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.

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 XI of XIX

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St. Paul cites not only clear policy language but also cases nationally that hold there is no reason a policy cannot provide multiple coverages for damages within a single action.

Further, St. Paul explained in detail in its moving papers why the Coverage Part endorsement does not apply to coverages within a Coverage Part under its plain language, and summarizes that discussion again below. Aspen also does not attempt to address St. Paul's textual argument of this endorsement, thereby effectively conceding St. Paul's reading is correct. Instead, it pivots into an ambiguity argument, arguing that its policy is ambiguous. This is not the law in Nevada. The policy is not ambiguous. It says there are two limits. Therefore, there are two limits. Even if it were ambiguous, it would be construed in favor of the insured, in whose shoes St. Paul stands. Therefore, this Court should grant St. Paul's motion that Aspen had two limits of $1 million each or a total of $2 million available in the underlying case.

In its attempt to avoid the plain language of its policy, and, ultimately, the consequences of its acts, Aspen argues it cannot be held to account for its actions because subrogation does not exist in Nevada and because St. Paul protected Cosmo from Aspen's bad faith Aspen is off the hook.[1] Because Aspen's discussion of subrogation is so fundamentally misguided, and because even before Aspen's misleading opposition brief this Court had questions regarding the operation of subrogation generally, St. Paul feels compelled to again provide a comprehensive primer on the law of subrogation below.

Put simply, subrogation is when one party stands in the shoes of another because it paid for that other party's injuries, thereby transferring to it via equity or contract the rights that injured party originally had to seek redress from the third party who injured it. Fundamental to this definition is that the originally injured party had its injuries paid for by the subrogating party. Thus, the fact that the injured party had its injuries paid for does not obviate a right of subrogation

[1] St. Paul agrees with Aspen's footnote no 2, wherein it infers St. Paul intended on this motion for the Court to rule only the number of available limits and the propriety of subrogation in Nevada. That was in fact St. Paul's intent. Thus this Court does not have to rule on whether St. Paul ultimately succeeds in its subrogation claim, whether it has evidence to support the elements of that claim, and it does not need to render final judgment against Aspen. Rather, all the Court need decide now is whether St. Paul can assert a claim for subrogation if it can prove the elements it says it can under Nevada law.

as Aspen would have this Court believe; rather, it is what creates that right. Aspen's position has been referred to as "circular" and "illogical" repeatedly by the courts, because otherwise subrogation would not exist at all.

Further, contractual subrogation is when one party has the right to subrogate to the rights of another per a contract between them, rather than merely through equity. This contract is between the subrogating party and the injured party, not between the subrogating party and the tortfeasor who caused those injuries. Aspen's position that St. Paul needs a contract with Aspen to sue it in contractual subrogation is therefore misguided. If St. Paul did have a direct contract with Aspen, a suit on on that contract would simply be a breach of contract action, not contractual subrogation. The reason it is called contractual "subrogation" is that St. Paul does not have such a contract, but rather subrogates to Cosmo's contract with Aspen. That is the whole point. St. Paul can sue under contractual subrogation because its policy includes a subrogation clause, which is undisputed, and which are enforced in Nevada. Therefore, again, Aspen's arguments fail.

All the cases Aspen cites either do not say what it claims they do, or are demonstrably incorrect themselves. If the Court were to hold to the contrary, that there is no right of subrogation in Nevada under these circumstances, than inevitably insurers will play chicken with each other in the settlement of cases, hoping that the other blinks first, pays the claim, and thereby gets stuck with the bill. Not only would this operate as a windfall to unscrupulous insurers like Aspen who commit bad faith while increasing premiums, but it would also greatly increase the risk of judgments in excess of policy limits that will directly injure insureds. Accordingly, this Court should grant St. Paul's motion for partial summary judgment, holding Aspen had two limits or a total of $2 million available to settle the underlying case, and that subrogation in the circumstances St. Paul alleges is available in Nevada.

LEGAL ARGUMENT

I. Aspen Had $2 Million in Applicable Limits.

A. Aspen's $1 Million Per Occurrence Limit Applied.

Aspen does not dispute that its $1 million per occurrence limit applied to the underlying action. As St. Paul explained in its moving papers, that limit applies whenever Coverage A -

Bodily Injury and Property Damage Liability of the CGL Coverage Part is triggered. Coverage A covers sums the insured becomes legally obligated to pay as damages because of bodily injury or property damage, if that injury or damage occurs during the policy period, and if it is caused by an occurrence, defined as an accident. Here, it is undisputed that this loss triggered Coverage A because of Moradi's bodily injury in the form of a beating and traumatic brain injury, and because negligence was alleged in the underlying complaint and found in the special verdict.

Aspen's indemnity obligation under Coverage A is limited by the per occurrence limit, which provides:

> 5. Subject to Paragraph 2 or 3 above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
>
> a. ***Damages under Coverage A;*** and
> b. Medical expenses under Coverage C
>
> because of all bodily injury and property damage arising out of any one occurrence.

This is not a complicated clause. It limits the amount of indemnity available under Coverage A and Coverage C (which is not relevant here) arising out of one occurrence to the amount of the per occurrence limit. *It does not state that the each occurrence limit applies to Coverage B.* Therefore, the each occurrence limit does not apply to Coverage B, but rather only Coverage A. The declarations of Aspen's policy state that the per occurrence limit is $1 million. Therefore, Aspen's $1 million per occurrence limit was triggered by the underlying claim.

B. Aspen's $1 Million Personal and Advertising Injury Limit Applied.

Coverage A is not the only coverage within the CGL Coverage Part that was applicable to the damages at issue. Coverage B - Personal and Advertising Injury was also applicable. Coverage B covers sums the insured becomes legally obligated to pay as damages because of personal and advertising injury. Personal and advertising injury is in turn defined to include a number of offenses, including false imprisonment. Because here the underlying suit alleged, among other things, false imprisonment, and the special verdict awarded damages based in part on a finding of false imprisonment, Aspen's personal and adverting injury limit under Coverage B was also triggered.

Aspen's indemnity obligation under Coverage B is limited by its personal and advertising injury limit, which provides:

> 4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay ***under Coverage B*** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

This is also not a complicated provision. It limits Aspen's indemnity obligation under Coverage B to the amount of the personal and advertising limit for all personal and advertising injury sustained by any one person. It does not apply to Coverage A because it does not reference Coverage A. Rather, it limits Coverage B. Aspen's declarations state that the personal and advertising limit is $1 million. Thus here, because one person was subject to false imprisonment, only one personal and advertising injury limit is available. Therefore, Aspen's $1 million personal and advertising limit under Coverage B was also triggered.

C. Aspen's General Aggregate Limit Caps Indemnity Under Coverages A and B at $2 Million.

The policy further provides a general aggregate limit which caps Aspen's total liability when both Coverage A and Coverage B are triggered. It states:

> 2. The General Aggregate Limit is the most we will pay for ***the sum*** of:
>
> a. Medical expenses under Coverage C;
>
> b. Damages under ***Coverage A***, except damages because of "bodily injury" or "property damage" included in the "products-completed operations" hazard; ***and***
>
> c. Damages under ***Coverage B***.

Again, this is a straightforward provision. It states that the general aggregate limit applies to the *sum of damages under both Coverage A and Coverage B*. Therefore, if a claim triggers both coverages, the general aggregate is the most Aspen can owe. This is an example of a limits section that actually applies to both Coverage A and Coverage B, and thus an example of how Aspen would have to draft that clause addressing the per occurrence limit for it to function as Aspen claims it does. Here, the declarations state that the general aggregate limit is $2 million,

which means that no matter how many occurrences took place under Coverage A and no matter how many people were injured under Coverage B, Aspen's liability is capped at $2 million. Thus, it had $2 million available to settle the underlying suit.

D. Aspen's Per Occurrence Limit Does Not Apply to Coverage B Because Coverage B Does Not Require an Occurrence.

Coverage A and Coverage B have different limits because they are designed to cover different types of injuries caused by different kinds of actions. As well-explained by the International Risk Management Institute ("IRMI"), a leading insurance industry source:[2]

> Coverage A of the standard commercial general liability (CGL) policy covers the insured's liability for "property damage" and "bodily injury." . . . Liability in connection with any of these forms of injury or damage is determined by tort law—the branch of law that governs civil wrongs not arising out of contract or statute. Some torts are negligent torts; bodily injury and property damage liability as covered by a CGL policy is based on negligence. But another category of torts—intentional torts—includes forms of injury different from bodily injury or property damage. These torts consist of a person's intentional acts that result in offenses such as libel or slander, wrongful eviction, invasion of privacy, and copyright infringement. Liability for acts of these kinds is insured by CGL Coverage B—Personal and Advertising Injury.
>
> The CGL policy defines these offenses as constituting "personal and advertising injury" . . . and makes injury of that kind the subject of the policy's Coverage B. Because negligent torts resulting in bodily injury or property damage, and intentional torts resulting in personal and advertising injury, are so different, ***the policy assigns completely different sets of provisions and exclusions to the two forms of coverage.*** For instance, while bodily injury and property damage under Coverage A must be caused by an "occurrence," which is defined as an accident, personal and advertising injury must be caused by an "offense." ***The kind of intentional tort that results in covered "personal and advertising injury" cannot usually be termed an "accident," so the requirement of an "occurrence" under Coverage B would defeat coverage from the outset in most instances.*** Similarly, there is no exclusion of injury that is expected or intended by the insured under

[2] IRMI is an educational organization and 'the leading publication for coverage analysis.'" *Deters v. USF Ins. Co.*, 797 N.W.2d 621 at 4 (Iowa Ct. App. 2011) (disposition without published opinion). IRMI has been relied upon by courts across the country, including the Nevada Supreme Court, for policy interpretation. *See, e.g., McKellar Dev. of Nevada, Inc. v. N. Ins. Co. of New York*, 108 Nev. 729, 733, 837 P.2d 858, 860 n.4 (1992) (relying on an IRMI publication to glean industry intent regarding the alienated premises exclusion); *see also, e.g., Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648, 652 (9th Cir. (Or.) 1988); *Furzier v. Ins. Co. of the W.*, 59 Cal. App. 4th 1276, 1287, 69 Cal. Rptr. 2d 629, 634 (1997). As stated by one California court when citing IRMI: "insurance industry publications are particularly persuasive as interpretive aids where they support coverage on behalf of the insured." *Prudential-LIME Commercial Ins. Co. v. Reliance Ins. Co.*, 22 Cal. App. 4th 1508, 1512–13, 27 Cal. Rptr. 2d 841, 844 (1994).

> Coverage B. . . . Instead, personal and advertising injury coverage is subject to exclusions that approach the insured's intentions from a different perspective, since the liability being insured is liability arising from an intentional tort. . . .
>
> ***As a separate coverage under the CGL policy, personal and advertising injury is also subject to its own set of policy limits.***

https://www.irmi.com/online/cli/ch005/1l05e-coverage-b-personal-and-advertising-injury-liability.aspx (emphasis added).

IRMI explains that Coverage A requires negligence, which is achieved through defining occurrence as an accident. In contrast, Coverage B does not have an occurrence requirement, and indeed, never uses that term, because its covered offenses often include intent as an essential element. *See also, Mez Indus., Inc. v. Pac. Nat. Ins. Co*., 76 Cal. App. 4th 856, 865 (1999) (the personal and advertising injury coverage "does not depend upon an accident, but may be based (and often is) on the intentional acts of the insured."); *Stein-Brief Group v Home Indem.*, 65 Cal. App. 4th 364, 372 (Cal. App. 4th 1998) ("Stein–Brief correctly points out personal injury coverage is not dependent on an occurrence, as is bodily injury and property damage coverage, but arises out of one or more offenses specified in the policy."); *Gen. Accident Ins. Co. v. W. Am. Ins. Co*., 42 Cal. App. 4th 95, 103 (1996) ("Unlike liability coverage for property damage or bodily injury, personal injury coverage is not based on an accidental occurrence. Rather, it is triggered by one of the offenses listed in the policy."). It is therefore nonsensical for Aspen to assert that the per occurrence limit impacts its indemnity obligation under Coverage B.

Indeed, the essential elements of false imprisonment include intent. *Hernandez v. City of Reno*, 97 Nev. 429, 433 (1981) ("'An actor is subject to liability to another for false imprisonment 'if (a) he acts ***intending*** to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it.'"). Therefore, false imprisonment would not qualify as an accident, *i.e.*, an occurrence under Coverage A. However, it need not, because it is a covered offense under Coverage B, which does not require an occurrence. Aspen's position that the per occurrence limit restricts coverage for an offense which would not qualify as an occurrence is absurd, and would effectively render Coverage B illusory, by obviating coverage for specifically

covered offenses. However, this is not what its policy says. Rather, the personal and advertising injury limit applies to Coverage B, not the per occurrence limit of Coverage A.

Thus, because the underlying suit triggers both coverages, both limits apply.

E. Insurers Are Free to Issue Policies Where Multiple Limits Apply.

Cases nationally also conclude multiple limits within a policy can apply to a single claim when the plain language of the policy so provides. For example, in *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wash. 2d 567, 581–82, 964 P.2d 1173, 1180 (1998), the Washington Supreme Court held that where pollution implicated both the property damage coverage and the personal injury coverage of the policy through the offense of trespass, two sets of limits were triggered. It reasoned:

> There is, in short, no rule of law that we are aware of that prevents an insurance company from providing overlapping coverage in any policy that it issues. By the same token, we know of no authority for the proposition that an insured must elect which coverage it chooses if it has been furnished with overlapping coverage in a policy. Any insurer that is a party to this suit provided the coverage that can be ascertained from a plain reading of its entire policy or policies. If the claims against Kitsap County constitute "personal injury" as that term is defined in any policy, then coverage is available under that policy, notwithstanding the fact that additional coverage may be provided to the insured by other provisions in the policy.

Id. at 581-82.

In other words, if a suit includes both property damage and personal injury, and the policy provides separate limits for each of these injuries, then both limits apply. Other cases nationally are in accord. *See, e.g.*, *FLM, LLC v. Cincinnati Ins. Co.*, 24 N.E.3d 444, 457 (Ind. Ct. App. 2014), *aff'd on reh'g*, 27 N.E.3d 1141 (Ind. Ct. App. 2015) ("We are also unaware of any rule of law that prevents an insurance company from providing overlapping coverage, and Cincinnati's CGL policy does not prohibit it under the facts of this case."); *DAE Aviation Enterprises, Corp. v. Old Republic Ins. Co.*, No. 11-CV-554-LM, 2012 WL 3779154, at 10 (D.N.H. Aug. 31, 2012); *see also, Granite State Ins. Co. v. Conner*, 83 Mass. App. Ct. 1133, 987 N.E.2d 620 (2013) (example of three overlapping coverages). Accordingly, here too, Aspen provides two limits.

F. The Cases Cited by Aspen Involved Only Coverage A.

Aspen ignores its policy language and instead cites cases involving only damages under Coverage A, and to which only the per occurrence limit therefore applied. For instance, *Century Sur. Co. v. Casino W., Inc.*, 99 F. Supp. 3d 1262 (D. Nev. 2015) involved hotel guests dying from

carbon monoxide poisoning. That was a bodily injury case under Coverage A. It had nothing to do with any personal injury offense under Coverage B. Thus, the number of occurrences there limited total indemnity, because indemnity was only available under Coverage A. Likewise, *Bish v. Guar. Nat. Ins. Co.*, 109 Nev. 133, 848 P.2d 1057 (1993) involved a car accident that injured a child. That bodily injury implicated only Coverage A, not Coverage B, because there was no personal injury offense involved. That only the per occurrence limit applied in cases that only involved Coverage A is as axiomatic as it is irrelevant. The issue here is whether both the per occurrence limit and the personal and advertising injury limit apply in a case that implicates both Coverage A and Coverage B. Aspen cites no case holding that both limits do not apply in that context because it cannot. Rather, as its policy plainly states, both limits apply.

G. Aspen's Coverage Part Argument Is Contrary to the Plain Policy Language.

In desperation, Aspen cites its Common Policy Conditions endorsement, which purports to restrict coverage to one limit when multiple "Coverage Parts" apply. In its moving papers, St. Paul explained in exhausting detail that that endorsement does not apply to Coverage A and Coverage B, and incorporates by reference that discussion again here. As Aspen failed to respond to any of those arguments, it necessarily concedes they are correct.

In summary, Aspen's Coverage Part endorsement applies only to those Coverage Parts as that term is used in the policy, such as the CGL Coverage Part, the Liquor Liability Coverage Part, the Commercial Property Coverage Part, etc. It does not apply to coverages *within a Coverage Part*, such as Coverage A and Coverage B of the CGL Coverage Part. Among the most glaring of the abundant evidence St. Paul cited to this effect were Aspen's other insurance provision, which states that that clause applies to "loss we cover under Coverages A and B of ***this*** Coverage Part," singular, referring to the CGL Coverage Part, as well as the language of the Coverage Part endorsement itself, which states, among other things, that it applies to the CGL Coverage Part, not Coverage A and Coverage B within that Coverage Part.

For this reason, the same argument regarding the analogous term "Coverage Form" has been rejected by multiple courts. *FLM, LLC v. Cincinnati Ins. Co.*, 24 N.E.3d 444, 458 (Ind. Ct. App. 2014) ("The different coverages are called precisely what they are—'coverages'—and the

policy itself is called a 'form.' . . . An example of an 'other Coverage Form' would be an automobile liability coverage form. Because there is no 'other Coverage Form' at issue here, the provision does not apply"); *see also, e.g., Argonaut Great Cent. Ins. Co. v. Casey,* 701 F.3d 829, 833–34 (8th Cir.2012) (finding "Two or More Coverage Forms" provision inapplicable in single policy with separate liability coverage and underinsured motorist coverage limits); *Philadelphia Indem. Ins. Co. v. Austin*, 2011 Ark. 283, 9, 383 S.W.3d 815, 821 (2011). Likewise, here the Coverage Part endorsement by its own terms does not apply to coverages within a Coverage Part such as Coverage A and Coverage B, making Aspen's position wrong.

H. Aspen's Policy Is Not Ambiguous, But If It Were, That Ambiguity Would Be Resolved in Favor of Coverage.

Instead of actually addressing St. Paul's textual arguments, because it can't, Aspen immediately pivots from a discussion of its Coverage Part endorsement into an ambiguity argument. Frankly, counsel for St. Paul has never before seen an insurer attempt to rely on ambiguity to restrict coverage, because for an insurer to concede ambiguity without simultaneously presenting any extrinsic evidence of intent is to effectively concede it must lose. Because Aspen drafted the policy, all ambiguities are construed against it. *National Union v. Reno Executive Air*, 100 Nev. 360, 365 (1984). Aspen offers no extrinsic evidence to deviate from its clear policy language, because there is none. The policy says exactly what it was intended to say, as the IRMI industry source attests. Conversely, St. Paul has no obligation to submit extrinsic evidence because St. Paul is not asking the Court to do anything other than enforce the plain language of Aspen's policy. Thus, both limits apply. But, again, if Aspen's ambiguity position is followed there is coverage under Nevada law.

Aspen also makes a half-hearted attempt to argue that if it is found liable for two limits this would constitute "double recovery," but this is not the case. Double recovery would occur only if the insured were seeking to be indemnified twice for the same damages. Here, the $161 million in damages actually awarded exceeded Aspen's $2 million in limits, as did the ultimate settlement, making a double recovery argument irrelevant. Rather, Aspen simply provides another limit to pay for additional damages that well exceed not only its occurrence limit but also its aggregate

limit. There is nothing inherently offensive or unfair about this. Aspen simply issued a policy with two million in applicable limits rather than one. What is unfair is Aspen arguing that, contrary to its plain policy language, it is only ever obligated to pay half its available limits.

Accordingly, St. Paul requests that this Court grant its motion for partial summary judgment, holding the underlying suit triggered both Aspen's per occurrence limit and its personal and advertising injury limit for a total of two million dollars in limits available to settle the underlying case.

II. St. Paul Is Entitled to Subrogate to Cosmo's Rights Against Aspen.

A. The General Law of Subrogation Nationally.

1. Misapplication of the Doctrine of Subrogation

Courts are sometimes confused by the doctrine of subrogation. As one highly influential opinion in this area stated, it is "difficult to think of two legal concepts that have caused more confusion and headache for both courts and litigants than have contribution and subrogation." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1291 (1998) (describing cases properly and improperly applying the doctrine of subrogation); *see also, Herrick Corp. v. Canadian Ins. Co.*, 29 Cal. App. 4th 753, 756, 34 Cal. Rptr. 2d 844, 845 (1994 ("Even lawyers find words like 'indemnity' and 'subrogation' ring of an obscure Martian dialect."); *U.S. Fid. & Guar. Co. v. Federated Rural Elec. Ins. Corp.*, 37 P.3d 828, 832 (Oklahoma 2001). For this reason, litigants are sometimes able to mislead courts about the nature of subrogation and how it operates, which is what, whether through intent or ignorance, Aspen is doing here. This is dangerous, because, as the *Fireman's v Maryland* court also explained, misapplying these rules encourages insurers to delay in paying claims, in the hopes that whichever carrier blinks first will be forever burdened with a particular loss in derogation of the equitable principals these doctrines were created to serve. *Id*. at 1297.

