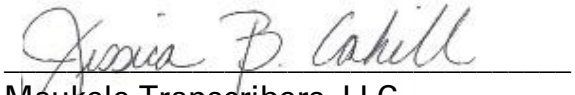
THE COURT: Okay. All right. Thank you. So as I said, I will look at that and determine if, in fact, there is anything additional needed, or if, really, at this point in time with what we've got, we're done. Because I kind of think it's one or the other. So thank you very much.

IN UNISON: Thank you, Your Honor.

THE COURT: Thank you very much for time, everybody.

[Proceedings concluded at 12:34 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

Exhibit U

Electronically Filed
7/1/2019 11:37 AM
Steven D. Grierson
CLERK OF THE COURT

ODM
Ramiro Morales [SBN 7101]
William C. Reeves [SBN 8235]
Marc. J. Derewetzky [SBN 6619]
MORALES FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Telephone: 702/699-7822
Facsimile: 702/699-9455

Attorneys for Plaintiff St. Paul
Fire and Marine Insurance Company

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE AND MARINE INS. CO., Plaintiff, vs. ASPEN SPECIALTY INS. CO, et al., Defendants.	Case No.: A758902 Dept.: XXVI ORDER RE: DEFENDANTS' MOTIONS TO DISMISS DATE: October 3, 2018 TIME: 9:30 a.m.

The Court, having considered the Motions to Dismiss filed separately by Defendants Aspen Specialty Ins. Co. ("Aspen"), Roof Deck Entertainment, LLC ("Roof Deck") and National Union Fire Ins. Co. of Pittsburgh, PA ("AIG") as to the First Amended Complaint ("FAC") filed by Plaintiff St. Paul Fire and Marine Insurance Company ("Travelers"), denied each of the motions for the reasons set forth in this Court's Minute Order, a copy of which is attached hereto as Exhibit A.

By virtue of this Order, Aspen, AIG and Roof Deck shall each file Answers to the FAC within ten (10) days of the issuance of this Order.

IT IS SO ORDERED.

Dated: June 26, 2019

DISTRICT COURT JUDGE

///

///

Case Number: A-17-758902-C

AA01478

SUBMITTED BY:

MORALES FIERRO & REEVES

By 

William C. Reeves
MORALES FIERRO & REEVES
600 Tonopah Drive, Suite 300
Las Vegas, NV 89106
Attorneys for Plaintiff

Exhibit A

A-17-758902-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Insurance Tort **COURT MINUTES** **February 28, 2019**

A-17-758902-C St. Paul Fire & Marine Insurance Company, Plaintiff(s)
vs.
Aspen Specialty Insurance Company, Defendant(s)

February 28, 2019 **3:00 PM** **Minute Order**

HEARD BY: Sturman, Gloria **COURTROOM:** RJC Courtroom 10D

COURT CLERK: Lorna Shell

PARTIES PRESENT: None

JOURNAL ENTRIES

- DEFENDANT ASPEN SPECIALTY INS. CO.'S MOTION TO DISMISS PLAINTIFF ST PAUL FIRE AND MARINE INS. CO.'S REDACTED FIRST AMENDED COMPLAINT ..... DEFENDANT ROOF DECK ENTERTAINMENT LLC'S MOTION TO DISMISS PLAINTIFF ST PAUL FIRE & MARINE INS. CO.'S FIRST AMENDED COMPLAINT ..... AND NATIONAL UNION'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant Aspen Specialty Ins. Co.'s Motion to Dismiss Plaintiff St Paul Fire and Marine Ins. Co.'s Redacted First Amended Complaint; Defendant Roof Deck Entertainment LLC's Motion to Dismiss Plaintiff St Paul Fire & Marine Ins. Co.'s First Amended Complaint; and National Union's Motion to Dismiss Plaintiff's Complaint came on for hearing on October 30, 2018. Having reviewed the transcript filed December 26, 2018 and taken the matter under advisement, the COURT HEREBY FINDS as follows:

With respect to the Roof Deck Motion to Dismiss, the Court raised the question of whether the standard of review for a Motion to Dismiss would change with the amendment of the Nevada Rules of Civil Procedure. COURT FINDS it is now clear from the Advisory Committee notes to NRCP 12 that no change is anticipated Rule 12(b)(5) mirrors FRCP 12(b)(6). Incorporating the text of the federal rule does not signal intent to change existing Nevada pleading standards. COURT FURTHER FINDS Roof Deck's Motion introduces matters outside the scope of the initial pleadings and the issues related to the operating agreement in question are such that, under Nevada s rigorous pleading standards, it is not appropriate for disposition at the pleading stage. Nevada law provides

A-17-758902-C

that a complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief. Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). COURT THEREFORE ORDERED, Roof Deck's Motion to Dismiss DENIED.