Accordingly, we provide a comprehensive overview of the history, purpose, and application of the doctrine of subrogation nationally and in Nevada below. It demonstrates that St. Paul has the right to subrogate to Cosmo's claims against Aspen because equity requires Aspen pay for the damages it caused by its wrongful actions for which St. Paul paid.

2. The Origin, Meaning, and Purpose of the Doctrine of Subrogation.

The doctrine of subrogation has been an integral part of the law for over three centuries. M. L. Marasinghe, "An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine I", 10 Val. U. L. Rev. 45, 48 (1975); *see also*, M. L. Marasinghe, "An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine II," 10 Val. U. L. Rev. 275 (1976). It originated in the courts of equity in the 17th and early 18th Centuries as an offshoot of the doctrines of contribution and constructive trust, and was specifically developed for cases involving indemnities such as insurance and surety. *Id*. at 49. The earliest case in the common law courts permitting subrogation was *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782), where a first party insurer subrogated to its insured's rights against rioters who had damaged his property. "Since *Mason v. Sainsbury*, the right of the insurer to stand in the place of the assured has been unquestionably accepted and applied in the common law courts, with the same ease as it has been in the courts of equity." *Id*. Over the centuries, the doctrine has been expanded to other areas not involving insurance in the service of equity, but this in no way limits application of the doctrine to the insurance context for which it was originally developed. *See id.*

"Subrogation is not a cause of action in and of itself," but rather an equitable remedy that allows one party to assert the cause of action of another. 73 Am. Jur. 2d Subrogation § 75; *Pulte Home Corp. v. Parex, Inc*., 174 Md. App. 681, 742, 923 A.2d 971, 1005 (2007), *aff'd*, 403 Md. 367, 942 A.2d 722 (2008); *Konkel v. Acuity*, 2009 WI App 132, ¶ 19, 321 Wis. 2d 306, 322, 775 N.W.2d 258, 265. Subrogation is "defined as the substitution of one person in the place of another with reference to a lawful claim or right." 73 Am. Jur. 2d Subrogation § 1; *Fireman's Fund Ins. Co. v. Maryland Cas. Co*., 65 Cal. App. 4th 1279, 1291, 77 Cal. Rptr. 2d 296, 302 (1998); *E. Boston Sav. Bank v. Ogan*, 428 Mass. 327, 329, 701 N.E.2d 331, 333 (1998). Under this doctrine, when one person, such as an insurer, pays for an injury to another caused by a third party, then the insurer has the right to step into the injured party's shoes to recover the cost of the injury from the wrongdoer. *Id*. This allows the burden of the loss to be placed on the party that caused it, where it belongs. 73 Am. Jur. 2d Subrogation § 2; *Kim v. Lee*, 145 Wash. 2d 79, 88, 31 P.3d 665, 669 (Wash. 2001).

In other words, because the insurer is the one who paid for the loss, it has the right to seek recovery for it, as if it were the party who would have been damaged had the insurer not paid. Foundational to the operation of subrogation is that the party who would have been injured was not in fact injured, because the insurer paid for the injury. Indeed, in the very first subrogation case under the common law, *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782), the central issue was whether the insurer could stand in the shoes of its insured given that the insured had not itself suffered injury because the insurer had already paid its loss. The court rejected the argument that the insurer could not seek recovery because the loss should fall on the wrongdoers, thereby introducing the doctrine of subrogation to the common law. *Id*. at 540 ("The principle is, that the insurer and insured are one, and, in that light, ***paying before or after can make no difference***."). Thus the fact that the injured party has not paid the loss itself, far from being a reason to deny subrogation, is the reason subrogation exists at all.

The fundamental reason for subrogation is that it is necessary to achieve a fair and just result. 73 Am. Jur. 2d Subrogation § 11 (subrogation "has its roots in natural justice and is an equitable remedy."); *see also*, 73 Am. Jur. 2d Subrogation §2 ("[T]he purpose of subrogation is to prevent injustice; it is designed to compel the ultimate payment of an obligation by the person who in justice, equity, and good conscience should pay it."); *see also, Republic Underwriters Ins. Co. v. Fire Ins. Exch.*, 1982 OK 67, 655 P.2d 544, 547("Subrogation is a creature of equity intended to achieve the natural justice of placing the burden where it ought to rest . . ."); *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435 (1960); *Sourcecorp, Inc. v. Norcutt*, 227 Ariz. 463, 467 (Ct. App. 2011). Subrogation is just not only because it allows a party who did not cause a loss to recover the cost of paying for it, but also because it makes those parties who cause injury bear the burden of the wrongs they commit.

Given the effectiveness of subrogation in placing the burden of wrongdoing where justice demands it belongs--on the wrongdoer--the courts have repeatedly held that it is to be liberally and expansively applied, even in situations where it has not been applied before. As explained in a well-respected secondary source:

Subrogation, as a doctrine, is not fixed and inflexible nor is it static, but rather, it is

> sufficiently elastic to meet the ends of justice. Furthermore, the doctrine is not constrained by form over substance, nor is it within the form of a rigid rule of law. Thus, the mere fact that the doctrine has not been previously invoked in a particular situation is not a prima facie bar to its applicability.
>
> The doctrine of subrogation embraces all cases where, without it, complete justice cannot be done. Grounded upon this premise, there is no limit to the circumstances that may arise in which the doctrine may be applied, particularly if applying the doctrine will provide the most efficient and complete remedy which can be afforded.

73 Am. Jur. 2d Subrogation § 7 "Flexibility and Scope"; *see also, e.g., Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. (Ill.) 2000); *Smith v. Clavey Ravinia Nurseries*, 329 Ill. App. 548, 552, 69 N.E.2d 921, 923 (Ill. App. Ct. 1946); *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 521, 475 N.W.2d 294, 298 (1991); *W. Sur. Co. v. Loy*, 3 Kan. App. 2d 310, 313, 594 P.2d 257, 260 (1979); *Fenly v. Revell*, 170 Kan. 705, 711, 228 P.2d 905, 909 (1951).

This is why subrogation has expanded so far beyond the insurance context where it originated. This also, of course, necessarily encompasses situations in the insurance context that a particular court has not yet had the opportunity to address because no appropriate case has arisen, as often happens in Nevada. Conversely, to argue that subrogation should not be applied in a particular context simply because it has not been applied there before is to misunderstand the basis of the doctrine in natural justice, equity, and good conscience. 73 Am. Jur. 2d Subrogation § 7.

3. Types of Subrogation

There are a three principal types are subrogation: equitable (sometimes referred to as legal), contractual (also referred to as conventional), and statutory.[3] 73 Am. Jur. 2d Subrogation § 3; *Roberts v. Total Health Care, Inc.*, 109 Md. App. 635, 648, 675 A.2d 995, 1001 (1996), *aff'd*, 349 Md. 499, 709 A.2d 142 (1998). Equitable subrogation was the original type of subrogation, which, as explained above, follows from equity and natural justice. 73 Am. Jur. 2d Subrogation at § 5 n.5 *citing Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 278 n.4. (Minn. 2010). It "includes every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity and good conscience should have

[3] Statutory subrogation is governed by whatever statute authorizes it. 73 Am. Jur. 2d Subrogation § 3. In this case, as no statute applies to Aspen, none is discussed herein.

been discharged by the latter." *Id*. It does not arise by contract but by operation of law based on the legal consequences of the acts and relationships between the parties. 73 Am. Jur. 2d Subrogation at § 5. As such, it is "it is a broad doctrine . . . given a liberal application; the doctrine of equitable subrogation is highly favored in the law." *Id.* at § 5 *citing U.S. Bank Nat. Ass'n v. Hylton*, 403 N.J. Super. 630, 637, 959 A.2d 1239, 1243 (Ch. Div. 2008); *Bennett Truck Transp., LLC v. Williams Bros. Const.*, 256 S.W.3d 730, 734 (Tex. App. 2008); *see also, id.* at § 5 n.3.

Contractual subrogation developed later, and has its basis in an agreement of the parties granting the right to pursue reimbursement from the responsible third party in exchange for payment of a loss. 73 Am. Jur. 2d Subrogation § 4; *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 646 (Tex. 2007). Insurers often include subrogation provisions in their policies toward the ends of "***prevention of a windfall*** to the insured or to the third party wrongdoer, and the ***reduction of the cost of insurance*** to both the insurer and the insured by ***making third party wrongdoers pay*** for the wrong done." Turner, *Insurance Coverage of Construction Disputes* § 5:5 (2d ed.) (Thomson Reuters 2018); *see also*, Rejda, et al., *Principles of Risk Management and Insurance* at 194 (13th Ed. Pearson 2016) ("*subrogation helps hold down insurance rates*. Subrogation recoveries are reflected in the rate-making process, which tends to hold rates below where they would be in the absence of subrogation. Although insurers pay for covered losses, subrogation recoveries reduce loss payments.") (emphasis in original); https://www.claimsjournal.com/news/national/2017/07/06/279219.htm ("Subrogation is the necessary evil of recovering as much of our insureds' claim dollars as possible in order to help hold down insurance premiums and soften the blow a claim event might otherwise have on them."); https://www.thehartford.com/resources/alarm/subrogation-insure-harmony ("Subrogation Actually Helps Lower Premium Costs").

As contractual subrogation is based on contract, it is governed by the terms of the agreement. 73 Am. Jur. 2d Subrogation § 4. Accordingly, most courts hold that a right to contractual subrogation can expand an insurer's rights beyond those available under equitable subrogation. *See, e.g.*, *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 646 (Tex. 2007); *see also, Sereboff v. Mid Atl. Med. Servs., Inc*., 547 U.S. 356, 126 S. Ct. 1869, 164 L. Ed. 2d 612 (2006); *Puente v. Beneficial Mortg. Co. of Indiana*, 9 N.E.3d 208 (Ind. Ct. App. 2014); *Allstate Ins. Co. v.*

Hugh Cole Builder, Inc., 772 So. 2d 1145, 1146 (Ala. 2000); *Puente v. Beneficial Mortg. Co. of Indiana*, 9 N.E.3d 208, 217 (Ind. Ct. App. 2014); *Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864, 866 (Utah 1988); *Capitol Indem. Corp. v. Strike Zone*, 269 Ill. App. 3d 594, 596, 646 N.E.2d 310, 312 (1995). For example, "a subrogee invoking contractual subrogation can 'recover without regard to the relative equities of the parties'" or before the insured has been made whole. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647 (Tex. 2007); *see also*, Windt, Insurance Claims and Disputes Section 10:5 (Thomson Reuters 2018); *see, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C.*, 646 A.2d 966, 971 (D.C. 1994); *Liberty Mut. Ins. Co. v. Thunderbird Bank*, 113 Ariz. 375, 379, 555 P.2d 333, 337 (1976); *Mut. Serv. Cas. Ins. Co. v. Elizabeth State Bank*, 265 F.3d 601, 628 (7th Cir. 2001).

All types of subrogation may exist independently and simultaneously alongside the others, *i.e.*, they are not mutually exclusive, and a bar to one does not preclude the others. 73 Am. Jur. 2d Subrogation § 3; *Roberts v. Total Health Care, Inc.*, 109 Md. App. 635, 648, 675 A.2d 995, 1001 (1996), *aff'd*, 349 Md. 499, 709 A.2d 142 (1998); *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1538 (10th Cir. 1996); *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1538 (10th Cir. 1996). Thus a party may assert claims for equitable, contractual, and statutory subrogation simultaneously where it has grounds to do so. However, because an insurer's natural right to equitable subrogation is so broad, some courts have opined that it most situations a contractual subrogation provision has nothing to add to it. *See, e.g., Progressive W. Ins. Co. v. Yolo Cty. Superior Court*, 135 Cal. App. 4th 263, 37 Cal. Rptr. 3d 434 (2005).

B. Nevada's Long History of Applying Subrogation Where It Serves Justice.

1. Nevada Recognizes Subrogation Applies as an Equitable Remedy Whenever It Is Just, Such As In the Instant Case.

In accord with jurisdictions nationally, Nevada has long applied subrogation expansively and flexibly in the interests of justice. While subrogation originated in the insurance context, the first opportunity the Nevada Supreme Court had to apply it was with regard to a refinanced mortgage. *Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250, 251 (1915).[4] There, the court expanded

[4] The Nevada Supreme Court commented on the propriety of subrogation as early as 1879, first in *Quilled v. Quigley*, 14 Nev. 215, 217 (1879), where the court noted that a surety had not been deprived of its right of subrogation, and also in *Revert v. Henry*, 14 Nev. 191, 197 (cont.)

subrogation in holding a party who paid off a mortgage is subrogated to rights under that mortgage. While no prior Nevada opinion on point existed, the court relied on national authority from well over a dozen jurisdictions to find subrogation should be broadly permitted. Even at that early date, the court quoted with approval the following:

> "Subrogation is, in point of fact, simply a means by which equity works out justice between man and man. Judge Peckham says, in *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102, that '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 to restrict the principle***, and the doctrine has been ***steadily growing and expanding*** in importance."

Id. at 252 (emphasis added).

In other words, subrogation should be applied expansively to promote justice, rather than limited in a way which allows wrongdoers to profit from their wrongs. Thus, the Nevada Supreme Court stated "[s]ubrogation . . . 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 is primarily liable, and which in equity and good conscience should have been discharged by the latter . . ." *Id.* at 252 (emphasis added). Thus the court had no trouble extending subrogation to the mortgage context.

The Nevada courts adhere to these same principles today. The Nevada Supreme Court stated as recently as 2010 that Nevada courts have "full discretion" to apply subrogation as an equitable remedy "based on the facts and circumstances of each particular case." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc*., 126 Nev. 423, 428, 245 P.3d 535, 538–39 (2010); *see also*, *Zhang v. Recontrust Co., N.A.*, 405 P.3d 103 (Nev. 2017); *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368–69, 252 P.3d 206, 208 (2011); *NAD, Inc. v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 115 Nev. 71, 76, 976 P.2d 994, 997 (1999). For this reason, *Laffranchini*, the court's first subrogation opinion, has been cited favorably by the Nevada Supreme Court as recently as 2012 in *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573, 289 P.3d 1199, 1209 n.8 (2012), where the court observe that Nevada "has recognized the doctrine of equitable subrogation in a

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(1879), where it observed that a surety which paid a claim subrogated to rights against responsible third party parties. Thus, even then the court was familiar with and accepted the concept, which is unsurprising given it had existed for over a century in the insurance and surety contexts, even if the court had not yet had a chance to apply the doctrine itself.

variety of situations" including workers compensation (*AT & T Technologies, Inc. v. Reid*, 109 Nev. 592, 855 P.2d 533 (1993)), negotiable instruments (*Federal Ins. Co. v. Toiyabe Supply*, 82 Nev. 14, 409 P.2d 623 (1966)), sureties (*Globe Indem. v. Peterson–McCaslin*, 72 Nev. 282, 303 P.2d 414 (1956)) and mortgages (*Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250 (1915)). In addition to these contexts, the court also held that a developer and general contractor's builders risk insurer may subrogate against a subcontractor when the subcontractor was required to indemnify and provide additional insured coverage to developer and general contractor. *Lumbermen's Underwriting All. v. RCR Plumbing, Inc.*, 114 Nev. 1231, 1232, 969 P.2d 301, 302 (1998). These were all specific areas where the court had not previously spoken, but it did not matter, because the general doctrine of subrogation is well-established in Nevada, and that doctrine applies beyond any specific context.

The Nevada Supreme Court has only limited subrogation in rare instances consistent with other jurisdictions. These include situations involving a loan receipt agreement, which eliminates the requirement the insured suffered a loss (*Cent. Nat. Ins. Co. of Omaha v. Dixon*, 93 Nev. 86, 87, 559 P.2d 1187, 1188 (1977)), preventing an insurer from subrogating against its own insured, which undermines the purpose of insurance (*Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980)), or when the court is concerned an insured might not be fully compensated for its loss (*Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 778, 121 P.3d 599, 604 (2005). In other words, all these limitations are based on the nature of subrogation itself, meaning they are not so much exceptions to as parameters of the rule. Therefore, Aspen's assertion that allowing subrogation here is without precedent is incorrect. In fact, it is Aspen's proposal that it be protected from subrogation when equity demands it applies that has no precedent in Nevada law.

2. Nevada Law Supports Equitable Subrogation Between Insurers.

This is why the Nevada federal district court had no difficulty concluding that current Nevada law supports equitable subrogation by an excess carrier against a primary carrier for bad faith failure to settle, even though Nevada state courts have not yet had the opportunity to specifically address that situation. *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL 3360943

(D. Nev. June 9, 2016); *see also*, *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 (D. Nev. July 5, 2018). In *Colony*, a primary auto insurer rejected settlement demands within its limits. The case later settled in excess of primary limits with the participation of the excess carrier. The excess carrier sued the primary carrier for the sum it paid based on bad faith failure to settle through equitable subrogation. The primary carrier argued Nevada had not "recognized" the right of an excess carrier to do so, so it need not pay for the damages its bad faith caused.

The court rejected this claim based on established Nevada law. The court relied on the following definition of equitable subrogation as articulated by the Nevada Supreme Court:

> [E]quitable subrogation is "an equitable remedy that requires the court to balance the equities based on the facts and circumstances of each particular case. Subrogation's purpose is to 'grant an equitable result between the parties.' This court has expressly stated that district courts have full discretion to fashion and grant equitable remedies."

Colony Ins. Co. v. Colorado Cas. Ins. Co., 2016 WL 3360943 at 3 (D. Nev. June 9, 2016).

In other words, application of equitable subrogation where it serves justice is well established in Nevada. The only exception the court noted was where subrogation is precluded by statute, which was not the case there, and not the case here. The instant case is comparable to *Colony*, in that St. Paul is also suing Aspen for the excess judgment Aspen's bad faith failure to settle caused, though St. Paul has additional grounds for suit, as explained below. Thus, as in *Colony*, St. Paul has a right of subrogation against Aspen under Nevada law. *See also*, *Riverport Ins. Co. v. State Farm*, 2019 WL 4601511, at *8 (D. Nev. Sept. 20, 2019) (following *Colony* to permit equitable subrogation, but denying relief because additional insured carrier did not cover the loss, and its named insured was not responsible for the loss).

Notably, in arguing that Nevada should not permit subrogation, Aspen does not actually cite any jurisdictions that prevents subrogation between carriers. This is because such a rule makes no sense, so any cases it could cite would be poorly-reasoned outliers which would undermine its position. To forbid subrogation would be to reward wrongdoers, and to undermine the insurance industry. There is no Nevada public policy in favor of either. Accordingly, established Nevada law support subrogation between insurers.

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3. Nevada Permits Contractual Subrogation.

While Aspen rejects *Colony*'s holding that Nevada law supports equitable subrogation based on Nevada's long history of employing that doctrine whenever justice so requires, it embraces that court's position that in some situations a contractual subrogation claim cannot be maintained, and asserts this is such a situation.

In fact *Colony* was incorrect when it held Nevada does not permit contractual subrogation. Nevada generally permits contractual subrogation, and has only barred it in the very limited context of med-pay cases, as was explained by the Nevada Supreme Court in *Canfora v. Coast Hotels & Casinos, Inc*., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). There, the court enforced a contractual subrogation clause. The court first cited the principal that in Nevada the court will not rewrite unambiguous contracts, and then concluded:

> In this case, the language in the subrogation clause could not be more plain. The clause unequivocally provides that when an employee receives the same benefits from the plan and a negligent third party, the recipient "must reimburse the plan for the benefits provided." Since the subrogation clause is unambiguous, the Canforas are bound by the terms of the document.

Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005).

In other word, the court enforced the subrogation clause because it is not in the business of revising contracts. It distinguished a prior case--*Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 506 (1986)--which held contractual subrogation was not available in the med-pay context as a matter of public policy as reflected in NRS 41.100 because of concerns the insured would not be fully compensated.[5] *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 778 (2005). ("We have previously prohibited an insurer from asserting a subrogation lien ***against medical payments*** of its insured as a matter of public policy."). However, "where an insured receives 'a full and total recovery, *Maxwell* and its public policy concerns are inapplicable." *Id.* In other words, the

[5] As explained previously, case law is abundant across the country not only recognizing contractual subrogation but holding it is not limited by equitable doctrines such as the doctrine of superior equities. It is, however, the case that contractual subrogation will not be allowed where a statute reflects a public policy contrary to that particular type of subrogation. 73 Am. Jur. 2d Subrogation § 4 ("Subrogation clauses in contracts do not violate public policy; however, despite the parties' contractual agreement, it will not be recognized where a statute expresses a public policy against the enforcement of those rights."). While that was the case in *Maxwell*, it is not the case here.

Nevada Supreme Court specifically held that where the insured is fully compensated, contractual subrogation is permitted.