Similarly, both the National Union and Aspen Specialty Ins. Co. Motions require the Court to go beyond the pleadings and ask this Court to analyze insurance policies without testing through discovery whether those policies are complete and that there are no missing amendments, exhibits, riders, or endorsements. Notably the declarations in support of the admissibility of the respective policies are brief, stating only that the exhibit is a true and correct copy with only premium information redacted, with no explanation of how the declarant determined the completeness of the policy. Further, both National Union and Aspen argue that the indemnity action must fail as a matter of law, but it seems that at least one piece of evidence necessary to evaluate these legal issues is missing from the record before the Court, i.e. the St Paul policy.

Nevada has not adopted the federal standard found in Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Both National Union and Aspen Specialty have provided evidence outside the initial pleadings, but argue that the issue before the court is purely a matter of legal interpretation and appropriate for disposition at the pleading stage. Based 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. COURT THEREFORE ORDERED, Motions to Dismiss filed respectively by National Union and Aspen Specialty DENIED WITHOUT PREJUDICE to raise these issues in a Motion for Summary Judgment.

Counsel for Plaintiff is DIRECTED to provide an Order for signature by the Court within 30 days.

CLERK'S NOTE: A copy of this minute order was e-mailed, mailed, or faxed as follows: Nicholas Salerno, Esq. (nsalerno@heroldsagerlaw.com), Ryan Loosvelt, Esq. (rloosvelt@messner.com), and William Reeves, Esq. (702-699-9455)

Exhibit V

William Reeves

From: William Reeves <wreeves@mfrlegal.com>
Sent: Wednesday, September 25, 2019 10:51 AM
To: Nicholas Salerno
Cc: Andy Herold; Kathleen Harrison; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

To be clear:

• Original inquiry was made on Calendar Day 7 (or, as you state below, 1 business day before 10 calendar days are scheduled to elapse)

• Follow up was made on Calendar Day 10 (Business Day 6) with a call later that day between us in which no mention was made of your view as to the deadline

• On Calendar Day 11 (Business Day 7), you substantively responding to our inquiry while contending the Opp is now untimely

Interesting timing. Under your logic, no extension is needed since we are already too late. Meanwhile, per the Court's website, the rules remain unchanged.

We will raise with the Court.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Wednesday, September 25, 2019 9:45 AM
To: William Reeves
Cc: Andy Herold; Kathleen Harrison; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

Bill –

This exchange seems unproductive. You requested an extension the business day before your oppositions were due and apparently did not appreciate the rule changes. We were not able to address your request with our client until the deadline had passed. You have offered no understandable reason why additional time would be needed to brief the same legal issues for a third time with the court. Nonetheless, we have offered you a proposal that provides some additional time for the briefing under a reservation of rights. Please advise how you wish to proceed.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Wednesday, September 25, 2019 9:40 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: Andy Herold <aherold@heroldsagerlaw.com>; Kathleen Harrison <kharrison@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

The exchange set forth below speaks for itself. Not sure what sentences you are referring to. At this point, feel free to clarify and/or expound upon where you believe I have erred.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Wednesday, September 25, 2019 9:33 AM
To: William Reeves
Cc: Andy Herold; Kathleen Harrison; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

Bill –

Apparently, you see some benefit to casting unfounded accusations. We tried to explain how this developed from our end on the phone yesterday and you would only make similar unfounded accusations without allowing us to even complete a sentence. This is your error. Please clarify if you are rejecting the proposal.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Wednesday, September 25, 2019 7:38 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: Andy Herold <aherold@heroldsagerlaw.com>; Kathleen Harrison <kharrison@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

Odd proposal since we requested the extension on calendar Day 7. Given this, it appears AIG strategically stalled in an effort to manufacture its timeliness argument. Unfortunate and disappointing gamesmanship.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 3:40 PM
To: wreeves@mfrlegal.com
Cc: Andy Herold; Kathleen Harrison; Jeremy Stamelman
Subject: FW: Moradi

The proposal is as follows:

- St. Paul to file its opposition to National Union's and Marquee's motions for summary judgment by October 4.
- National Union and Marquee reserve their rights to contend St. Paul missed its deadline to file oppositions to their motions for summary judgment.
- National Union and Marquee to file their replies by October 18.
- Parties agree to move the October 23 discovery motion hearing date until after the new MSJ hearing date.
- Discovery stay in place through new MSJ hearing and new discovery motion hearing.