Aspen concedes the insured was fully compensated here because that is the basis of its no damages argument. Thus this limited bar on contractual subrogation does not apply in this case. Unfortunately, the *Colony* court concluded Nevada did not allow contractual subrogation because it did not recognize *Maxwell* had been so limited by the Nevada Supreme Court. Indeed, *Maxwell* was the only Nevada case *Colony* relied on for this point. In doing so, it erred. Likewise, the California cases it relied on--*Colony--21st Century Ins. Co. v. Superior Court*, 47 Cal. 4th 511, 518, 213 P.3d 972, 976 (2009) and *Progressive W. Ins. Co. v. Yolo Cty. Superior Court*, 135 Cal. App. 4th 263, 37 Cal. Rptr. 3d 434 (2005)--were also med-pay claims, and both cases specifically limited their reasoning to that context.

Likewise, those sections of *Progressive W.* cited by the *Colony* court for the proposition that contractual subrogation adds nothing to equitable subrogation are a misreading: those sections only mean that equitable subrogation is very broad, not that contractual subrogation is disfavored. Further, California is one of those few jurisdictions that apply equitable limitations to contractual subrogation. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal. App. 4th 1098, 1110, 49 Cal. Rptr. 3d 785, 793 (2006). This is not the case in most of the country, where contractual subrogation can expand those rights available at equity, as explained above. Even the California appellate courts have opined it would make more sense for contractual subrogation to not be bound by equitable limitations. *Id.* Therefore, these opinions cannot circumscribe St. Paul's right to contractual subrogation here.

Lastly, the *Capitol* court referenced "windfalls" to the insurer as a reason to avoid contractual subrogation, because premiums are supposedly not calculated by taking into account anticipated subrogation recoveries. This argument was also employed in *Maxwell* based on cases from the 1960s. It is obsolete. Whatever underwriting practices may have been over a half century ago, today the technology exist for carriers to take into account anticipated subrogation recoveries in premiums, as explained above in that section regarding the basis of contractual subrogation by citation to industry sources. Therefore, there is no windfall to St. Paul. Rather, the

windfall would be to Aspen to the extent it is not bound to pay for the damages it caused by its bad faith.

In addition, as other courts have explained, where the defendant caused the loss, that the insurer received a premium that requires it to pay for that loss does not alter the equities between them: the party that caused the loss should still pay for it, because the insurance was not purchased for the wrongdoer's benefit. *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal. App. 4th 23, 45, 105 Cal. Rptr. 3d 606, 624 (2010). Or as a California court put it, "it would be better for the windfall to go to the one that undisputedly fulfilled its contractual obligations, rather than to the one that allegedly breached them." *Id.* at 47. Justice would be better served by awarding recovery to St. Paul, which honored its contract, rather than Aspen which breached.

Accordingly, as there is no public policy reason to protect an insurer which committed bad faith from paying for the consequences of its actions, St. Paul is entitled to contractual subrogation to Cosmo's claims under Nevada law.

C. St Paul Alleges All Necessary Elements of an Insurer's Subrogation Claim.

"There is no general rule to determine whether a right of subrogation exists. Thus, ordering subrogation depends on the equities and attending facts and circumstances of each case." 73 Am. Jur. 2d Subrogation § 10. In the insurance context, an influential California court of appeal opinion broke down subrogation into eight elements:

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

Fireman's v. Maryland, 65 Cal. App. 4th 1279, 1292 (1998).

In the context of subrogation by an excess carrier against a lower level carrier, the Nevada

federal district court held that while Nevada will weigh the California factors, because subrogation is an equitable remedy, none are dispositive except that only the insured's rights may be asserted. *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965, at *5 (D. Nev. July 5, 2018).

Under the California test, St. Paul is entitled to subrogation from Aspen because: a) Cosmo suffered a loss for which Aspen is liable, namely the $161 million excess judgment caused by its bad faith; b) St. Paul is not primarily liable like Aspen because Aspen breached its duty to settle and St. Paul did not, because Aspen breached its duty to provide an adequate defense and St. Paul did not, and because St. Paul's policy responds after Aspen's; c) Cosmo has been compensated for the loss through the settlement of the underlying action and the payment by St. Paul of its limit; d) St. Paul paid to protect its own interest, not as a volunteer, because the claim underlying the judgment was potentially covered under St. Paul's policy; e) Cosmo had an existing assignable cause of action for bad faith against Aspen that it could have asserted had it not been compensated for its loss by St. Paul; f) St. Paul has suffered damages because of Aspen's bad faith, in that it had to pay its limit to protect Cosmo; g) justice requires the entirety of the loss be shifted to Aspen, because its equitable position is inferior because: i) it breached its duty to settle; ii) it breached its duty to defend by providing a conflicted defense; and iii) St. Paul's policy is excess to Aspen; h) the damages are in a liquidated sum, the $25 million St. Paul paid to protect Cosmo.

Again, for purposes of this motion, the Court does not need to decide that St. Paul has evidence sufficient to prove these allegations. Rather, all the Court need decide now is that, if it can, it is entitled to subrogation. As what St. Paul seeks to prove is more than adequate to establish this right, the Court should grant this motion for partial summary judgment.

D. Aspen's Position That Subrogation Fails Because Cosmo Has No Damages Is Fundamentally Contrary to the Nature of Subrogation.

Aspen argues St. Paul's subrogation claim fails because the insured suffered no damages, because St. Paul paid them. In other words, because St. Paul stepped up and protected its insured from Aspen's bad faith, Aspen gets away with its tortious conduct.

While this argument is a trap courts occasionally fall into, it is only possible based on ignorance of the fundamental nature of subrogation. As explained above, the reason the doctrine

of subrogation was introduced into the common law was because of, not despite, the fact that the insurer had paid the insured for its damages. *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782). Modern cases are in accord. *See, e.g., Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co*., 182 Cal. App. 4th 23, 105 Cal. Rptr. 3d 606 (2010); *Troost v. Estate of DeBoer*, 155 Cal. App. 3d 289, 294, 202 Cal. Rptr. 47, 50 (Ct. App. 1984) ("Payment by the insurance company does not change the fact a loss has occurred."); *Maryland Cas. Co. v. Acceptance Indem. Ins. Co*., 639 F.3d 701, 706 (5th Cir. 2011) (the law "does not bar contractual subrogation simply because the insured has been fully indemnified."); *Amerisure Ins. Co. v. Navigators Ins. Co*., 611 F.3d 299, 307 (5th Cir. 2010) (same). This is because that is what subrogation is: the insurer paying for the insured's damages, thereby protecting the insured, and thereby gaining the right to pursue whoever was responsible for causing those damages. Conversely, if the insurer paying to protect the insured obviated subrogation, then subrogation would not exist. As bluntly explained by one court:

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

Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co., 182 Cal. App. 4th 23, 34 (Cal. 2010).

Subrogation demonstrable does exist Nevada, including in the insurance context, as explained above. Therefore, Aspen is necessarily wrong.

To support its position, Aspen cites and misrepresents *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co*., 2018 WL 2276815 (Cal. Ct. App. May 18, 2018), which the California Supreme Court has made unpublished and thus uncitable in California courts. In that case, ***the insurer did not assert a cause of action for subrogation***. Rather, after Capital breached its duty to settle, resulting in an excess judgment, it was sued by another insurer under an ***assignment***. The court held Capital had no right under the assignment because it had paid the judgment, relying exclusively on cases in which insureds tried to sue their insurers directly after another insurer had compensated them, *i.e.*, double recovery cases, not subrogation cases. While this is of course wrong, because even an assignee has the right to sue for damages for which it paid, Aspen is

incorrect that the court denied subrogation on a no damages argument, since such a claim was not asserted.

It is true that Capital tried to correct its deficient pleadings by arguing its indemnity cause of action included subrogation. The court held that even that even if such a claim had been made, it would fail ***because Capital did not have equitable superiority.*** It ***did not*** reject subrogation based on a no damages argument. It held Capital lacked equitable superiority because: 1) ***Capital's bad faith had caused the excess judgment in the first place***; and 2) of a lack of indemnity agreements between the underlying parties. There would therefore be no equitable reason to shift the loss to the other carrier, since both were in breach.

The instant case is entirely different. This case involves subrogation, not assignment. St. Paul has equitable superiority, as outlined above, for numerous reasons. Aspen, not St. Paul, caused the excess judgment. Aspen is in breach and bad faith, while St. Paul is not. The underlying insured parties do have indemnity agreements with each other, allocating the risk to Aspen's named insured, and away from St. Paul's. Regardless, even if *Capital* did say what Aspen says it does, it would be wrong, because subrogation presupposes the insurer paid the loss and protected the insured.

Aspen also cites *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Tokio Marine & Nichido Fire Ins. Co.*, 233 Cal. App. 4th 1348, 1362 (2015) to support its misapplication of subrogation. This is an example of a case where the court misunderstood the fundamental nature of subrogation, as was later explained by the California federal court in *Pub. Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp.*, 2017 WL 3601381 (E.D. Cal. Aug. 22, 2017), the only case to have ever cited *Tokio*. In rejecting *Tokio*, the court relied on *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co*., 182 Cal. App. 4th 23, 105 Cal. Rptr. 3d 606 (2010), reasoning:

> When Interstate sued Cleveland for breach of contract as its insured's subrogee, Cleveland demurred on grounds, inter alia, that because Interstate had fully compensated the indemnitee, it could not sue for subrogation on the indemnitee's behalf. The *Interstate* court squarely rejected this contention, stating that "Cleveland's insistence that [the insured] suffered no loss because Interstate paid [the insured's employee], and Interstate therefore suffered no loss because it stands in the shoes of its insured, ***is circular and erroneous***." *Id*. at 35, n.3. As the Court observed, if Cleveland's "***Illogical***" contention were accepted "***no insurer could ever state a cause of action for subrogation in order to recover amounts it paid on***

> ***behalf of its insured, because of the very fact that it had paid amounts on behalf of its insureds.***" *Id.* at 34. In the court's view, that would contradict "decades of cases consistently holding that an insurer may be equitably subrogated to its insured's indemnification claims." *Id.*

Pub. Serv. Mut. Ins. Co. v. Liberty Surplus Ins. Corp., 2017 WL 3601381 (E.D. Cal. 2017).

In other words, *Tokio* is necessarily wrong, because if it were correct subrogation would not exist, and centuries of precedent demonstrate it plainly does. The federal court therefore held that subrogation was in fact available both for breach of contract and bad faith, not despite the fact the subrogating insurer paid the claim to protect its insured, but because of it.

Furthermore, part of the reason the *Tokio* court held the insured suffered no damages was because there was no excess judgment, because the case settled on the first day of trial. Some cases suggest that an excess judgment is necessary for bad faith exposure. *See J.B. Aguerre, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 59 Cal. App. 4th 6, 13, 68 Cal. Rptr. 2d 837, 841 (1997). In the instant case, there was a $161 million excess judgment which constituted actual damage to the insured when it was rendered. Thus, while this should not matter so long as the claim is paid, on this ground also, *Tokio* is distinguishable.

Accordingly, the Court should not be misled by Aspen's no damages argument, which is, quite frankly, profoundly ignorant. St. Paul's payment does not obviate its right to subrogation. It creates it. This is made plain by a simple question: if paying the claim obviates the right to subrogation, then how would such a right ever arise? The answer is, if that were true, it could not. Centuries of precedent, including that of the Nevada Supreme Court, would be wrong. Aspen's position is analogous to arguing a breach of contract claim fails whenever it is based on a contract. It is inherently absurd. Therefore, because St. Paul paid for the insured's damages caused by Aspen, St. Paul is entitled to subrogation.

E. Aspen's Argument That a Contract Must Exist Between Aspen and St. Paul for St. Paul to Bring a Subrogation Action Against Aspen is Nonsensical and Contrary to the Nature of Subrogation.

Aspen's argument that for St. Paul to bring a contractual subrogation claim against Aspen St. Paul must have contracted with Aspen directly is just as ignorant as its no damages argument. As explained above, subrogation is when one party steps into the shoes of another, such that the

first party can assert the rights of the second against a third. Thus, for example, through subrogation, St. Paul steps into Cosmo's shoes, and can assert Cosmo's contractual rights against Aspen, even though St. Paul did not have its own contract with Aspen. St. Paul is not asserting its own contact rights against Aspen, but rather Cosmo's. That is the point of subrogation. Therefore, St. Paul does not need a contract with Aspen. Rather, it need only pay for Cosmo's injury, because Cosmo has a contract with Aspen. As authority, St. Paul cites every subrogation case to have ever been decided, including those cited above in its explanation of the fundamental nature of subrogation. Aspen of course cites nothing supporting it, because its argument is contrary to the very nature of subrogation. If Aspen were correct, subrogation would not exist.

Fireman's v. Maryland's, 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762 (1994), which Aspen misunderstands, analyzed whether carriers at different levels had a contract between them because there ***the insured had released one of them***. Therefore, ***the carriers could not proceed via subrogation***, because the insured had given up its contractual rights, *i.e.*, it no longer had any rights left to subrogate to. As the carriers had no direct contract with each other, there was thus no legal conduit remaining to assert a claim. The whole point of the case was that subrogation was not available.

Here, in contrast, Cosmo has not released Aspen. Therefore, St. Paul's subrogation to Cosmo's breach of contract and bad faith claims against Aspen is perfectly viable. Likewise, Aspen's rambling about the need for St. Paul to be a third party beneficiary on Cosmo's contract with Aspen also has nothing to do with St. Paul's right to subrogate to Cosmo's existing rights, since again, it is Cosmo's rights against Aspen it is asserting, not its own.

Fundamentally, what Aspen is trying to do here is avoid the consequences of its bad faith. If there are no consequences for bad faith, then there is nothing to prevent it. Indeed, that is why bad faith is available in tort along with extra contractual damage; because it is so very important that insurers be prevented from committing bad faith. If this Court fails to allow subrogation here, it not only rewards Aspen for its conduct, it essentially tells St. Paul, "Well, you should have committed bad faith too if you didn't want to be stuck with the bill." That cannot be the right answer. It is certainly contrary to the equitable principals for which subrogation was created, and

pursuant to which the Nevada Supreme Court has enforced subrogation in the past. Accordingly, this Court should grant St. Paul's motion, holding that St. Paul can subrogate to Cosmo's rights against Aspen because subrogation, both equitable and contractual, is available in Nevada.

III. St. Paul's Equitable Estoppel Claim Includes Aspen.

Aspen countermoves for summary judgment on St. Paul's cause of action for equitable estoppel on the ground it only alleges liability against AIG. This is not correct. Because Aspen's argument is not evidence-based, but rather pleading-based, it can be easily disposed of on the face of the pleading.

Equitable estoppel includes the following elements:

> (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.

S. Nevada Mem'l Hosp. v. State, Dep't of Human Res., 101 Nev. 387, 391 (1985).

St. Paul alleges a number of facts in its pleading supporting equitable estoppel against Aspen. It alleges Aspen is estopped to assert Marquee's direct coverage (including both Aspen and AIG) is not wholly responsible for this loss rather than Cosmo's direct coverage (including both Zurich and St. Paul). Among other bases for this, Aspen appointed a single, conflicted defense counsel to defend Marquee and Cosmo together, based on both the implicit and explicit representation that Marquee's coverage would cover this loss, not Cosmo's. Cosmo relied on this conduct by not asserting its own cross-complaint against Marquee, which could have allocated all liability to Marquee, and by not requesting a special verdict which would have clearly allocated liability between them. Aspen knew that its conduct would be relied upon by Cosmo, and Cosmo did not know Aspen would argue its own direct coverage had to share the loss. Therefore, Cosmo, and thus St. Paul via subrogation, is entitled to equitable estoppel. Likewise, Aspen behaved toward St. Paul in a way that estops Aspen from asserting it is not wholly responsible for this loss, by failing to tender the claim to St. Paul until the eve of trial, failing to inform St. Paul of trial until after it had begun, and preventing St. Paul from participating in handling the case. All these actions caused St. Paul to rely to its detriment on Aspen's representations that St. Paul would not

be responsible, Aspen knew the truth was to the contrary and intended its actions to be relied upon so that it could maintain control of the defense and thus prevent a cross-complaint against Marquee and a special verdict form laying out the allocation of liability, and St. Paul did not know of Aspen's schemes to the contrary. This also supports equitable estoppel. St. Paul believes Aspen takes the position that St. Paul had the same duty to settle the underlying case that Aspen did, even though its actions belied that position. If that last belief is not so, St. Paul is happy to take Aspen's concession on this point. However, the other points are perfectly valid bases for equitable estoppel, and Aspen is plainly included in the cause of action as drafted. Accordingly, Aspen's countermotion for dismissal of the equitable estoppel claim should be denied.

IV. Aspen's Evidentiary Objections Are Irrelevant.

Aspen has decided to waste St. Paul and this Court's time by objecting to certain evidence Aspen knows is perfectly reliable and which, in any event, is not critical to the issues addressed on this motion. These objections do not in any way support denial of St. Paul's motion.

First, Aspen raises its judicial notice objection only generally, and cites only three specific documents with respected to its authentication objection, Exhibits 15-17. Objections must be specific. *In re J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012) ("When objecting to the admission of evidence, a party must state the specific grounds for the objection. NRS 47.040(1)(a). This specificity requirement applies not only to the grounds for objection, but also to the particular part of the evidence being offered for admission."); *State v. Kallio*, 92 Nev. 665, 668, 557 P.2d 705, 707 (1976); Nev. Rev. Stat. Ann. § 47.040 (West). Therefore, Aspen only effectively objects to authentication of the three documents specified.

Exhibits 15 and 16 are Aspen's reservation of rights to Cosmo and Marquee respectively, in which it appoints conflicted defense counsel, and Exhibit 17 a defense analysis from this counsel to Aspen and Cosmo explaining the defendants faced excess exposure. None of these documents impacts the specific issues currently before the Court, *i.e.*, whether both Aspen's per occurrence limit and personal and advertising injury limit were triggered and whether St. Paul alleges a viable subrogation claim under Nevada law. The only facts the Court needs to determine these issues are: 1) the underlying complaint; 2) Aspen's policy; and 3) St. Paul's policy. Even the

underlying special verdict is not strictly necessary to prove both limits were in play, though it does prove the viability of both Coverage A and Coverage B claims. Aspen does not dispute introduction of this evidence, including the special verdict, because it cannot. Aspen provided its own policy, St. Paul provided its policy, and the other two are subject to judicial notice. Thus Aspen's evidentiary objections are irrelevant. The three disputed documents merely provide broader factual context for the Court. The same holds true as to Aspen's vague judicial notice objection, which also does not appear to encompass these documents. Therefore, these objections should not be a basis for denying this motion.

CONCLUSION

For all the foregoing reasons, St. Paul's motion for partial summary judgment should be granted, establishing that Aspen's policy had $2 million in limits available to settle Moradi's claims, and that St. Paul has the right to assert subrogation against Aspen under Nevada law.

Dated: October 2, 2019

MORALES FIERRO & REEVES

By: /s/ Ramiro Morales
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PROOF OF SERVICE

I, William Reeves, declare that:

I am over the age of eighteen years and not a party to the within cause.

On the date specified below, I served the following document:

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

Service was effectuated in the following manner:

_____ BY FACSIMILE:

XXXX BY ODYSSEY (Notice Only): I caused such document(s) to be electronically served through Odyssey for the above-entitled case to the parties listed on the Service List maintained on the Odyssey website for this case on the date specified below.

_____ BY U.S. Mail: By placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice, mail is deposited with pre-paid postage with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 2, 2019

William Reeves

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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 OPPOSITION TO PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COUNTERMOTION FOR SUMMARY JUDGMENT

Hearing Date: October 15, 2019
Hearing Time: 9:30 a.m.

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Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee"), by and through its attorneys of record HEROLD & SAGER and KELLER/ANDERLE LLP, hereby submits the following Points and Authorities in Support of its Opposition to Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Countermotion For Summary Judgment.

POINTS AND AUTHORITIES

I.

INTRODUCTION

St. Paul's Countermotion ignores how this Court invited Defendants' motions for summary judgment during the motion to dismiss phase, when it found that "[b]ased on the record before the Court at this time, there appears to be no material questions of fact and the only issues remaining are purely questions of law." Pretending the Court never made this finding, the Countermotion is largely based on the false contention that "Cosmo's claims against Marquee are not barred or impacted by any terms of conditions of the [Nightclub] Management Agreement." But as detailed in Marquee's Motion for Summary Judgment, the NMA relied on by St. Paul in its attempt to step into its insured Cosmopolitan's shoes contains a "waiver of subrogation" provision: "All Owner Policies . . . shall contain a waiver of subrogation against [Marquee]." As a matter of law, the NMA's waiver of subrogation provision is fatal to St. Paul's claims.

St. Paul inconceivably argues that Cosmopolitan somehow benefitted from the NMA without ever being "bound by it." The NMA and Cosmopolitan Lease attached to it prove otherwise. Cosmopolitan was undisputedly a signatory to the NMA. And as described in Marquee's pending Motion, Cosmopolitan expressly assumed – through Section 17.2 of the Lease – the obligation to procure insurance compliant with the NMA's terms, including the NMA's waiver of subrogation obligation.

Similarly, the Countermotion does not sufficiently address other "purely" legal issues fatal to St. Paul's claims, such as St. Paul's express indemnity claim against Marquee. As explained in Marquee's Motion, that claim fails because under the express terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan *only applies to losses not covered by insurance*. Cosmopolitan was defended and indemnified by the insurers in the underlying action. It is

undisputed that Cosmopolitan did not sustain any uninsured losses. As a matter of law, Cosmopolitan has no shoes for St. Paul to step into for any purported subrogation claim against Marquee.

The Countermotion's inability to address these undisputed facts is exemplified by its failure to provide any declaration from Cosmopolitan addressing the evidence in Marquee's Motion or supporting the Countermotion's erroneous arguments. It is telling that St. Paul's counsel was unable to secure a declaration from their insured which support the "facts" and positions they assert. The Countermotion's failure to provide any declaration from Cosmopolitan is reason alone to deny it.

Failing to fill that void, the Countermotion relies on the inadmissible and speculative declaration testimony from St. Paul's two lead litigators in this action. But those attorneys had nothing to do with the NMA, Marquee, Cosmopolitan, the Lease, the Underlying Moradi Action, or National Union. How desperate is St. Paul to escape Marquee's Motion for Summary Judgment that it forces its litigation counsel in this case to make sworn statements for which they have absolutely no personal knowledge rather that muster a single fact witness to support its assertions. The Court should reprimand St. Paul's counsel for submitting declarations swearing to "personal knowledge of all facts set forth" and then making purported factual assertions about disputed events obviously outside their personal knowledge. A party cannot make a wish list of disputed "facts" needed as undisputed for summary judgment and offer them as true and with personal knowledge in their own litigators' declarations. The Countermotion should be rejected for this reason alone.

But St. Paul's failings don't end there. The Countermotion suffers from numerous other deficiencies requiring its denial:

- The Countermotion fails to identify each undisputed fact purportedly supporting it.
- St. Paul states the Moradi "verdict was never reduced to a judgment because the parties ultimately settled the Moradi action" and "in so doing . . . defendants Marquee and Cosmo admitted no fault," but then falsely claims "it is undisputed that Marquee acted both with negligence and willful misconduct."

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- St. Paul concedes "the relative fault of Marquee and Cosmo was never raised, pled or adjudicated," but inconsistently asserts it is "undisputed" that "Cosmo had no active role in managing or operating the venue."
- It erroneously contends as undisputed "Moradi's injuries and damages were caused solely by Marquee's actions," when the jury found both Marquee and Cosmopolitan liable for intentional torts (although that judgment was never entered).
- The Countermotion overlooks numerous other disputed facts (on topics unrelated and irrelevant to Marquee's Motion for Summary Judgment) to be addressed if and when Marquee's pending Motion is denied and the discovery stay is lifted (neither of which should occur).
- It provides insufficient notice as to which claims or defenses are subject to the Countermotion's request for summary judgment and which arguments are specific to the Countermotion, rather than the Opposition.
- St. Paul erroneously contends the Opposition and Countermotion were timely filed.

The Countermotion actually "counters" nothing in Marquee's Motion for Summary Judgment. It presents a confusing mish mash of disputed facts (none of which are relevant to Marquee's Motion for Summary Judgment as to purely legal issues), inadmissible "evidence" and "facts," as well as erroneous arguments. St. Paul unsuccessfully attempts to muddy the clear questions of law presented in Marquee's Motion for Summary Judgment. Just as counter-moving for summary judgment on alleged bad faith, causation, or damages at this stage of the litigation – while discovery has been stayed – would have no legal effect on any of Defendants' pending Motions for Summary Judgment on "purely questions of law," the same is true of this Countermotion. For the reasons set forth in this Opposition and Marquee's Motion (which is incorporated reference), the Court should deny St. Paul's Countermotion.

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II.

FACTUAL BACKGROUND

Marquee incorporates by reference the Factual Background in its Motion for Summary Judgment,[1] which for the convenience of the Court, is included below:

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 beaten by Marquee employees, whose conduct was alleged to be ratified, encouraged and countenanced by the Cosmopolitan, resulting in bodily 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. (FAC ¶¶ 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.)

Roof Deck Entertainment, LLC owns and operates the Marquee Nightclub. (FAC ¶ 4.) Nevada Property 1, LLC owns and operates The Cosmopolitan of Las Vegas. (*Id.* ¶ 10.) Marquee and Roof Deck Entertainment, LLC are the same entity. (*Id.* ¶ 4) Similarly, Nevada Property 1, LLC and Cosmopolitan are the same entity. (*Id.* ¶ 10) Cosmopolitan is the owner of the subject property where the Marquee Nightclub is located and leased 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. (FAC ¶ 10; Bonbrest Decl., Ex. 1.) Marquee is an insured

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[1] Citations in this Section are to the evidence submitted with Marquee's Motion for Summary Judgment.

under the National Union policy. (FAC ¶ 30.) Cosmopolitan is an insured under the St. Paul policy. (FAC ¶ 40; Declaration of Nicholas B. Salerno ("Salerno Decl."), Ex. 2.)

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.) Specifically, the Court held as a matter of law that the Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers…" and that Marquee and Cosmopolitan could be held jointly and severally liable. (RJN, Ex. 3.)

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

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 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.)

C. Nightclub Management Agreement

The written agreement referred to by St. Paul in the FAC is the NMA, dated April 21, 2010, entered into between Marquee and NRV1 with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (Bonbrest Decl., ¶¶ 3, 6, Ex. 1.) Cosmopolitan is identified as the Project Owner in the Recitals section of the NMA and is also a signatory to the agreement both on behalf of itself and NRV1, for which it is the Managing Member. (Bonbrest Decl., Ex. 1 at T000064, T000152.)

While Cosmopolitan and NRV1 are related entities, Cosmopolitan and Marquee are separate and unrelated entities and have separate towers of liability insurance. National Union and Aspen Specialty Insurance Company are the insurers of Marquee while Zurich American Insurance Company and St. Paul are the insurers of Cosmopolitan. (FAC ¶¶ 15, 30, 40, 69.) As set forth in the NMA, Cosmopolitan is the Project Owner of the hotel casino and resort premises, including the Marquee Nightclub venue. (Bonbrest Decl., Ex. 1 at T000064.) 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. (Bonbrest Decl., Ex. 1 at T000064, T000087 – T000095.)

The NMA sets out the insurance requirements among the parties at Section 12. (Bonbrest Decl., Ex. 1 at T000124 – T000126) Section 12.2.6 of the NMA includes a subrogation waiver provision that precludes St. Paul's subrogation claims for express indemnity and contribution against Marquee. Section 12.2.6 states:

> **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.

(Bonbrest Decl., Ex. 1 at T000126) (emphasis added.)

Notably, the St. Paul policy also contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery of such payment. (Salerno Decl., Ex. 2, at T000038.)

St. Paul attempts to subrogate against Marquee under the following express indemnity provision in the NMA:

> **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.

(Bonbrest Decl., Ex. 1 at T000126 – T000127.) (Emphasis added.) Under Section 13 of the NMA, any express indemnity obligation owed by Marquee to Cosmopolitan only applies to losses not covered by insurance.

III.

LEGAL STANDARD ON SUMMARY JUDGMENT

Under NRCP 56(a), summary judgment shall only be granted if the movant shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Frederic and Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 109 (Nev. 2018); *Wood v. Safeway*, 121 Nev. 724 (2005). A party asserting that a fact cannot be genuinely disputed must cite to particular parts of material in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. NRCP 56(c)(1). Affidavits or declarations in support of a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. NRCP 56(c)(4). Affidavits or declarations substantially defective in these respects may be stricken, wholly or in part. Eighth Judicial District Local Rule 2.21(c). Summary judgment motions that are not supported by any competent evidence should not be considered. *Hosmer v. Avayu*, 97 Nev. 584, 585 (1981); *Collins v. Union Federal Sav. & Loans Ass'n*, 99 Nev. 284, 298, fn. 7 (1983).

IV.

ARGUMENT

A. The Countermotion Fails To Counter The Undisputed Facts And "Purely Questions of Law" Set Forth In Marquee's Pending Motion For Summary Judgment

The Countermotion seeks to avoid this Court's findings during the extensively briefed motion to dismiss stage inviting Defendants' pending Motions for Summary Judgment:

> 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.* (Emphasis added.)

As explained in Marquee's Motion for Summary Judgment, Section 12.2.6 of the NMA contains a "waiver of subrogation" provision that precludes St. Paul, as a matter of law, from attempting to step into Cosmopolitan's shoes. (Mot. 14-16.) Under Section 12.2.6 of the NMA, all policies issued to NRV1, Marquee, and Cosmopolitan are required to contain a waiver of subrogation for any claims against each other. Further evidencing this requirement, the St. Paul policy also contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages caused by an occurrence, then St. Paul agrees to waive its right of recovery for such payment. (*Id.*)

Unable to rebut the undisputed facts that the NMA and St. Paul's own policy bar its subrogation claims, the Opposition/Countermotion contends Cosmopolitan was never bound by the terms of the NMA. (Opp. 8.) But St. Paul offers no declaration or other evidence from Cosmopolitan to support this allegation. The undisputed facts before the Court establish that (1) Cosmopolitan signed the NMA, (2) St. Paul invokes that agreement for its indemnification argument on behalf of Cosmopolitan, and (3) Cosmopolitan is bound by the terms of the NMA. (Mot. 8.)

In addition, the NMA's express terms provide that the waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies." (Mot. 11.) "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in Sections 12.2.3 and 12.2.5 to include the Owner (NRV1), the Project Owner (Cosmopolitan), and the landlord and tenant under the Lease (also Cosmopolitan and NRV1). (Mot. 16.) The Countermotion has no answer to these undisputed facts.

The Countermotion's unsupported contention that Cosmopolitan is somehow not bound by the NMA also fails because St. Paul ignores that Section 17.2 of the Lease attached as Exhibit D to the NMA delegated NRV1's insurance requirements under the NMA to Cosmopolitan. Section 17.2 of the Lease provides that Cosmopolitan shall procure "all insurance required to be obtained

by" NRV1 under the NMA. (Mot. 15.) Through the Lease, Cosmopolitan assumed the obligation to procure insurance that complied with all of the terms of Section 12, including the waiver of subrogation obligation set out in Section 12.2.6. (Mot. 15-16.)

Nevada law does not permit St. Paul to pick and choose among the NMA provisions it likes and dislikes. In response to St. Paul's invocation of the NMA on behalf of Cosmopolitan, the Court is to apply that agreement to Cosmopolitan, especially since it was a signatory. *See, e.g., Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 779 (2005) ("an intended third-party beneficiary is bound by the terms of a contract even if she is not a signatory"); *Gibbs v. Giles*, 96 Nev. 243, 246-247 (1980) ("a third-party beneficiary takes subject to any defense arising from the contract that is ascertainable against the promisee"). St. Paul bases its arguments on the contention that Cosmopolitan was an intended third-party beneficiary of the NMA. St. Paul cannot invoke the NMA for third-party beneficiary status of its insured in one argument yet disavow the NMA terms when they are fatal to its subrogation claims in another.[2] *Id.*

The Countermotion also fails to rebut the other "purely" legal issues dispositive of St. Paul's claims. As detailed in Marquee's Motion, St. Paul's express indemnity fails for the separate reason that under the terms of the NMA, any indemnity obligation owed by Marquee to Cosmopolitan *only applies to losses not covered by insurance*. (Mot. 16-18.) It is undisputed that Cosmopolitan did not sustain any uninsured losses. (Mot. 18.)

Accordingly, for these reasons and the others stated in Marquee's Motion for Summary Judgment "on purely questions of law," St. Paul's Countermotion should be denied.

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[2] Even if St. Paul offered a declaration from Cosmopolitan contending it never intended to be bound by the NMA, the Court should still reject St. Paul's Countermotion and grant Marquee's Motion for Summary Judgment. That is because, under Nevada law, the third-party beneficiary is subject to the same limitations of the contracting party and is afforded no greater rights. *Canfora*, 121 Nev. at 779; *Gibbs*, 96 Nev. at 246-247.

B. The Countermotion Contends That "Facts" Irrelevant to Marquee's Pending Motion Are Undisputed, When They Clearly Are Contested

The Countermotion attempts to bog this Court down with unnecessary allegations that have no bearing on Defendants' pending Motions and the undisputed facts supporting them. As stated above, the Court previously indicated that those pertinent arguments present "no material questions of fact and the only issues remaining are purely questions of law." Not only does the Countermotion attempt to inject these pointless distractions into Marquee's pending Motion, but it also falsely contends these unrelated "factual" allegations are undisputed, when in reality, they are contested.

For example, the Opposition/Countermotion correctly concedes that "the relative fault of Marquee and Cosmo was never raised, pled or adjudicated" in the Moradi trial. (Opp. 4.) But St. Paul then inconsistently asserts as "undisputed" that "Cosmo had no active role in managing or operating the venue." (Opp. 13.) Through a clumsy sleight-of-hand, St. Paul tries to convert Cosmopolitan's "alleged passive tortfeasor" status and its non-delegable duty *in the Moradi case* into an "undisputed" contention *in this case* that Cosmopolitan played no role in the alleged tortious wrongdoing. (Opp. 4-5, 13.) This tactic must be rejected, because, as noted above, St. Paul admits no active/passive findings were made in the Underlying Action and there was no allocation of fault between Marquee and Cosmopolitan. (Opp. 4-5.)

Contrary to St. Paul's assertion, a legal determination that a property owner had a non-delegable duty cannot be converted into an undisputed factual finding that property owner was only passively at fault. This issue is also irrelevant to Marquee's pending Motion. In Nevada, the active/passive distinction is relevant only to a claim of equitable indemnity. *See generally*, *The Doctors Co. v. Vincent*, 120 Nev. 644 (2004); *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27 (1997); *Piedmont Equip. Co. v. Eberhard Mfg.*, 99 Nev. 523, 526, (1983); *Black & Decker v. Essex Group*, 105 Nev. 344, 345 (1989). St. Paul, however, has not and cannot assert a claim for equitable indemnity where, as explained in Marquee's pending Motion, Cosmopolitan and Marquee entered an express indemnity relationship in the NMA.

The Opposition/Countermotion also rightly states the Moradi "verdict was never reduced to a judgment because the parties ultimately settled the Moradi action" and "in so doing . . .

defendants Marquee and Cosmo admitted no fault." (Opp. 10.) St. Paul simultaneously contradicts this representation by arguing it is "undisputed" that "Moradi's injuries and damages were caused solely by Marquee's actions" and "Marquee acted both with negligence and willful misconduct." (Opp. 13.) These so-called facts are contested. Although the jury found both Marquee and Cosmopolitan liable for intentional torts, that judgment was never entered. St. Paul even concedes that "questions of fact exist as to which damages were awarded" in the Moradi trial "as to any specific count or legal theory." (Opp. 9, n.6.) If the Court denies Marquee's pending Motion, these unrelated issues will need to be litigated in this action.

In addition to these examples, St. Paul fails to recognize throughout its submission other disputed factual issues on topics unrelated and irrelevant to Marquee's Motion for Summary Judgment. *See*, *e.g.*, Countermotion/Opposition at 4 (incorrectly contending as undisputed that Moradi was not an invitee of Cosmopolitan), *id.* (erroneously asserting as undisputed "Cosmo had no express or implied authority to control the Marquee"); *id.* at 8 (falsely claiming Cosmopolitan had no obligation to procure insurance coverage); *id.* at 9 (arguing as undisputed that Marquee recognizes for the purposes of this action "that it was responsible for the Moradi claim"); *id.* at 10 (asserting as undisputed that Marquee "manipulated the proceedings" against Cosmopolitan in the Moradi action); *id.* (claiming without evidence no "unreasonable conduct on the part of Cosmo"); *id.* at 13 (disputing, but simultaneously claiming as undisputed, that Cosmopolitan was not "held liable for its own intentional conduct"). As explained herein (and in Marquee's concurrently filed evidentiary objections), the Countermotion fails to carry its burden of establishing with admissible evidence that its factual allegations are accurate and undisputed.

In sum, the Countermotion heavily relies on alleged facts that are irrelevant to Marquee's Motion, but also contested in this action.

C. Without A Declaration From Cosmopolitan, The Countermotion Relies Almost Exclusively On Inadmissible Evidence.

The Countermotion relies on inadmissible misinformation and fails to satisfy its burden of proving undisputed facts with admissible evidence. Fatal to its arguments, St. Paul fails to provide a declaration from Cosmopolitan (1) rebutting the evidence in Marquee's Motion or (2) supporting

the Countermotion's erroneous arguments. The only declarations submitted in support of St. Paul's Countermotion are from its litigation counsel in the instant action, Marc Derewetzky and William Reeves, each of whom lacks personal knowledge of virtually all of the matters attested to. Those litigators are not able to provide admissible evidence about the NMA, Marquee, Cosmopolitan, the Lease, the Underlying Moradi Action, or National Union.

For example, Mr. Derewetzky lacks the personal knowledge required to declare that numerous exhibits to St. Paul's Appendix are true and correct copies. (*See*, *e.g.*, Derewetzky Decl., ¶¶3-20; *see generally*, Marquee's Objections to Facts not Supported by Admissible Evidence.) Support for the admissibility of those document must come in the form of a declaration from the authors or recipients of the documents or another person who can be shown to possess personal knowledge that a document is what it purports to be.

Mr. Derewetzky also lacks personal knowledge to make under-oath declarations about, among other things, the Underlying Moradi Action, what evidence was or was not available to the parties in that action, and what AIG did or did not do in connection with that case. (*See*, *e.g.*, Derewetzky Decl., ¶¶25-36; *see generally*, Marquee's Objections to Facts not Supported by Admissible Evidence.) It is simply false – and outrageous – for Mr. Derewetzky to claim in his declaration that he has "personal knowledge of all facts set forth in this Declaration" and in that same document, make purported factual assertions about disputed events obviously outside his personal knowledge. Examples of inaccurate statements Mr. Derewetzky makes in his declaration for which he has absolutely no personal knowledge include the following: "AIG provided a single attorney to represent Cosmo and Marquee"; "Aspen and AIG mishandled the claims"; "AIG consistently represented that its coverage for Cosmopolitan was primary to St. Paul's coverage"; "AIG elected to . . . unreasonably take its chances"; "AIG lost this gamble"; and "AIG did not want St. Paul interfering in the handling of the defense." Each of these statements (and several others) should be stricken from the record, and Mr. Derewetzky should be reprimanded for offering the false statement that he has personal knowledge of these matters when he clearly does not. If his statements are not stricken, and this case continues, he will need to sit for a deposition in this action about his purported factual testimony.

As for Mr. Reeves' inadmissible declaration, he too lacks personal knowledge to authenticate documents referenced in his declaration. He asserts in blanket fashion that all the documents submitted by St. Paul "were either produced in this case or filed with this Court. As to the latter documents, request is made that this Court take judicial notice of them." (Reeves Declaration, ¶3.) Mr. Reeves fails to identify or distinguish the documents which were purportedly produced in this case from the documents which can be judicially noticed from the Underlying Action. Nonetheless, even if he did, the mere fact a document was produced in a case does not make it or its contents admissible evidence, or judicially noticeable, without more foundation.

Accordingly, for the reasons set forth in Marquee's concurrently filed objections, as well as those above, the St. Paul litigation attorney declarations should be stricken from the record, and the Countermotion must be denied for its failure to offer admissible evidence.

D. The Countermotion Suffers From Other Procedural And Due Process Flaws Requiring Its Denial

Given the Countermotion's inability to comply with Nevada's summary judgment requirements and basic standards of due process, St. Paul's request for summary judgment fails to provide notice to Marquee of what it is even seeking or its legal basis for doing so. For example, the Countermotion fails to identify the claim(s) or defense(s) upon which St. Paul is moving. This is reason alone to deny the Countermotion. *See* NRCP 56(a). Similarly, St. Paul fails to identify what arguments are specific to the Countermotion and which to the Opposition. Marquee should not have to guess what claims or defenses are at issue in the Countermotion.

Separate from this deficiency, the Countermotion also fails to identify each of its undisputed facts or the purported evidence supporting them. This too is reason alone to deny the Countermotion. NRCP 56(c)(1); *Fergason v. LVMPD*, 131 Nev. 939, 943-944 (2015); *Allen v. U.S.*, 964 F.Supp.2d 1239, 1252 (D. Nev. 2013).