If acceptable, please provide proposed stipulations for the Judge and for the Discovery Commissioner to accomplish the above.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 12:23 PM
To: 'Nicholas Salerno' <nsalerno@heroldsagerlaw.com>
Cc: 'Andy Herold' <aherold@heroldsagerlaw.com>; 'Kathleen Harrison' <kharrison@heroldsagerlaw.com>; Jeremy Stamelman <jstamelman@kelleranderle.com>
Subject: RE: Moradi

Go ahead and make a proposal and we will convey it to our client.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 12:19 PM
To: wreeves@mfrlegal.com
Cc: Andy Herold; Kathleen Harrison; Jeremy Stamelman
Subject: Moradi

Bill –

As we tried to explain during the call today, EDCR 1.14 has been suspended by the Eighth District pursuant to the attached Administrative Order, effective March 12, 2019. As such, the exclusion of weekends and holidays for deadlines of less than 11 days no longer applies nor does the mail rule. The deadline for the oppositions has passed and we do not have client authority to extend an already passed deadline. However, we believe our clients would be agreeable to an extended briefing period that is not as lengthy as proposed with the proviso that (i) my clients reserve all rights relating to the missed opposition deadline and (ii) the hearing on the motion to phase discovery is moved commensurately to a time after the MSJ hearing.

Please let us know if there is any interest in an approach of this nature.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 11:10 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Andy Herold <aherold@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

I do not understand the purpose of the call. Per below, you refused any extension. Has there been a change in position?

Local Rules obtained via the Clark County website today are attached. Let me know what I am missing.

William C. Reeves
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Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 10:50 AM

To: William Reeves
Cc: 'Jeremy Stamelman'; Andy Herold; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

We will give you a call at 11:00 PM.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 10:25 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Andy Herold <aherold@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

No idea what confusion or options you are referencing. I am around.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 10:18 AM
To: William Reeves
Cc: 'Jeremy Stamelman'; Andy Herold; 'Jeremy Stamelman'; Ramie Morales
Subject: RE: Moradi

Bill –

Your response indicates some confusion as to where we are coming from. Are you available for a call at 11:00 AM to clarify and discuss options?

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 10:07 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Andy Herold <aherold@heroldsagerlaw.com>; 'Jeremy Stamelman' <jstamelman@kelleranderle.com>; Ramie Morales <rmorales@mfrlegal.com>
Subject: RE: Moradi

Your response below is disappointing and reflects a lack of professional courtesy.

As you know, LR 1.14 provides that weekends are excluded from time calculations. The recent changes in the NRCP do not trump these rules, a fact highlighted by your comment below that our Oppositions to your 40+ page dispositive motions are due in 10 calendar days, which is ludicrous.

As stated during your call, the additional time requested is, in part, to permit for us to coordinate with our clients in opposing the motions. I assume the same was true when your office previously requested extensions which we agreed to afford as a matter of professional courtesy.

Given your position outlined below, I see no reason for a further call. If you believe otherwise, I am reachable per below. All rights remain reserved.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280

Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Tuesday, September 24, 2019 9:15 AM
To: William Reeves
Cc: 'Jeremy Stamelman'; Andy Herold; Jeremy Stamelman
Subject: RE: Moradi

Bill –

NU's and Marquee's motions for summary judgment are premised on the same legal arguments that were briefed in the two rounds of their motions to dismiss so it is unclear why St. Paul needs the additional weeks when those legal issues have already been briefed at length. When we spoke yesterday, you did not offer a particular reason for the extension request and our clients do not understand what St. Paul's good cause would be for the amount of time requested.

In addition, we have reviewed the rules and are confused by St. Paul's request because the deadline for St. Paul to file its oppositions is now past: 10 days from the filing and service of the motions for summary judgment. We cannot agree to an extension of a past deadline.

Please let us know if you would like to set a call today to discuss St. Paul's basis for an extended briefing period.

From: William Reeves <wreeves@mfrlegal.com>
Sent: Tuesday, September 24, 2019 7:25 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>
Subject: RE: Moradi

Let me know on the extension.

Note that we plan to involve the Court via Emergency Motion if needed.