Moreover, the Countermotion is not actually one because it is not related to the legal issues raised in Marquee's Motion: St. Paul's ability, as a matter of law, to maintain its subrogation claims. The Countermotion is based on disputed allegations and genuine issues of material fact that are irrelevant and unrelated to the purely legal issues that were presented in Marquee's motion to

dismiss and now in its pending Motion for Summary Judgment. St. Paul also incorrectly asserts its Opposition and Countermotion were timely filed. Pursuant to this Court's Administrative Order effective March 12, 2019, the deadline for St. Paul to file its Opposition/Countermotion was September 23, 2019. Because St. Paul did not file until September 27, the Opposition/Countermotion was untimely and could be stricken for this reason as well.

V.

CONCLUSION

For the foregoing reasons, as well as those set forth in Marquee's Motion and the concurrently filed evidentiary objections, the Court should deny St. Paul's Countermotion.

DATED: October 7, 2019

HEROLD & SAGER

By: _____

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CERTIFICATE OF SERVICE

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

That on October 7, 2019, service of DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S OPPOSITION TO PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COUNTERMOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

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

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Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (*Pro Hac Vice)* Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (*Pro Hac Vice)* Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 7th day of October, 2019.

JuRee A. Bloedel

OBJ

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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 OBJECTIONS 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

Hearing Date: October 15, 2019
Hearing Time: 9:30 a.m.

Pursuant to NRCP 56(c)(1), Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") hereby submits the following objections to facts not supported by admissible evidence filed in support of Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Opposition to Motion for Summary Judgment and Countermotion Re: Duty to Indemnify.

FACTS/EVIDENCE	OBJECTION
1. "Consistent with the terms and provisions of the Management Agreement, a Marquee representative at trial testified as follows: 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 of employees, including the security staff? A. Roof Deck Entertainment, LLC. Ex Q, 134:22-135:3." (Opp., at 3:19-25.) Declaration of William Reeves ("Reeves Decl."), ¶ 2; Declaration of Marc J. Derewetzky ("Derewetzky Decl."), ¶ 19; Consolidated Appendix of Exhibits in Support of Plaintiff's Opposition to Motions for Summary Judgment filed by AIG and Marquee ("Appendix"), Ex. Q – Excerpts of Trial Transcript in the Underlying Action From the Afternoon of April 18, 2017.	St. Paul offers the excerpts of trial testimony, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit Q through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 19. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit Q is a true and correct copy of transcript excerpts from the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit Q is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to

FACTS/EVIDENCE	OBJECTION
	provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). Further, St. Paul fails to identify the background and capacity of the witness purporting to offer testimony through Exhibit Q such that St. Paul fails to establish the witness has personal knowledge of the cited testimony. NRS §§ 51.065; 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). In addition, the testimony from the witness purporting to offer testimony through Exhibit Q assumes facts that have been established in the evidence.
2. "Defendant Aspen Specialty Ins. Co. ("Aspen"), an insurer for both Marquee and Cosmo, appointed the same defense counsel to defend both Marquee and Cosmo. Appendix, Ex. C; see also Appendix, Ex. D." (Opp., at 4:6-8.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 5-6; Appendix, Ex. C – September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance; Ex. D – Defendant's Answer to Complaint in the Underlying Action.	St. Paul offers correspondence issued by defense counsel for defendants in the Underlying Action, along with an answer filed on behalf of the defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits C and D through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 5-6. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit C is a true and correct copy of September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance and/or whether Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr.

FACTS/EVIDENCE	OBJECTION
	Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit D is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). The portions of correspondence offered by St. Paul through Exhibit C are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits C and D purporting to offer evidence assume facts that have been established in the evidence.
3. "After conducting a preliminary investigation, but before appearing in the case, defense counsel sent Aspen a detailed report dated September 18, 2014 in which he advised that 'Plaintiff has already stated he sustained $15-$20 million of losses from his hedge fund as a result of this incident.' Appendix, Ex. C, p. 6." (Opp., at 4:8-11.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 5; Appendix, Ex. C – September 18, 2014 Letter from Martin Kravit and Tyler Watson of	St. Paul offers correspondence issued by defense counsel for defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025.

FACTS/EVIDENCE	OBJECTION
Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance.	St. Paul attempts to establish the authenticity of Exhibit C through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 5. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit C is a true and correct copy of September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibit C is inadmissible hearsay. NRS § 51.065.
4. "Defense counsel proceeded to file an Answer on behalf of both Marquee and Cosmo. Appendix, Ex. D." (Opp., at 4:12-13.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 6; Appendix, Ex. D - Defendant's Answer to Complaint in the Underlying Action.	St. Paul offers an answer filed on behalf of the defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit D through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 6. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr.

FACTS/EVIDENCE	OBJECTION
	Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit D is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2).
5. "By jointly representing both parties, no cross or counter claims were pursued between the parties. [Appendix, Ex. D.]" (Opp., at 4:13-14.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 6; Appendix, Ex. D - Defendant's Answer to Complaint in the Underlying Action.	St. Paul offers an answer filed on behalf of the defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit D through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 6. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr.

FACTS/EVIDENCE	OBJECTION
	Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit D is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). In addition, the portions of Exhibit D purporting to offer evidence assume facts that have been established in the evidence.
6. "On December 10, 2015, Moradi made a settlement demand of $1,500,000. Appendix, Ex. G." (Opp., at 4:16-17.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 9; Appendix, Ex. G – Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000.	St. Paul offers an offer of judgment served by Moradi in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit G through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 9. Marc Derewetzsky and William Reeves lack

FACTS/EVIDENCE	OBJECTION
	personal knowledge whether Exhibit G is a true and correct copy of Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of Moradi's offer of judgment offered by St. Paul through Exhibit G are inadmissible hearsay. NRS § 51.065.
7. "At that time, defense counsel had advised both Aspen and Defendant National Union Fire Ins. Co. of Pittsburgh, PA ('AIG') in multiple reports that Moradi was making a loss of income claim of $300,000,000. Appendix, Ex. E, p. 4; Ex. F." (Opp., at 4:17-19.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 7-8; Appendix, Ex. E – November 13, 2014 Letter From Martin Kravitz and Tyler Watson of Kravitz Schnitzer & Johnson to Edward Kotite of Aspen Insurance; Ex. F – December 7, 2015 E-Mail From Tyler Watson of Kravitz Schnitzer & Johnson to Edward Kotite of Aspen and Robin Green of AIG.	St. Paul offers two pieces of correspondence issued by defense counsel for defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits E and F through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 7-8. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit E is a true and correct copy of a November 13, 2014 Letter From Martin Kravitz and Tyler Watson of Kravitz Schnitzer & Johnson to Edward Kotite of Aspen Insurance, and/or whether Exhibit F is a true and correct copy of a December 7, 2015 E-Mail From Tyler Watson of Kravitz Schnitzer & Johnson to Edward

FACTS/EVIDENCE	OBJECTION
	Kotite of Aspen and Robin Green of AIG. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibits E and F are inadmissible hearsay. NRS § 51.065.
8. Despite being aware of these claims, Aspen and AIG declined to accept the demand or even engage in settlement discussions. Appendix, Ex. H." (Opp., at 4:19-20.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 10; Appendix, Ex. H – December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle.	St. Paul offers correspondence issued by defense counsel for defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit H through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 10. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit H is a true and correct copy of a December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he

FACTS/EVIDENCE	OBJECTION
	avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibit H are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibit H purporting to offer evidence assume facts that have been established in the evidence.
9. "In advance of trial, the parties filed various motions to address what exposure, if any, Cosmo faced. Appendix, Exs. N, O, P." (Opp., at 4:21-22.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 16 – 18; Appendix, Ex. N – Defendants' Trial Brief for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 15, 2017; Ex. O – Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 23, 2017; Ex. P – Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty Dated April 12, 2017.	St. Paul offers Defendants' Trial Brief, Defendants' Reply to Plaintiff's Opposition to Motion for Determination of Several Liability, and Defendants' Opposition to Plaintiff's trial brief, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits N, O, and P through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 16-18. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit N is a true and correct copy of Defendants' Trial Brief for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 15, 2017, whether Exhibit O is a true and correct copy of Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 23, 2017, and/or whether Exhibit P is a true and correct copy of Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-

FACTS/EVIDENCE	OBJECTION
	Delegable Duty Dated April 12, 2017. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibits N, O, and/or P are properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2).
10. "In joint filings made on behalf of Marquee and Cosmo, Marquee conceded that Cosmo had no express or implied authority to control the Marquee Nightclub such that Moradi was not a business invitee of Cosmo. Appendix, Ex. P, 5:20-6:4." (Opp, at 4:22-24.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 18; Appendix, Ex. P - Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty Dated April 12, 2017.	St. Paul offers Defendants' Opposition to Plaintiff's trial brief, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit P through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 18. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit P is a true

FACTS/EVIDENCE	OBJECTION
	and correct copy of Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty Dated April 12, 2017. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit P is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). In addition, the portions of Exhibit P purporting to offer evidence assume facts that have been established in the evidence.
11. "Given this, Marquee conceded that Cosmo was 'at most an alleged passive tortfeasor' with no active role in any aspect of the operations of the Marquee Nightclub. Appendix, Ex. O, 4:27-5:3; see also Ex. N, 4:26-5:1. (Opp., at 4:24-27.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 16 – 17; Appendix, Ex. N - Defendants' Trial Brief for Determination of Several Liability Under	St. Paul offers Defendants' Trial Brief and Defendants' Reply to Plaintiff's Opposition to Motion for Determination of Several Liability, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for

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NRS 41.141 in the Underlying Action Dated March 15, 2017; Ex. O – Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 23, 2017.	express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits N and O through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 16-17. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit N is a true and correct copy of Defendants' Trial Brief for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 15, 2017, and/or whether Exhibit O is a true and correct copy of Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 23, 2017. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibits N and/or O are properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2).

FACTS/EVIDENCE	OBJECTION
	In addition, the portions of Exhibits N and O purporting to offer evidence assume facts that have been established in the evidence.
12. "Trial testimony from the Marquee representative was in accord that Marquee alone (and not Cosmo) operated and managed the Marquee Nightclub. Appendix, Ex. O, 3:15-24." (Opp., at 4:27-28.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶ 17; Appendix, Ex. O - Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 23, 2017.	St. Paul offers Defendants' Reply to Plaintiff's Opposition to Motion for Determination of Several Liability, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit O through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 17. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit O is a true and correct copy of Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 23, 2017. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit O is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a

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	proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). In addition, the portions of Exhibit O purporting to offer evidence assume facts that have been established in the evidence.
13. "In light of this ruling, Cosmo was held to be jointly liable for the conduct of Marquee notwithstanding the fact that Cosmo had no active role in managing or operating the venue." (Opp., at 5:3-5.)	St. Paul offers this unsupported factual assertion in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that Cosmopolitan was held to be jointly liable for the conduct of Marquee notwithstanding the fact that Cosmo had no active role in managing or operating the venue, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
14. "As both Cosmo and Marquee were represented by the same attorney, no crossclaims were asserted between the parties." (Opp., at p. 5:7-8.)	St. Paul offers this unsupported factual assertion in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that because Cosmopolitan and Marquee were represented by the same attorney, no crossclaims were asserted between the parties, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).

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15. "Marquee's assertion of this provision is particularly egregious because Marquee accepted Cosmo's tender of defense and indemnity, recognizing that it was responsible for the Moradi claim." (Opp., at 9:19-20.)	St. Paul offers this unsupported factual assertion in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that Marquee accepted Cosmopolitan's tender of defense and indemnity, recognizing that it was responsible for the Moradi claim, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
16. "Marquee defended Cosmo in the Moradi action through its insurers, which provided joint counsel for Marquee and Cosmo. Appendix, Exs. C, D." (Opp., at 9:21-22.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 5 – 6; Appendix, Ex. C – September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance; Ex. D – Defendant's Answer to Complaint in the Underlying Action.	St. Paul offers correspondence issued by defense counsel for defendants in the Underlying Action, along with an answer filed on behalf of the defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits C and D through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 5-6. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit C is a true and correct copy of September 18, 2014 Letter from Martin Kravit and Tyler Watson of Kravitz Schnitzer & Johnson to Greg Irons of Aspen Insurance and/or whether Exhibit D is a true and correct copy of Defendant's Answer to Complaint in the Underlying Action. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set

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	forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibit D is properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). The portions of correspondence offered by St. Paul through Exhibit C are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits C and D purporting to offer evidence assume facts that have been established in the evidence.
17. "In this case, it is undisputed that Marquee acted both with negligence and willful misconduct. Appendix V." (Opp., at 13:16-17.)	St. Paul offers this unsupported factual assertion in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that Marquee acted both with negligence and willful misconduct, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1). Namely, there is no

FACTS/EVIDENCE	OBJECTION
	"Appendix V" and to the extent St. Paul intended Exhibit V to its Appendix, that exhibit is an email exchange regarding the timeliness of St. Paul's opposition, which clearly has no relationship to the factual assertion made.
18. "It is likewise undisputed that per Marquee, Cosmo was "at most an alleged passive tortfeasor" with no active role in any aspect of the operations of the Marquee Nightclub. Appendix, Ex. N, 4:26-5:1; Ex. O, 3:15-24; 4:27-5:3; Ex. P, 5:20-6:4." (Opp., at 13:17-19.) Reeves Decl., ¶ 2; Derewetzky Decl., ¶¶ 16 – 18; Appendix, Ex. N – Defendants' Trial Brief for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 15, 2017; Ex. O – Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 23, 2017; Ex. P – Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty Dated April 12, 2017.	St. Paul offers Defendants' Trial Brief, Defendants' Reply to Plaintiff's Opposition to Motion for Determination of Several Liability, and Defendants' Opposition to Plaintiff's trial brief, through the declarations of William Reeves and Marc Derewetzky, in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits N, O, and P through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 16-18. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit N is a true and correct copy of Defendants' Trial Brief for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 15, 2017, whether Exhibit O is a true and correct copy of Defendants' Reply to Plaintiff's Opposition to Their Motion for Determination of Several Liability Under NRS 41.141 in the Underlying Action Dated March 23, 2017, and/or whether Exhibit P is a true and correct copy of Defendants' Opposition to Plaintiff's Trial Brief Regarding Jury Instruction Concerning Defendant Nevada Property 1, LLC's Non-Delegable Duty Dated April 12, 2017. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge.

FACTS/EVIDENCE	OBJECTION
	He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. St. Paul also fails to request or show whether Exhibits N, O, and/or P are properly admissible by judicial notice. William Reeves' Declaration fails to identify or establish any particular document to which judicial notice is sought or explain why judicial notice is proper for any particular document. Mr. Reeves' declaration is not a proper request for judicial notice as he fails to provide the Court with sufficient information necessary to determine which document he is asking the Court to take judicial notice of and/or how such documents are appropriate for judicial notice. NRS § 47.150(2). In addition, the portions of Exhibits N, O and P purporting to offer evidence assume facts that have been established in the evidence.
19. "There was no evidence presented at trial in the Underlying Action that Cosmo was directly liable for Moradi's injuries and no evidence that Cosmo had nay role in hiring, training or supervising the Marquee personnel. No Cosmo employee or manager testified at trial in the Underlying Action. Prior to trial, the Court denied Cosmo's motion for summary judgment finding instead that Cosmo had a non-delegable duty to exercise reasonable care so as not to subject others to an unreasonable risk of harm." (Derewetzky Decl., ¶ 25.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 25. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which

FACTS/EVIDENCE	OBJECTION
	one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
20. "AIG provided a single attorney to represent Cosmo and Marquee jointly, despite the fact that Cosmo was entitled to be indemnified by Marquee pursuant to contract, thus improperly waiving Cosmo's rights. Exhibits A, L and M." (Derewetzky Decl., ¶ 26.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025 St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 26. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
21. "Aspen and AIG mishandled the claims and then failed to accept reasonable settlement offers within their limits. Exhibits G, H, I, K." (Derewetzky Decl., ¶ 27.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 27. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set

FACTS/EVIDENCE	OBJECTION
	forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
22. "Aspen and AIG failed to inform either Cosmopolitan or St. Paul of opportunities to settle before the offers expired. These offers included a statutory offer of judgment for $1.5 million dated December 10, 2015 and offers to settle for $26 million (the undisputed amount of the combined Aspen and AIG limits) presented on November 2, 2016 and March 9, 2019, shortly before trial commenced. Exhibits G, H, I, K." (Derewetzky Decl., ¶ 28.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 28. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
23. "Throughout the Underlying Action, AIG consistently represented that its coverage for Cosmopolitan was primary to St. Paul's coverage and, therefore, that AIG was responsible for defending and resolving the Underlying Action." (Derewetzky Decl., ¶ 29.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth

FACTS/EVIDENCE	OBJECTION
	in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 29. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
24. "Rather than accept a settlement demand within its limits that would have insulated both Marquee and Cosmo, AIG elected to reject the demands and instead unreasonably take its chances that they would do better at trial. Exhibits G, H, I, K. AIG lost this gamble spectacularly, by virtue of the jury awarding damages in excess of $160,000,000. Exhibit R." (Derewetzky Decl., ¶ 30.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 30. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for

FACTS/EVIDENCE	OBJECTION
	any party in the Underlying Action that participated in trial of the Underlying Action.
25. "Having lost its gamble AIG then took the position that its exposure was capped at the limits of its policy ($26,000,000 when combined with the limits Aspen claimed were available), and that they would pay the alleged policy limit to protect Marquee but not Cosmo." (Derewetzky Decl., ¶ 31.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 31. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
26. "Throughout, AIG conducted itself by word and deed as though its policy was obligated to pay the Moradi claims before St. Paul was required to pay, rendering the St. Paul policy excess to the AIG policy. But AIG failed to avail itself of opportunities to spend its limits to protect *both* of its insureds, opportunities that were never presented to St. Paul. Exhibits I, K. With a joint and several judgment handing over its named insured's head, St. Paul funded Cosmo's portion of the settlement." (Derewetzky Decl., ¶ 32.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 32. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's

FACTS/EVIDENCE	OBJECTION
	Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
27. "St. Paul was not notified about the *Moradi* action until February 13, 2017, so it could not have accepted either the December 10, 2015 $1.5 million Offer of Judgment or the November 2, 2016 $26 million written settlement demand. Exhibit J. As to the March 9, 2017 $26 million demand, AIG "failed" to report it to St. Paul until *after the demand had expired* and trial had commenced." (Derewetzky Decl., ¶ 33.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 33. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
28. "The settlement demand post-verdict was for the limits of all insurance, including the St. Paul policy." (Derewetzky Decl., ¶ 34.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025.

FACTS/EVIDENCE	OBJECTION
	St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 34. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
29. "AIG, contrary to its current position, knew St. Paul was a higher-level excess carrier and did not want St. Paul interfering in the handling of the defense." (Derewetzky Decl., ¶ 35.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 35. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.

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FACTS/EVIDENCE	OBJECTION
30. "As to the March 9, 2017 offer within the AIG limits, although St. Paul had been notified about the case on February 13, 2017, AIG concealed the March 9 offer from St. Paul until after it had expired." (Derewetzky Decl., ¶ 36.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that Cosmopolitan was passively negligent and Marquee actively negligent in the Underlying Action. This argument has no relevance to St. Paul's causes of action set forth in the First Amended Complaint against Marquee for express indemnity or statutory contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 36. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.

DATED: October 7, 2019

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

CERTIFICATE OF SERVICE

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

That on October 7, 2019, service of DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S OBJECTIONS 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 was made to the following interested parties in the following matter:

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

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Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY

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COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Jennifer L. Keller, Esq. (*Pro Hac Vice*) Email: jkeller@kelleranderle.com Jeremy W. Stamelman, Esq. (*Pro Hac Vice*) Email: jstamelman@kelleranderle.com KELLER/ANDERLE LLP 18300 Von Karmen Avenue, Suite 930 Irvine, CA 92612-1057	(949) 476-8700 (949) 476-0900 FAX	Defendants, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA and ROOF DECK ENTERTAINMENT, LLC dba MARQUEE NIGHTCLUB

Executed on the 7th day of October, 2019.

JuRee A. Bloedel

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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 1-25; inclusive,

Defendants.

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

DEFENDANT'S ASPEN SPECIALTY INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS COUNTERMOTION FOR SUMMARY JUDGMENT

COMES NOW, Defendant ASPEN SPECIALTY INSURANCE COMPANY (hereinafter "Defendant") by and through its attorneys of record, MESSNER REEVES LLP, and hereby submit its Reply in Support of its Countermotion for Summary Judgment as follows:

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Preliminary Statement

Plaintiff requested an extension of the briefing and continuance of the hearing on the parties' competing motions for summary judgment. Aspen agreed. Aspen's counsel was involved in pretrial proceedings in another manner, and also wanted to time to respond to Plaintiff's Opposition to Countermotion, which the current briefing schedule would not allow for.

However, less than one week before the hearing on the competing motions, Plaintiff filed a 30 page Reply/Opposition to Aspen's Countermotion that it already had ready to go, which included close to 100 separate legal authority citations, and pulled its agreement to continue the hearing, in order to obtain a tactical advantage and prevent Aspen from adequate time to respond and file its reply papers in advance of the hearing.

Aspen then submitted an Ex Parte Motion to the Court to continue the hearing the next day but Aspen was informed the judge was out of town that Thursday and Friday. As of Monday, Aspen did not hear back the continuance would be allowed, so it filed a reply to the extent possible that day. Aspen contends the hearing should be continued to afford it time to fully respond to Plaintiff's opposition, as parties should not be rewarded for gamesmanship, and cases, especially serious issues of new impression as may be at issue here, should be heard on the merits.

I. INTRODUCTION

Plaintiff's theory about a $2 million limit applying is unsupported by law, unsupported by the plain language of the Aspen Policy, and would render the subject Endorsement limiting coverage meaningless. Instead, the law holds that the policy limit is the $ 1 million per occurrence limit for all injuries, whether bodily or personal advertising, that are caused by one causal event, as here. The Aspen policy also excludes coverage for bodily injury caused as a result of personal and advertising injury such that the personal and advertising injury coverage is not even implicated here. And, the Aspen policy also expressly limits coverage by Endorsement to the maximum coverage applicable under any one coverage part, which Plaintiff admits is $1 million under either coverage part A or coverage part B—Plaintiff just seeks to confuse the Court through its misplaced analysis of what constitutes a coverage part, an argument that would turn insurance law on its head and increase premiums beyond affordable levels for insureds.

Plaintiff's analysis of subrogation claims is likewise misplaced. It argues the Court cannot rely on unpublished cases and then *only* cites to an unpublished federal case for the adoption of a brand new claim in Nevada--equitable subrogation--that has never been recognized here before. This alone is cause for summary judgment in Aspen's favor. The Court has not recognized contractual subrogation either, and the principles behind it do not allow for its adoption here either. Even were the Court to recognize equitable subrogation for the first time here, "essential elements" are lacking as a matter of law, so Aspen is still entitled to summary judgment on the claim. And, because estoppel is derivative of the other claims, Aspen is entitled to summary judgment on that 'claim' as well.

II. ARGUMENT

A. Aspen's Policy Excludes Coverage for "Bodily Injury' arising out of 'personal and advertising injury'"; Coverage Part B, Personal And Advertising Injury, Cannot Therefore Provide An Extra $1 Million Coverage For The Same Injuries.

Plaintiff's Reply/Opposition contends that Coverage Part A and Coverage Part B are "designed to cover different types of injuries caused by different types of actions." Pl.'s Reply/Oppo., 6:5-6. Plaintiff further contends that Coverage Part A is intended to apply to negligent bodily injury from tortious conduct, but that Coverage Part B, personal and advertising injury, is intended to cover different types of damages in different types of suits from intentional conduct, such as libel, slander claims, or false imprisonment claims. *Id.* at 6:9-14.

Nevertheless, Plaintiff incorrectly argues that the two coverage parts double coverage for the same injuries and action. In the *Moradi* action, Plaintiff alleged claims concerning bodily injury and resultant damages. The Aspen Policy is not here covering different types of injuries in different actions; rather it is covering for the bodily injury claims and damages for the Moradi action.

The Aspen policy specifically excludes coverage for "Bodily Injury' arising out of 'personal and advertising injury'" such that Coverage Part A (bodily injury) and Coverage Part B (personal and advertising injury) do not double coverage here. *See* Exhibit A1 to Aspen's Opposition/Countermotion.

The Policy provides:

2. Exclusions

This insurance does not apply to ....

o. Personal and Advertising Injury

"Bodily injury" arising out of "personal and advertising injury."

Id. at p.4 of 13. Because bodily injury as a result of personal or advertising injury is specifically **excluded** from coverage, Coverage B for personal and advertising injury does not apply to add another $ 1 million of coverage to the Moradi action for Moradi's injuries. Plaintiff ignore this exclusion of coverage in the hopes the Court will too.

B. Aspen's Policy Excludes Coverage for The False Imprisonment Claim Too.

The Aspen Policy also excludes coverage for *intentional* personal and advertising injury. Plaintiff's Reply/Opposition also argued Coverage Part B, personal and advertising injury, was otherwise meant to cover *intentional* type conduct (for different claims and different actions). However, the Aspen Policy, under Coverage Part B, specifically excludes coverage for "knowing" conduct like that that results out of intentional type acts such as false imprisonment:

COVERAGE PART B PERSOANL AND ADVERTISING INJURY LIABILITY ...

2. Exclusions

This Insurance does not apply to:

a. Knowing Violation of Rights of Another

"Personal 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 and advertising injury."

Id. at p. 5 of 13. Once again, Coverage Part B is not implicated by the false imprisonment claim and provides no coverage here because it is excluded from coverage.

C. Aspen's Endorsement Expressly Applies to Limit Coverage To The Maximum Implicated Under Any One Coverage *PART*--$1 Million Here; A Construction Otherwise Would Render The Endorsement Meaningless.

Plaintiff's argument about how the subject Endorsement applies is obviously disputed by Aspen; the suggestion in its Reply/Opposition otherwise is ridiculous. Plaintiff's argument that the

Endorsement limits coverage to $2 million, which is already limited through the aggregate limit to $2 million, would render the Endorsement meaningless. Plaintiff's argument that the Endorsement applies to the policy as a whole, in that the CGL Coverage form and the Liquor liability Coverage Form are instead the coverage parts, likewise renders the Endorsement meaningless. In order to reach this absurd result, Plaintiff plays games with the Policy's language, but the plain language of the Aspen Policy is clear that the maximum that applies under any one coverage part is the limit of insurance.

Here, Plaintiff has conceded that the maximum under Coverage Part A is $ 1 million and the maximum under Coverage Part B is $ 1 million. Thus, the maximum under either is at best $1 million, which the Endorsements' first paragraph limits coverage to.

Plaintiff's Reply/Opposition argues Coverage Part A applies to "occurrences" and that Coverage Part B applies to "offenses." Tellingly though, Plaintiff then fails to set forth the subject Aspen Endorsement limiting coverage because its express, plain terms show that Plaintiff's construction is contrary to the terms of the Endorsement and the policy as a whole:

> **G. Other Insurance with This Company**
>
> **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.**
>
> If this policy and any other policy issued to you by us apply to the same "occurrence," "accident," "cause of loss," "injury," "loss" or offence, the maximum limit of insurance under all of the policy shall not excess the highest limit of insurance under any one policy. This condition does not apply to any policy issued by us which specifically provides that the policy is to apply as excess insurance over this policy.

See Exhibit A1 at Endorsement ASPGL044 05 04 (emphasis added).

First, the language of the first paragraph states if the policy applies to the same *occurrence*, *offense*, cause of loss, etc., as the two subject coverage parts are argued to do so here by Plaintiff, the maximum limit under all coverage parts is the maximum under any one. This shows that, even under Plaintiff's 'occurrence vs. offense' rationale, the endorsement limits coverage that would otherwise implicate both, to the maximum under any one. Plaintiff concedes that maximum under

Coverage A is $ 1 million and coverage B is $ 1 million. Thus, the $ 1 million limit applies under the first paragraph of the Endorsement.

In addition, the Policy states that the Aggregate Limit ($2 million) is the most the Policy pays for coverage parts A, B, and C. *Id.* at CGL Coverage Form p, 8 of 13. Plaintiff's construction arguing that the Endorsement limits the coverage to two million would also render it meaningless because it would be superfluous of the general aggregate limit that otherwise already applies to coverage parts A-C.

Thus, under any construction by Plaintiff, Plaintiff's reading of the Endorsement renders it meaningless which is untenable. The Endorsement applies to *limit* coverage, not confirm already existing coverage as Plaintiff's argument really boils down to, under parts A, B, and C. That's why Plaintiff cites no law holding this Endorsement applies otherwise.

Plaintiff has not offered evidence of *anyone* including the insured treating the Aspen limit as $2 million at any point of the underlying case or even in settlement, a settlement which was based on the Aspen $1 million limit (and the other primary insurer's $ 1 million limit). Plaintiff does not sue its' primary insurer, Zurich, for an additional $ 1 million either.

Instead, all the objective evidence shows that everyone including the insured treated Aspen's limit as a $ 1 million limit. Thus, while Aspen has not argued that the subject provisions are ambiguous (again, contrary to Plaintiff's disingenuous statement otherwise), it stated that to the extent *the Court believes so*, coverage would not automatically be construed in favor of a $2 million dollar policy limit, but that the evidence, should the Court believe the Endorsement or other provisions ambiguous, would show the $1 million limit applies.

D. Plaintiff's Arguments That The Occurrence Limit Does Not Apply To Limit Coverage Is Contrary To Law—Policy Limits Are Determined By The Cause of the Damage.

As Aspen's Opposition/Countermotion demonstrated, there was one cause of the injuries and therefore the artful pleading of claims for the same injuries does not implicate a second million dollars of coverage under personal advertising injury; a ruling otherwise would be disastrous to the insurance industry and the insureds trying to obtain coverage.

"'When all injuries emanate from a common source ..., there is only a single occurrence for purposes of policy coverage." *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.*, 178 Cal.App.4th 620, 633, 55 Ca.Rptr..3d 844 (2007). "**It is irrelevant that there are multiple injuries or injuries of different magnitudes, or that the injuries extend over a period of time.**" *Id.*, at 633-634. "[T]he existence of only one cause or event means there was only one occurrence for determining policy limits." *Id.* at 634. "**[P]olicy limits are determined by the cause of the damage.**" *Id.* at 634

In *Safeco*, the Court acknowledged that the personal injury liability coverage did *not* add more coverage to the same injuries all caused by the single causal event:

> Safeco's reliance on the policy's "Limit of Liability" provision is misplaced. That provision stated in part that "[a]ll 'bodily injury ' and 'property damage' resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful conditions shall be considered to be the result of 'one occurrence.' " (Italics added.) Safeco deems it significant that Fireman's Fund did not include "personal injury " in the provision. This omission, **Safeco contends**, means **that a single occurrence of property damage can simultaneously give rise to additional occurrences under the personal injury coverage in determining policy limits—for example, a second occurrence for wrongful entry and yet a third for wrongful eviction. But, as we have explained, policy limits are determined by the cause of the damage. Here, there was only one cause regardless of the number of injurious effects**.

Id. at 634. This is precisely what Plaintiff attempts to do here by arguing the occurrence limit does not apply to prevent an additional $1 million of coverage being implicated under the personal and advertising injury coverage part. But California and Nevada law show the policy limits are construed by the single cause of injuries rule, which makes sense under the law. *See, e.g., Century Sur. Co. v. Casino West, Inc.,* 99 F.Supp.3d 1262, 1264 (D. Nev. Mar. 27, 2015), citing *Bish v. Guaranty Nat'l Ins. Co.,* 109 Nev. 133, 137, 848 P.2d 1057, 1058 (1993) ("injuries arising from multiple "causes" are nonetheless attributable to a single 'occurrence' when those causes 'act[ ] concurrently with and [are] directly attributable to' a single first cause.").

Thus in *Safeway*, under four successive liability insurance policies each providing limits of $500,000 per "occurrence," a landslide from the insured's property happening during the first policy period, *which gave rise to both personal injury and property damage*, was single "occurrence,"

thus insurer was liable for only $500,000 of $4 million judgment against insured. *Id.* The Court further explained:

> Our interpretation of the policy—that there was one occurrence—is consistent with the reasonable expectations of the insured. According to Safeco, when the landslide happened, it simultaneously gave rise to personal injury and property damage in a variety of ways. As the mud and debris initially crossed the Rauches' property line, it caused a wrongful entry; as it moved onto their property, it caused physical injury; and after it ended, it resulted in a wrongful eviction and an ongoing loss of use. Yet, notwithstanding these various types of harm, the insured would perceive them all as the result of a single discrete event—the landslide. Nor would the insured believe that by paying annual premiums of around $1,600, he was entitled to an additional $500,000 per year in benefits, for a total of $2 million, based on conditions that remained static after the landslide: The insured's slope and the Rauches' backyard were unchanged during the successive policy periods, resulting in a jury award of around $88,000 for loss of use.

Id. at 637.

Nevada also construes the aggregate limit to apply where there are multiple occurrences, unlike here. *See Century Sur. Co.*, 99 F.Supp.3d at 1262 ("The Policy, however, has an aggregate limit of $2,000,000 if the damages at issue arise from more than a single occurrence.").

If there was any question, the Aspen Policy excludes personal and advertising injury coverage arising out of bodily injury, further confirming, even under Plaintiff's misplaced rationale, that the one occurrence limit applies here. There was one causal even that caused all Moradi's injuries, and the Aspen policy limit was therefore $1 million.

E. <u>Nevada Has Not Recognized Equitable Or Contractual Subrogation, And It Does Not Apply Here.</u>

Plaintiff argues Nevada has a long history of equitable subrogation generally but cannot dispute Nevada has never adopted it in the context here, and this Court should not do so here for the first time. Plaintiff cannot point to any Nevada state law allowing its subrogation claims to proceed either. The unpublished, non-controlling Nevada federal case (*Colony*) Plaintiff relies on its papers (which as unpublished and non-controlling this Court cannot rely on), has *not* been relied upon by other courts to adopt the claim, and the federal unpublished *Riverport* case Plaintiff cites

did *not* "adopt" equitable subrogation either, but instead held it could not apply there because justice did not require it anyways, as here.

Further, Plaintiff's Reply/Opposition confirms whether the equitable subrogation claim can be adopted *here* would be "based on the facts and circumstances of each particular case" (*see* Pl.'s Reply/Opposition, p.17:17-18), but here, Plaintiff also concedes it is seeking only rulings as matter of law *without* resort to the facts of the case. In other words, there are no facts before the court other than the parties' two insurance policies. Thus, there are no facts and circumstances at issue showing Plaintiff is entitled to *summary judgment* that it's claim is viable here such that this Court can rule as a judgment that the claim should be adopted here as a new claim.

However, because Nevada has not recognized it, specifically rejected versions of it some similar contexts, and because essential elements are lacking as a matter of law, the Court may grant summary judgment on the subrogation claims as a matter of law in favor of Aspen.

The law does not provide for contractual subrogation under the circumstances here. Contractual subrogation is based on the implied covenant of good fair dealing. *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 21 Cal. App. 4th 1586, 1599 (1994). Nevada also recognizes the implied covenant of good faith and fair dealing where a contract exists. *A.C. Shaw Construction, Inc. v. Washoe County,* 105 Nev. 913, 914 (1989). Without a contractual underpinning, there is no independent claim for breach of the implied covenant. *Fireman's Fund Ins. Co*, 21 Cal. App. 4th at 1599.

Here, Plaintiff is an excess insurer of Cosmopolitan, and Aspen is a primary insurer of Marque. In *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, the court held that where two contracts existed, one between the insured and the insurance company for primary coverage, and the other between the insured and another insurance company for excess coverage, that no direct contractual relationship existed. 21 Cal. App. 4th at 1599. The Court then analyzed, and found, that the excess insurer could not be considered a third party beneficiary to the primary insurance company's policy such that that the excess carrier could maintain its action. *Id.* The Court ruled that the contract must be expressly made for the benefit of the third person and that it is not enough

that an excess insurer incidentally benefits from the primary insurance company's contract with the insured. *Id.* at 1600.

Nevada follows the same approach. *Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-605 (2005) (c*iting Jones v. Aetna Casualty & Surety Co.*, 26 Cal. App. 4th 1717, 33 Cal Rptr 2d 291 (requiring that the an individual be more than merely an incidental beneficiary to a contract to have standing to enforce a covenant in an insurance policy intended to benefit the lessor); *see also Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 505, 728 P.2d 812, 814-815 (Nev. 1986) (rejecting contractual subrogation in insurance context as against public policy).

California law, which Plaintiff asks this Court to adopt, recognizes equitable subrogation (though Nevada does not), not contractual subrogation under the circumstances of a primary and excess insurer. But, under California law, elements are lacking as a matter of law here such that, even were the Court considering adopting a new claim in Nevada for the first time, the elements are not present. While Plaintiff states it "alleges" the conclusory elements, it must establish each the law shows the elements do not exist here.

Plaintiff argues not all elements need be proven, but this is contrary to the express language of *Fireman's Fund*, on which *Colony* relied, on which Plaintiff relies, which states "The **essential elements** of an insurer's cause of action for equitable subrogation" to include the listed elements. *Fireman's Fund*, 65 Cal.App.2d at 1292. *Fireman's Fund* lists eight elements that the *Colony* Court adopted by the statement that those are the "essential elements" of the claim. 65 Cal. App. 4th at 1292. The plain meaning of this explanation is that each of the eight elements is "essential." The *Fireman's Fund* decision does not state the elements should be weighed and balanced as opposed to determined satisfied or unsatisfied. It does not state they are 'factors,' or 'considerations,' to be weighed, but rather are "essential elements" of such a claim. *See also National Union Fire Ins. Co. v. Tokio Marine & Nichido Fire Ins. Co.*, 233 Cal. App.4th 1348, 1361 185 Cal. Rptr. 3d 296 (2015).

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These decisions do not state that an equitable subrogation plaintiff can be excused from proving certain of these elements. The equitable nature of the cause of action of equitable subrogation does not permit the Court to excuse proof of some of these elements.

The *Fireman's Fund* decision emphasized:

> "The right of subrogation is purely derivative. An insurer entitled to subrogation is in the same position as an assignee of the insured's claim, and succeeds only to the rights of the insured. The subrogated insurer is said to 'stand in the shoes' of its insured, because it has no greater rights than the insured and is subject to the same defenses assertable against the insured. Thus, an insurer cannot acquire by subrogation anything to which the insured has no rights, and may claim no rights which the insured does not have."

65 Cal. App. 4th at 1292.

In *National Union v. Tokio Marine*, a published case, the California court of appeal upheld dismissal of an equitable subrogation claim because there was no allegation that Costco (the insured) suffered harm as a result of Tokio Marine's bad faith conduct for which National Union paid. The court explained: "Specifically, the settlement payment made by National Union was not a loss suffered by Costco, and Costco's payments toward the settlement were not reimbursed by National Union. Thus, neither of the payments claimed in this cause of action meet the specific requirements for pleading a bad faith subrogation claim." *National Union*, 233 Cal. App.4th at 1362.

Plaintiff also argues the Court may not consider a case cited by Aspen (*California Capital*) because it was unpublished (despite it relying on published law, including the *Fireman's Fund* case on which *Colony* relies), but then argues for the adoption of an entirely new claim in Nevada based on an the *Colony* unpublished case. California Capital recognized there was no assignable cause of action as here because the insured did not have an assignable cause of action. *See* California *California Capital Ins. Co. v. Scottsdale Indemnity Ins.,* 2018 WL 2276815 (Cal.Ct.App. 2018*)* at *7, citing *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1291–1292. It also listed the "essential elements" of an equitable subrogation claim as including an "assignable cause of action." *Id. citing Fireman's Fund*65 Cal.App.4th at p. 1292. To say the Court did not decide a subrogation claim where it held there is no assignable interest, as plaintiff

appears to argue, is mere form without substance; if the there is no assignable interest, and that it as we know an essential element of the claim, it is lacking as a matter of law here.

In addition, because Aspen only had a $1 million policy limit as demonstrated above, and there was no settlement offer within its limit, Plaintiff is not in a superior equitable position (another essential element) to apply the doctrine here. In determining who has superior equites in an equitable subrogation claim, California courts focus on whether the defendant is a wrongdoer who caused the underlying loss: "An insurer cannot establish its position is equitably superior to the party to be charged if the party is not the wrongdoer whose act or omission caused the underlying loss or is not otherwise legally responsible for the underlying loss." *San Diego Assemblers, Inc. v. Work Comp for Less Insurance Services, Inc.*, 220 Cal.App.4th 1363, 1368, 163 Cal.Rptr.3d 621, 624 (2013).

Because the superior equitable position is premised on the misnomer that Aspen refused to settlement within a purported $2 million limit, this element is also lacking, and Aspen is entitled to summary judgment in the equitable subrogation claim even if the Court were inclined to adopt a new claim for relief in Nevada.

F. Aspen Is Also Entitled To Summary Judgment On Plaintiff's Estoppel Allegations, Styled As A Claim for Relief.

Aspen's Countermotion seeks summary judgment on Plaintiff's claim for equitable estoppel. Aspen argued in part it is based on claims against National Union and is derivative of other claims for which Aspen is also entitled to summary judgment. Plaintiff only argues that it is based on additional *allegations* too, but it offers no support for such allegations rendering summary judgment still proper for Aspen.

Plaintiff has not opposed the argument that Aspen is entitled to summary judgment on this claim as derivative of other claims for which it is entitled to summary judgment. *See Mahlan v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597, 691 P.2d 421 (1984). If judgment on the other claims on which equitable estoppel is based is obtained, there is no basis for the estoppel claim to remain and Aspen is entitled to judgment on it as well.

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G. Plaintiff Concedes Its Evidence In Support Cannot Be Considered.