Thanks.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: William Reeves [mailto:wreeves@mfrlegal.com]
Sent: Monday, September 23, 2019 11:32 AM
To: Nicholas Salerno
Cc: 'Jeremy Stamelman'
Subject: RE: Moradi

Works. Talk to you then.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Monday, September 23, 2019 11:28 AM
To: William Reeves
Cc: 'Jeremy Stamelman'
Subject: RE: Moradi

How about 1:30 PM?

From: William Reeves <wreeves@mfrlegal.com>
Sent: Monday, September 23, 2019 10:49 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Cc: 'Jeremy Stamelman' <jstamelman@kelleranderle.com>
Subject: RE: Moradi

Yes.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: Nicholas Salerno [mailto:nsalerno@heroldsagerlaw.com]
Sent: Monday, September 23, 2019 10:46 AM
To: William Reeves
Cc: Jeremy Stamelman
Subject: RE: Moradi

Are you available to discuss this afternoon?

From: William Reeves <wreeves@mfrlegal.com>
Sent: Monday, September 23, 2019 10:03 AM
To: Nicholas Salerno <nsalerno@heroldsagerlaw.com>
Subject: RE: Moradi

Let me know. Thanks.

William C. Reeves
MORALES • FIERRO • REEVES
2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

From: William Reeves [mailto:wreeves@mfrlegal.com]
Sent: Friday, September 20, 2019 9:19 AM
To: Nicholas Salerno
Subject: Moradi

Do you want to set a briefing schedule for the AIG and Marquee motions? Opps due in 30 days and replies due 21 days thereafter?

William C. Reeves
MORALES • FIERRO • REEVES

2151 Salvio Street, Suite 280
Concord, CA 94520
(925) 288-1776

**********PLEASE NOTE **********

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Steven D. Grierson
CLERK OF THE COURT

RPLY
RAMIRO MORALES [Bar No.: 007101]
E-mail: rmorales@mfrlegal.com
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E-mail: wreeves@mfrlegal.com
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Telephone: (702) 699-7822
Facsimile: (702) 699-9455

Attorneys for Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiffs, vs. ASPEN SPECIALTY INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ROOF DECK ENTERTAINMENT, LLC, d/b/a MARQUEE NIGHTCLUB; and DOES 1 through 25, inclusive, Defendants.	CASE NO.: A-17-758902-C **ST. PAUL'S REPLY SUPPORTING ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT ASPEN SPECIALTY INSURANCE COMPANY, AND OPPOSITION TO ASPEN'S COUNTERMOTION FOR SUMMARY JUDGMENT** Date: Time: 9:00 a.m. Dept.: XXVI

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INTRODUCTION

The underlying action triggered two coverages within Aspen's CGL Coverage Part: 1) Coverage A - Bodily Injury and Property Damage Liability, which covers bodily injury caused by an accident, *i.e.*, negligence; and 2) Coverage B - Personal and Advertising Injury, which covers injuries resulting from a variety of offenses including false imprisonment. Because the underlying action alleged and the $161 million special verdict found liability based on bodily injury from negligence as well as for false imprisonment, both coverages apply. Coverage A is subject to a $1 million per occurrence limit, limiting Aspen's indemnity obligation under Coverage A for damages resulting from one occurrence to $1 million. Coverage B is subject to a personal and advertising injury limit of $1 million, limiting Aspen's indemnity obligation under Coverage B for injury sustained by any one person to $1 million. Aspen's indemnity obligation under the sum of both coverage parts together is in turn limited by the general aggregate limit of $2 million. Therefore, because both coverages were triggered by the underlying suit, Aspen had $2 million available to settle this case and indemnify its insured.

Aspen disputes this plain language, arguing that: 1) the per occurrence limit applies to both Coverage A and Coverage B; 2) its Coverage Part endorsement limits not just coverage under the Coverage Parts of the policy, but also coverages within a Coverage Part; and 3) its policy is ambiguous, and should be resolved against its insured to limit coverage. All of these arguments fail to withstand even basic scrutiny. The policy plainly states the per occurrence limit of $1 million applies only to Coverage A, not Coverage B, and that the $1 million personal and advertising limit applies to Coverage B, with both coverages together subject to the general aggregate of $2 million. In fact, Coverage B does *not require an occurrence or use that term because many of the covered offenses are not occurrences*, so to subject it to a per occurrence limit would render Coverage B illusory. Aspen's position is therefore necessarily wrong.

Aspen does not even attempt to address this actual policy language. Rather, it cites irrelevant cases that only involved damages under Coverage A, and which therefore only involved the per occurrence limit, for the proposition that the per occurrence applies to Coverage B as well. Of course, these cases do nothing of the kind, since they did not involve Coverage B. In contrast,