Plaintiff offered various lengthy documents and items to this Court which Aspen showed to be unreliable and not authenticated for this Court to consider. Plaintiff's Reply/Opposition concedes it is mostly irrelevant to its Motion and that only the underlying complaint and the two policies can be considered, yet accuses Aspen of wasting party and Court time addressing items improperly submitted by Plaintiff's papers. Plaintiff's contradictory positions and unprofessional accusations against Aspen here are similar to its circular reasoning arguments elsewhere; they contradict each other, are not based in fact or law, and should be disregarded by the Court. In any event, the Court cannot rely on the evidence challenged by Aspen, which Plaintiff's Reply/Opposition concedes and appears to withdraw anyways.

Without evidence to demonstrate the essential elements and equities of subrogation apply to the undisputed facts and circumstances of this case, the Court cannot grant summary judgment for Plaintiff here *at all*. Plaintiff concedes only the underlying complaint and two policies are considered here on its Motion (Pl.'s Reply/Opposition at 29:27-28), and thus the Court cannot grant judgment for Plaintiff that there are facts and circumstances present here for the Court to recognize a new cause of action for the first time in Nevada; this is unlike a pleading stage where the court construes the facts, if true, in favor of Plaintiff. This does not preclude summary judgment for Aspen because it is based e lack of essential elements as a matter of law as well as that no such claim exists under Nevada law currently.

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III. CONCLUSION

For the foregoing reasons and arguments, Aspen's Countermotion for Summary Judgment should be GRANTED in full, and summary judgment entered in favor of Aspen on all claims against it accordingly.

DATED this 7th day of October, 2019.

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PROOF OF SERVICE

St. Paul Fire & Marine Insurance Company v. Aspen Specialty Insurance Company

Case No.: A-17-758902-C

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed by Messner Reeves LLP, 8945 W. Russell Road, Suite 300, Las Vegas, Nevada 89148. I am readily familiar with Messner Reeves LLP's practice for collection and processing of documents for delivery by way of the service indicated below.

On this 7 day of October, 2019, I served the following document(s):

DEFENDANT'S ASPEN SPECIALTY INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS COUNTERMOTION FOR SUMMARY JUDGMENT

on the interested party(ies) in this action as follows:

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By Electronic Service. Pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused said documents(s) to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, States of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

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

An employee of Messner Reeves LLP

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 8, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

For the Plaintiff: RAMIRO MORALES, ESQ.

For Aspen Specialty Insurance Company: RYAN A. LOOSVELT, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, October 8, 2019

[Case called at 10:06 a.m.]

THE COURT: We're going to be calling the -- we've got somebody on the phone there, I think. So, yeah, this would be the St. Paul v. Aspen. And we'll call --

MR. MORALES: Good morning, Your Honor.

THE COURT: -- I believe there is somebody who was going to be participating telephonically.

MR. MORALES: Okay.

THE CLERK: Mr. Herold. Hello.

MR. MORALES: Good morning, Your Honor. [Indiscernible} on their way.

UNIDENTIFIED SPEAKER: Hello.

THE CLERK: Do I have Mr. Herold on the line?

THE COURT: Okay. The Court has called St. Paul Fire & Marine v. Aspen Specialty Insurance, 758902. Is there anybody on the telephone who wishes to participate in St. Paul Fire & Marine v. Aspen Specialty? If not, then you'll just need to hold pending your matter.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: Okay. All right. Thanks. So it appears that he did not call in. Okay. So I guess we can --

MR. MORALES: Okay. Good morning. Ramiro Morales, counsel for St. Paul, bar number 7101.

MR. LOOSVELT: Good morning, Your Honor. Ryan Loosvelt

for Aspen.

THE COURT: Okay. All right. Great. So this is the motion for partial summary judgment, and this is the question of the policy limits.

MR. MORALES: Yes. Yes, Your Honor.

THE COURT: Okay.

MR. MORALES: Again, this is a single issue motion. The issue was whether there was two million available --

THE COURT: Uh-huh.

MR. MORALES: -- if there was two million or one million available.

THE COURT: Uh-huh.

MR. MORALES: In reviewing the papers from Aspen, they seem to raise three issues. One, that they have a coverage part endorsement that limits coverage is to a single limit. Two, that the policy is limited by the number of occurrences. And, three, that there is ambiguity in the policy.

My view of that is the easiest way to deal with it is really just to read the policy because -- so what I've done is I just have a short PowerPoint just to run through the policy terms, because the arguments that Aspen has made in response, is they don't dispute that there's a $2 million aggregate limit. They don't dispute that there is a $1 million personal injury limit, and a $1 million coverage paid bodily injury limit. They just say they're combined. There's really no authority for that in their papers because when you read the policy it is very clear that in fact

it is -- they are separate limits.

So I just ran through here and to just go through the policy terms, I think is the easiest thing to do. When you look at the declaration page of the policy, you'll see that they have the coverage part argument that the coverage part limits all coverage to one limit, but you'll see that the coverage parts are actually separate. There's the commercial general liability coverage part and the liquor liability coverage part, those are separate coverage parts. That's what the endorsement that they refer to, to limit coverage to.

THE COURT: I thought this was a stacking case when I read it, and I didn't understand why it wasn't being approached that way. If this policy contains two or more coverage parts --

MR. MORALES: Yes.

THE COURT: -- providing coverage for the same occurrence. And I thought this was your argument, maybe I'm wrong about it. I thought your argument was these were two different occurrences. That he had an advertising injury and the actual slamming his head into the concrete floor injury?

MR. MORALES: That is true, but in a precise reading of the policy that's actually not an occurrence argument --

THE COURT: Okay.

MR. MORALES: -- because the advertising injury coverage is driven by personal injury offenses. And the law is that advertising injury is not driven by occurrence. And I actually have a slide that will address that, if you give me a moment.

THE COURT: Uh-huh.

MR. MORALES: You'll see this is the limit of liability section of the policy. And you'll see that paragraph four refers to the personal and advertising injury limit, referring to coverage B. And paragraph five says -- refers to the coverage A, and it refers to each occurrence.

So it is somewhat conflating the concepts when you say that the advertising injury coverage is an occurrence limit. The advertising injury coverage is an offense limit --

THE COURT: Uh-huh.

MR. MORALES: -- and the bodily injury coverage is an occurrence limit. And you have separate limits for those. Let me just get to that.

You'll see there that in the policy there is an occurrence limit of $1 million and a separate personal injury limit of $1 million bound by the aggregate limit. And here, because you have a unique set of factual circumstance where they actually have both claims of false imprisonment and claims of bodily injury, and it's ultimately a judgment on both, you get two limits.

THE COURT: Okay. I'm going to go back to their other -- they call it another insurance. They don't call it standby stacking. In your policy, I believe it's specifically identified as anti-stacking. In their policy, they term it other insurance.

If this policy contains two or more coverage parts providing coverage for the same occurrence, accident, cause of loss, loss, or offense -- so they have both occurrence and offense -- the maximum

limit of insurance under all coverage parts shall not exceed the highest limited insurance under any one coverage part.

MR. MORALES: Okay. So you're referring to the coverage part, Your Honor.

THE COURT: Right.

MR. MORALES: The coverage part is the commercial general liability coverage. There are separate coverage parts in the policy. Let me get --

THE COURT: Yes, there are two. There are three, actually.

MR. MORALES: No, there is a liquor liability coverage part and a commercial general liability coverage part. Within the commercial general liability coverage part, there are two separate coverages. Those are not coverage parts. The commercial general -- the personal injury coverage and the bodily injury coverage are not coverage parts. Those are coverages within a single coverage part.

THE COURT: Uh-huh.

MR. MORALES: What the endorsement does is it prevents combining of the liquor liability coverage and the -- the liquor liability and the commercial general liability coverage.

THE COURT: Okay. And so -- I mean, is there anything further? I didn't want to cut you off.

MR. MORALES: No, I mean, it's --

THE COURT: For purposes of having a clear record, we would -- if you could email the slides so that it's clear in the Court's records. And so, we have them --

MR. MORALES: Okay. I have copies here. Would you preferred them emailed?

THE COURT: Well, if you got a hard copy, we'll absolutely take a hard copy. I don't know, counsel, if you wanted to see that. So, again, I look at it as a stacking case, and I believe you provided -- and we should make it clear, I don't think any of these policies were -- I mean there's nothing in here that we need to worry about it being sealed, right? Because I mean we do have a really -- a lot of confidentiality agreements governing us.

MR. MORALES: Yes. Yes.

THE COURT: So I just want to make clear that the pleadings that we've got filed, we don't have to worry about any -- nobody's got any issues with any of this having to be sealed or be confidential.

MR. LOOSVELT: I don't. Do you?

MR. MORALES: No, Your Honor.

THE COURT: Okay. Got it. Okay. Because I looked at the two different policies. They call it anti-stacking in their policy. You provided that. And then they provided your policy, which has this other insurance clause and, which, kind of is the same thing. So that's what I look at it as. And counsel's point is that I'm reading this too restrictively. That the coverages are the CGL versus the liquor, not the three coverage parts that are under this one policy, because there were three.

MR. MORALES: Your Honor, we cite to ten different portions of the CGL policy where they refer to it as a single coverage part.

THE COURT: Right. So commercial general liability has the

insurance agreement, and then let's see what we got up here. We got the chart. Because it contains within it coverage -- it's coverage B, personal and advertising, it's two different -- they're both coverage parts. I mean, I don't --

MR. MORALES: They're not coverage parts. They use coverage part as a definition of different coverages. When you look at the declarations page of the policy --

THE COURT: Okay.

MR. MORALES: -- they refer to coverage part as the liquor liability coverage part, the commercial general liability --

THE COURT: Yeah, let me get back to that.

MR. MORALES: -- coverage part, and the property coverage part.

THE COURT: Let me get back to --

MR. MORALES: Within those --

THE COURT: -- let me back to those.

MR. MORALES: -- there are different coverages.

THE COURT: Let me get back to these. Okay. Okay. Great. I'm back there. Common policy declarations.

MR. MORALES: Yes.

THE COURT: Okay. Common policy declarations, page 32. Commercial general, commercial property coverage, liquor liability coverage part --

MR. MORALES: They all say part at the end.

THE COURT: -- terrorism premium, and the total events

premium. Okay.

MR. MORALES: So they're each separate parts. Then within the CGL there are two limits bound by the aggregate. So the protection is the aggregate limit, the 2 million. You have two different coverages, the personal injury coverage and the bodily injury coverage.

THE COURT: Okay. All right. So then when I look at the CGL policy, it has coverages and in the policy -- because I don't know that the declarations page is a binding contract. The policy it calls it coverages. Coverage A, bodily injury and property damage. Coverage B, personal and advertising injury liability. And Cover C, I think was med pay.

MR. MORALES: An then there was another form as well. There is a separate coverage.

THE COURT: Oh, separate. Uh-huh.

MR. MORALES: It's got a completed operations coverage and a general aggregate.

THE COURT: Okay. All right. So just this interpretation of what is the other insurance --

MR. LOOSVELT: Yeah. So the endorsements is just one aspect of what we need to look at here. But just to address that quickly. The way Your Honor read it -- and we submitted our reply yesterday. I don't know if you had a chance to read it.

THE COURT: I got it here.

MR. LOOSVELT: Okay.

THE COURT: Uh-huh.

MR. LOOSVELT: And the reason is for that is we had an

agreement to continue the hearing, and that was pulled last week, so we wanted to get the reply on file before the hearing today. But in any event, the endorsement, as you read it, it does include -- it states occurrence, offense. And those are the words within those coverage points in bodily injury, in the personal advertising injury. We think it's pretty plain on its face that that's what it covers, and it limits it to the maximum for any one, which he concedes is the 1 million in their papers.

But there's more -- there's other reasons here outside of this endorsement. Everyone knows it's a $1 million policy. This is how they've been treated always. This is not a new interpretation Aspen is advancing. This is a new interpretation that St. Paul is asking the Court to adopt. They filed a 30 page reply with 98 authorities in it, none of which state what they want this Court to adopt. We did discuss in our reply the *Safeco Insurance Company* case, where this very argument was made. The artful pleading of claims is not going to double the coverage just because they have -- they allege false imprisonment in addition to the negligence claim. That doesn't double coverage. What's the effect it's going to be. And any plaintiff is going to be able to double the coverage on the policy just by artful pleading of the claims.

And that's not what the law says. The law for the policy limits, it looks at the causal nexus of all the injuries. Here there is no dispute it was all just one cause, what happened at the nightclub that evening that caused all the injuries.

THE COURT: Right. And so, again, just to be clear, I had

nothing to do with the trial. So I don't know anything about the underlying trial. So I don't think it's really disputed how they describe the accident. I mean what happened is what happened. I mean, I think, we're all in agreement on that. That he was -- you know, ran into this altercation with management in the club. You know, hit his head on the doorframe. Then they took him into the bathroom and allegedly beat him up before letting him go.

So each of those, hitting his head on the floor of the holding cell, versus hitting his head on the doors as they're taking him out aren't separate occurrences.

MR. LOOSVELT: Correct. And I don't even think Plaintiff is arguing there's multiple occurrences.

THE COURT: Right. So I mean --

MR. LOOSVELT: They're just saying --

THE COURT: -- but it's the same thing.

MR. LOOSVELT: Right.

THE COURT: I mean, occurrence is defined.

MR. LOOSVELT: Right. Right. So it's all one continuous act. It's all one cause. So there's one occurrence here. And the way the law looks at it, that's how the policy limits are applied. So if there are multiple occurrences, then it would -- then the aggregate might come into play, but it doesn't here. And this is a new interpretation that they're asking the Court to adopt and frankly there's no support for it.

It's how the policy reads, it's how it's treated, it's how the law construes the limits. And, frankly, it's how it was treated throughout the

entire case. So there was a $26 million settlement offer. Well, what did that represent? That's the 1 million primary Aspen and the 25 million National Union.

THE COURT: Okay. I don't think we're supposed to talk about settlement or policy limits.

MR. LOOSVELT: Oh, okay.

THE COURT: I think that was part of the agreement.

MR. LOOSVELT: But the same thing with the -- if we look at the post-judgment settlement. That represents --

MR. MORALES: It's all confidential, Your Honor.

THE COURT: Right.

MR. LOOSVELT: I understand, but that represents the --

THE COURT: You're not going to talk about numbers.

MR. MORALES: Okay.

THE COURT: I think we all agreed we wouldn't talk about the numbers.

MR. LOOSVELT: Right. So we all know what those numbers are, and we know what those represented. And so that's how it was treated the whole time here. So we think the plain language applies to a $1 million policy. We haven't seen anything else to show us otherwise here in the 30 page reply. There was nothing on point there that would -- that would allow us to adopt this new doubling the coverage, because he pled alternative claims here. And a duty to defend is different than a duty to indemnify. And the law is pretty clear on this.

So what we have, we have Plaintiff's claims, contractual

subrogation, which isn't recognized in Nevada with equitable subrogation, which hasn't been recognized yet, and they're asking the Court to recognize it here. But because -- most importantly because there's a 1 million policy limit, there's been no bad faith refusal to settle within the policy limit. They contend the settlement was the 1.5 million offer. That's in excess of that.

So there's no security equity here for St. Paul to even have these equitable subrogation claims, were the Court even to recognize it here for the first time.

THE COURT: Now -- so their request for relief on their motion for partial summary judgment was for the Court to interpret this as a $2 million limit. Your countermotion?

MR. LOOSVELT: Was for the $1 million limit and summary judgment on the claims against Aspen.

MR. MORALES: No. I think all we pled was the $1 million limit and dismissal of the equitable estoppel claim.

THE COURT: Yeah, the estoppel. Uh-huh.

MR. MORALES: I didn't see anything else.

MR. LOOSVELT: We would --

THE COURT: So I'm just trying to figure out what you're asking for because --

MR. LOOSVELT: Well, we're asking for summary judgment on the claims because there -- it was a countermotion based on the relief. They're seeking the viability of these subrogation claims. And our countermotion in opposition, they're not viable, and they can't be

recognized, and because we have this $1 million limit, they couldn't be viable even if it were going to be recognized as equitable subrogation claims.

MR. MORALES: Your Honor --

MR. LOOSVELT: So those are at issue here, just like they're at issue in the summary judgment motions you're hearing next week with the other Defendants, whether or not contractual subrogation and equitable subrogation, summary judgment should be granted --

THE COURT: Okay.

MR. LOOSVELT: -- in favor of Defendants.

MR. MORALES: Your Honor, if could just -- because we're going a little far afield here --

THE COURT: Okay.

MR. MORALES: -- but I just want to make a couple of things clear. We asked for a very specific issue. He's referring to Aspen's conduct during the underlying case. There will be evidence that even when they could have settled for the one-five, they never even offered $1 million. They offered nothing. So there will be evidence about improper conduct throughout. It's just --

THE COURT: Right. I mean that seems kind of premature to me.

MR. MORALES: Yes.

THE COURT: I mean because you had a very narrow issue, just what are the limits.

MR. MORALES: Yes. And then -- but just to respond.

Counsel repeatedly says the law doesn't support it. This is a novel concept. Not a single citation. Okay. It's -- if you read the record he could say, look, it's not supported by the law. It's not supported by the law. We gave you law that says the advertising injury limit and the coverage A, bodily injury limit, are separate limits. They are driven separately. If you look at page 6 of our reply brief, we cite to the IRMI article, which is well regarded authority cited by the Nevada Supreme Court in the *McKinney* case as authoritative. It explains the difference between coverage A and coverage B, that one is different by offenses, the other is different by occurrences. To say these are all the same occurrence is the wrong starting point.

THE COURT: Okay. Well --

MR. MORALES: There is an offense and an occurrence.

THE COURT: Okay. But we have this other insurance clause, which includes all of those definitions.

MR. MORALES: It includes all of those for a coverage form for separate coverage forms.

THE COURT: Uh-huh.

MR. MORALES: This is not a separate -- the maximum limit on this coverage form is $2 million.

THE COURT: Uh-huh.

MR. MORALES: It's the aggregate. The maximum limit on this coverage form, coverage A, before you, is $2 million.

THE COURT: Okay. And so then again reading your client's anti-stacking endorsement, regardless of the limits testified in the

declarations of this policy, if any bodily injury, property damage, personal injury, or advertising injury covered by this policy is also covered by any other named insured certificate issued by whatever this entity is, the maximum that we will pay for all such bodily injury, property damage, personal injury, or advertising injury will be the highest applicable, each occurrence limit under any one of those certificates.

So your position being that an anti-stacking clause as written by -- in your client's policy, where it's dependent on the certificates and encompasses all those different kinds of coverage, is operative to limit the exposure under the anti-stacking.

MR. MORALES: That anti-stacking endorsement --

THE COURT: Uh-huh.

MR. MORALES: -- goes to different policies --

THE COURT: Uh-huh.

MR. MORALES: -- not coverages within a policy.

THE COURT: Right. And that's what I'm saying.

MR. MORALES: So anti-stacking is a different concept there.

THE COURT: Right.

MR. MORALES: Okay. So it is different.

THE COURT: Okay. And so, again, I just want to make it clear that -- because when I look at this, I just thought, well, it's with the stacking. I thought we settled stacking 30 years ago when I first moved here. So --

MR. MORALES: You have a personal injury event and a

bodily injury event.

THE COURT: Uh-huh.

MR. MORALES: Two limits.

THE COURT: Okay. Perfect. So did you want to say anything further with respect to his motion, because to the extent that I view this as -- you had narrowed the issue pretty clearly. I do think that these other issues are questions of fact about whether or not you can recover on any of these --

MR. MORALES: Okay.

THE COURT: -- causes of action or --

MR. MORALES: That's fine. Yeah.

THE COURT: The policy limit part I understood is very limited. I don't know if you want to address it any further with respect to why I should go beyond the one narrow issue that they started with, which was the policy limit. Your counter-motion seemed to expand just to more -- a couple more issues.

MR. LOOSVELT: Yeah, we discussed it, and I kind of hit it already, but we discussed the law and how it construes the policy limits and the one cause. We went over that as well. We did cite a case in our reply brief, when you get a chance to look at it. I know it was submitted yesterday. It kind of rejects this argument that you're going to double cover just because you have a personal injury claim, and then also a claim in the other coverage part. So it's a $1 million policy. It's how everyone treated it.

THE COURT: And so, as I said, pointing to they had -- they

specifically called theirs anti-stacking. Your client's policy was other insurance. Same concept. They differentiated it in theirs by the basis of certificates and types of policies, that anti-stacking of the policies. Whereas, in this one it's anti -- it looks to me -- I mean this is an anti-stacking clause. We've had them for 35 years.

So I'm going to grant the countermotion, deny the motion. I believe that the other insurance clause in this policy operates to limit coverage to $1 million. Whether they should have made any offers, whether they could have made an offer or could have gone over any of those other issues that kind of were talked about a little bit it in this wonderful, you know, 550 page reading, thank you very much guys, which I did. I read it.

MR. MORALES: Your Honor, if I could clarify for the record the Court is relying on the conditions endorsement for -- that they're limited to one --

THE COURT: The other insurance clause, yeah.

MR. MORALES: Yes.

THE COURT: Let me -- I appreciate the fact you had your pages numbered. So this was -- it appears to be -- it's page 68. And I read that, but I didn't limit it to that. I read that. And then, as I said, I went back, and I looked at all these -- the way all these other things were defined, because I went back and read the definitions. I read the definition of occurrence. It's not in here. Occurrence. I read the definition of injury, and it wasn't -- some of these weren't defined.

MR. MORALES: Personal injury is defined as an offense.

THE COURT: Yeah. And so where's my definitions. Okay. So we have bodily injury -- definitions. Where's my definitions? I have all these different tabs. There was supposed to be different colors, so I can tell what I was looking at with the different colors, and then I forgot what my colors mean.

MR. LOOSVELT: Your Honor, just also for the --

MR. MORALES: I can -- Your Honor, personal injury is an offense defined as a number of offenses including false imprisonment, false arrest, libel, slander, defamation.

THE COURT: Uh-huh.

MR. MORALES: It runs through that. That's personal injury and advertising injury definition.

THE COURT: Uh-huh.

MR. MORALES: You have the bodily injury definition, which is --

THE COURT: And occurrence on page -- well, it's page 12 of the policy, in your pleading it's page 53.

MR. MORALES: -- an accident including continuous repeated exposure to the --

THE COURT: Right.

MR. MORALES: -- same conditions.

THE COURT: Yeah.

MR. MORALES: You will find that the word occurrence is not found in the personal injury coverage.

THE COURT: Uh-huh.

MR. MORALES: Okay. So it is not part of the personal injury coverage.

MR. LOOSVELT: Your Honor, the denial of the summary judgment on the other claims are without prejudice to be brought later.

MR. MORALES: Your Honor, this is the third time we've dealt with this.

MR. LOOSVELT: The subrogation claims.

MR. MORALES: Those are fact questions.

THE COURT: Yeah, I mean that seems very factual to me. The other insurance starts on page 9 of the policy, in addition to the endorsement that's on page -- it's page 50, if you look at the page numbers.

MR. MORALES: Okay. So the --

THE COURT: Other insurance there. And then there's other insurance endorsement and that's -- the other insurance is in the commercial general policy. They have a specific other insurance clause in there. Then they have the other insurance endorsement. We have the term occurrence defined. I mean I read the definitions. I looked through them and tried to find where the words were defined.

MR. MORALES: Yeah, I just wanted to --

THE COURT: Some of them were defined and some of them weren't.

MR. MORALES: Right. I get that. And so, just if we're relying on that endorsement, that's fine. I just want the record clear because --

THE COURT: The endorsement as well as the language of the specific coverages and how they define --

MR. MORALES: Okay.

THE COURT: -- what they cover, and the definitions of their coverages.

MR. MORALES: Okay.

THE COURT: And page 49, limits of insurance, I read that, to see how they were defining limits of insurance. I read the other insurance. I mean, I read it.

MR. MORALES: I understand.

THE COURT: I read the policy.

MR. MORALES: I'm just trying to make sure we have a clear record. The limits of insurance has paragraph 4 and 5, which has a separate limit for personal injury and advertising.

THE COURT: Right.

MR. MORALES: I just wanted to make sure the record --

THE COURT: Right. And I read -- and I had to read that in connection with the other insurance clause, and then go back and read the definitions and look up the definitions, some of which -- some of those other terms they use in that other insurance endorsement are defined in the policy and some of them aren't --

MR. MORALES: Yes.

THE COURT: -- which is a little bit challenging.

MR. MORALES: I understand, Your Honor.

THE COURT: So -- but that's -- it appeared to me to be a

pretty clear --

MR. MORALES: So you don't think it's ambiguous. You think it's clear.

THE COURT: I thought it was.

MR. MORALES: It is a single limit regardless of coverage parts, regardless of whether or not --

THE COURT: Correct.

MR. MORALES: -- you have both an advertising injury, a personal injury offense, and a bodily injury occurrence.

THE COURT: I think it all rises out of the -- because if you read occurrence, it all arises out of the same occurrence, the way they define occurrence in the policy. So to me -- and that's why I said -- I mean if we were going to get down in the weeds as to what's an occurrence, you know --

MR. MORALES: I don't think --

THE COURT: -- I didn't really see that.

MR. MORALES: Yeah.

THE COURT: To me it looked like it all arose out of the same incident. He might have had coverage under potentially two different parts, but it didn't increase the insurance coverage. It's one limit.

MR. MORALES: Thank you, Your Honor.

MR. LOOSVELT: Thank you, Your Honor.

THE COURT: Okay. All right. So that's a partial summary judgment. Did you want a 54(b) certificate on that, or are you just going to -- do you want to take it up in the interim?

MR. MORALES: I'll need to discuss it with my client, if I can.

THE COURT: Okay. Because it's going to be the same issue next week. We'll take -- there's a little bit of difference, but I just didn't know, given the fact that we were making these interim rulings if these were going to be appealable. If we would need that kind of language in there. You might want to discuss.

MR. MORALES: Yes, we'll discuss it with -- I mean, certainly on the subrogation issue there are fact questions.

THE COURT: Yeah, those -- that's absolutely -- to me we've talked about that time and time again. For another day.

MR. MORALES: So as far as findings of fact and conclusions of law, do I prepare it on the --

THE COURT: You know, I'm going to deny the initial motion, grant the counter-motion only as to coverage limits. I'm not getting into the other issues that you argued.

MR. LOOSVELT: Fine. We'll prepare it and run it by him.

THE COURT: And, as I said, if they want a 54(b), then you guys can work on some language for that, and then we'll just take those slides if you kindly brought them for us --

MR. MORALES: Oh, can --

THE COURT: -- and we'll give them to the --

MR. MORALES: -- may I approach, Your Honor?

THE COURT: -- Clerk. She'll make that part -- so it's clear in the record that they've got that. That's why I asked. If it goes up, they'll need that. So I just want to make sure we've got a clear record for him.

Okay. Thank you.

MR. MORALES: Thank you, Your Honor.

THE COURT: Okay. So I think that was everything.

[Proceedings concluded at 10:32 a.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.

Jessica B. Cahill

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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
DEPT.: XXVI

DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Date: October 15, 2019
Time: 9:30 a.m.

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Nevada Rules of Civil Procedure

Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") hereby submits the following Reply in Support of its Motion for Summary Judgment on Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Second, Fourth, Seventh and Eighth Causes of Action in the First Amended Complaint ("FAC").

I.

INTRODUCTION

St. Paul's Opposition does not contest that the Nevada Supreme Court has never recognized a subrogation claim between insurers. Equitable or contractual subrogation between insurers would be an entirely new claim and remedy in the Nevada state courts. If the Court allows St. Paul to proceed with its subrogation claims, new law in Nevada will be created. This Court should refrain from creating that new Nevada law. National Union respectfully submits that decision is for the Nevada Legislature or Supreme Court. Those branches of government are well equipped to evaluate the judicial economy issues that will result from the State of Nevada becoming a hotbed for "Monday-morning-quarterback" litigation among insurance companies about how lawsuits, settlement discussions, mediation, and trials should have or could have been differently handled, after-the-fact.

However, if this Court takes the plunge, St. Paul's subrogation claims still cannot survive summary judgment. That is because the undisputed factual record before this Court is that St. Paul and National Union were excess insurers in different towers of insurance coverage. No case in any jurisdiction has ever permitted subrogation in that circumstance. The Opposition cites no such cases. This Court should not be the first in Nevada – or anywhere else in the United States – to create that new law.

From the outset of this lawsuit, St. Paul refused to attach to its pleadings or provide to this Court its insurance policy covering Cosmopolitan. After stalling for nearly two years after filing this action to disclose its policy, the St. Paul policy has now been produced, authenticated, and submitted. St. Paul concealed its own policy for as long as it could because that policy proves, as a matter of law, that St. Paul and National Union were each excess insurers in different towers of insurance coverage. Further, it is now clear and undisputed that St. Paul's policy is not excess to

National Union's. St. Paul desperately attempts to create a genuine issue by fabricating insurance terminology and labeling itself a "higher level excess carrier" and National Union a "lower level excess carrier." (Opp. 20.) But these terms are found nowhere in the policies. This made-up nomenclature is inadmissible argument with no factual support in the record or reality.

The Opposition does not dispute that Cosmopolitan's defense and indemnification in the Underlying Moradi Action were fully paid by its insurers, and that Cosmopolitan has suffered no contract damages. St. Paul's subrogation breach of contract claim cannot survive summary judgment in the face of these undisputed facts.

Like its subrogation claims, St. Paul's claim for equitable contribution cannot survive summary judgment. Nevada state courts have not recognized an equitable contribution claim between insurers. The Opposition concedes as much. But even if such a claim existed under Nevada law, St. Paul does not dispute that National Union's policy limit was exhausted. Equitable contribution does not allow for the recovery of damages beyond the limits of an insurer's policy.

It is telling that the Opposition's lead argument proffers misrepresentations about the case's procedural history. Contrary to St. Paul's revisionist history, this Court did not previously reject the arguments in Defendants' pending Motions. The Opposition ignores how this Court invited National Union's Motion for Summary Judgment during the motion to dismiss phase, when it found that "[b]ased on the record before the Court at this time, there appears to be no material questions of fact and the only issues remaining are purely questions of law." This Court's denial of National Union's second motion to dismiss was "without prejudice" to allow it to properly authenticate and lay the foundation for the at-issue insurance policies, which National Union has now done.

The Opposition seeks to bog this Court down with unnecessary allegations that have no bearing on National Union's Motion. Lacking evidence to support the Opposition's arguments, St. Paul has improperly made its own litigation counsel attest to statements for which they have no personal knowledge. The Opposition also makes an unsupported and unsubstantiated request under Rule 56(d), which should also be rejected.

For the reasons stated in National Union's moving papers and in this reply, the Court should grant its Motion for Summary Judgment in its entirety.

II.

DENYING SUMMARY JUDGMENT WILL CREATE NEW LAW IN NEVADA

St. Paul does not dispute that the Nevada Supreme Court has never recognized a subrogation claim between insurers. The Opposition cites no Nevada state court decision – published or unpublished – permitting an insurer to pursue subrogation against another insurer, let alone any Nevada state court case allowing an insurer to pursue another insurer for a purported failure to settle. The Opposition provides a dissertation on the origins of subrogation, but no amount of academic recitations or ramblings can change a simple concept: if this Court allows St. Paul's subrogation claims to survive summary judgment, new subrogation and insurance law in Nevada will be created.

A. Nevada State Courts Have Never Allowed Equitable Subrogation Between Insurers

Equitable subrogation between insurers would be an entirely new claim and remedy in the Nevada state courts. In misleading fashion, the Opposition cites Nevada state cases in purported support of its contention that Nevada recognizes equitable subrogation claims between insurers.[1] But *none of those cases* involved equitable subrogation between insurers. There is a good policy reason for this: judicial economy in preventing a tsunami of subrogation and insurance litigation throughout the state among insurance companies about how lawsuits, settlement discussions, mediation, and trials should have or could have been differently handled, after-the-fact. If the State of Nevada is going to recognize new claims and remedies not previously permitted, the Nevada Supreme Court or Legislature should make that decision.

Even the unpublished federal district court case heavily relied on by St. Paul acknowledged that the Nevada Supreme Court has never addressed the question of whether equitable subrogation applies between insurers. *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL3360943 at *4 (D.

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[1] *See* Opp. 12-13. *AT&T* involved a self-insured employer's statutory subrogation claim against its employee injured by a third-party tortfeasor. *American Sterling Bank* involved equitable subrogation in the context of mortgage lienholders. *Federal Ins. Co.* involved subrogation rights of a surety against a bank. *Globe* involved the scope of a surety's subrogation rights on a public works bond arising from a contractor's failure to perform. *Laffranchini* involved the subrogation rights of a subsequent mortgagee as to the original mortgagee. *In re Fontainebleau* involved equitable subrogation in the context of a mechanic's lien. *Lumbermen's* involved the subrogation rights of a builder's risk insurer against a negligent subcontractor on a construction project.

Nev. June 9, 2016); *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2018 WL 3312965 at *5 (D. Nev. July 5, 2018). The unpublished *Colony* case failed to engage in a substantive analysis of the policy considerations (such as those noted above and others) against such a vast expansion in Nevada law. *Colony* also did not address equitable subrogation between excess insurers in the different towers of insurance coverage, which is the specific legal issue before this Court. Notably, the Opposition cites no case law in Nevada (or any other jurisdiction) permitting equitable subrogation between excess insurers in different towers of insurance coverage.

B. Nevada State Courts Have Never Allowed Contractual Subrogation Between Insurers

Contractual subrogation between insurers would also be an entirely new claim and remedy in Nevada. The Opposition cites *no Nevada cases* permitting contractual subrogation between insurers. *See* Opp. 14-16. The only case law cited in either the Opposition or the Motion that addressed contractual subrogation between insurers rejected that theory. *See* Mot. 15 and Opp. 14-16 (each citing *Colony Ins. Co.*, 2016 WL3360943 at *6, which rejected contractual subrogation claims between insurers finding that "in the insurance context, contractual subrogation is generally applied not by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor").

The Opposition focuses on the *Canfora* decision, but that case involved a dispute between an insured and an employer-insurer, and had nothing to do with contractual subrogation between insurers. (Opp. 14 citing *Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771 (2005).)

The Opposition also ignores the *Sapiano* case cited in National Union's Motion. Although not Nevada law, that case stands for the well-established proposition in California that any right to subrogation an insurer may have arises by operation of law, and is not dependent on or enlarged by contract or policy provisions. *Sapiano v. Williamsburg Nat'l Ins. Co.*, 28 Cal.App.4th 533, 538 (1994).[2]

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[2] *See also 21st Century Ins. Co. v. Superior Court*, 47 Cal.4th 511 (2009); *Progressive W. Ins. Co. v. Yolo Cty. Sup. Ct.*, 135 Cal.App.4th 263 (2005); *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal.App.4th 1098, 1107 (2006). The Opposition quibbles that California law on this issue is not the majority rule, but offers no meaningful reason why that should dissuade the Court from considering these decisions.

The Opposition relies heavily on the *Colony* decision in the context of equitable subrogation (Opp. 13) but takes issue with its rejection of contractual subrogation claims between insurers. (Opp. 14-15.) St. Paul argues the *Colony* decision somehow "misapplied" the *Maxwell* case, which the Opposition contends is limited to the context of medical payments. (*Id.* citing *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502 (1986).) The Opposition provides no support for this purported limitation, and its argument ignores *Maxwell's* holding that "[w]hether the subrogation clause is viewed as an assignment of a cause of action or as an equitable lien on the proceeds of any settlement, the effect is to assign a part of the insured's right to recover against a third-party tortfeasor...We hold such an assignment is invalid." *Maxwell*, 102 Nev. at 505. The Opposition misses the point of how *Maxwell* reflects the Nevada Supreme Court's unwillingness to expand contractual subrogation in that context, albeit a different one than this case.

The *Colony* case cited *Maxwell* as support for its decision to reject contractual subrogation claims between insurers. As noted above, St. Paul has failed to provide this Court with any Nevada case law permitting contractual subrogation between insurers. As the plaintiff, St. Paul bears the legal burden to establish that a claim for equitable or contractual subrogation between insurers can be pursued in Nevada state court. The Opposition fails, as a matter of law, to carry St. Paul's burden. No Nevada state court has allowed such a claim. It is not enough, as the Opposition argues, that Nevada state courts have not (yet) expressly prohibited St. Paul's claims. A plaintiff cannot invent claims for trial that do not actually exist. National Union respectfully submits that if St. Paul wants to proceed with unfounded subrogation theories new to the Nevada state court system, it is up to Nevada's Supreme Court or Legislature to permit that. For the reasons in National Union's Motion and above, St. Paul's Second and Fourth Causes of Action for subrogation cannot survive summary judgment. The Court should grant National Union's Motion as to those claims.

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III.

THE SUBROGATION CLAIMS CANNOT SURVIVE SUMMARY JUDGMENT BECAUSE ST. PAUL'S POLICY IS NOT EXCESS TO NATIONAL UNION'S

Even if Nevada recognized subrogation claims between insurers (which it does not), those claims fail as a matter of law here because St. Paul cannot carry its threshold burden of establishing its policy is excess to National Union's. *See*, *e.g.*, *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 1291-1292 (2013) (explaining distinctions between contribution and subrogation). In those jurisdictions outside Nevada where subrogation between insurers has been in certain circumstances recognized, an essential threshold requirement is that one insurer *was primarily liable* and the other insurer *was not primarily liable*, such that subrogation only applies to insurers providing *different levels of coverage*. *Id.* As the undisputed record before this Court establishes, National Union and St. Paul provided excess coverage to Cosmopolitan on the same level under different towers. (Declaration of Richard C. Perkins ("Perkins Decl."), Ex. 1; Declaration of Nicholas Salerno ("Salerno Decl."), Ex. 3.) Accordingly, even if Nevada recognized subrogation between insurers, such recognition would still preclude St. Paul's subrogation claims against National Union because they each provided excess coverage to Cosmopolitan on the same level under different towers of insurance coverage.[3]

Cognizant of the legal flaws fatal to its subrogation claims, St. Paul resorts to fabricating insurance terminology found nowhere in the factual record before this Court. In the Opposition, St. Paul speciously classifies itself as a "higher level excess carrier" and National Union as a "lower level excess carrier." (Opp. 20.) But these made-up terms are not found anywhere in the policies. (Perkins Decl., Ex. 1; Salerno Decl., Ex. 3.) St. Paul has asserted these fictional and misleading classifications solely for the purpose of this litigation. In any event, it cannot reasonably contest the

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[3] The Opposition cites out-of-state cases applying Kentucky and Illinois law. But those cases are neither Nevada authority nor persuasive because they involved actions between primary and excess insurers in the same tower of insurance coverage. *See* Opp. 20 (citing *National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493F.3d 752 (6th Cir. 2007) and *Central Illinois Public Service Co. v. Agricultural Ins. Co.*, 378 Ill.App.3d 728 (2008)).

undisputed nature of each of the St. Paul and National Union excess policies by calling them something they are not.

Desperate to save the subrogation claims, St. Paul invokes the Nightclub Management Agreement ("NMA") at issue in Marquee's Motion for Summary Judgment. But contrary to the Opposition's argument, the NMA does not control the priority of coverage issues between St. Paul and National Union. That is because (1) neither excess insurer was a party to the NMA, and (2) in actions between insurers over priority of coverage, the insurance policies control over the insureds' contracts. *See Travelers Cas. & Surety Co. v. American Equity Ins. Co.*, 93 Cal.App.4th 1142, 1157-1158 (2001) (holding that disputes between two insurers should be governed by general principles governing the interpretation and enforcement of the policies, as opposed to contractual indemnification clauses).[4]

Even if St. Paul's subrogation claims did not require new law in Nevada in order to survive summary judgment, those claims fail, as a matter of law, because St. Paul's policy is not to excess to National Union's.[5] For this independent reason, the Court should grant National Union's Motion as to these claims.

IV.

THE SUBROGATION CLAIM FOR BREACH OF CONTRACT CANNOT SURVIVE SUMMARY JUDGMENT BECAUSE THERE ARE NO CONTRACT DAMAGES

Even if Nevada recognized subrogation claims between insurers (it does not), and even if St. Paul was excess to National Union (it is not), the subrogation breach of contract claim fails for St. Paul's failure to carry its burden in establishing the damages element of the claim. A claim for

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[4] St. Paul's reliance on the *Rossmoor* and *Mt. Hawley* cases is misplaced. (Opp. 17-18.) These California cases involved a *primary insurer* stepping into the shoes of its *insured* to pursue its insured's contractual right to indemnity from *another primary insurer*. St. Paul is not stepping into Cosmopolitan's shoes to pursue any claim against National Union for express indemnity under the NMA. These cases are also inapposite because National Union and St. Paul are each excess insurers, not primary insurers. (Perkins Decl., Ex. 1; Salerno Decl., Ex. 3.)

[5] In addition, the Opposition fails to create a disputed fact relevant to the Motion's argument upon lack of superior equity. St. Paul's arguments rely on its counsel's factually inaccurate statements (for which they lack personal knowledge) and the undisputedly false position that St. Paul's excess policy (immediately above the Zurich primary policy in the Cosmopolitan tower) is somehow excess to National Union's excess policy (immediately above the Aspen primary policy in the Marquee tower).

breach of contract that presents no admissible evidence of contract damages is subject to dismissal on summary judgment. (Mot. 17.) In the insurance context, damages for breach of an insurance policy are limited to amounts for policy benefits owed under the policy. *Morris v. Paul Revere Life Ins. Co.*, 109 Cal.App.4th 966, 977 (2003); *Avila v. Century National Ins. Co.*, 2010 WL 11579031 (D. Nev. Feb. 10, 2010).

The Opposition does not dispute that (1) Cosmopolitan's defense in the Underlying Moradi Action was fully paid by its insurers; (2) Cosmopolitan was fully indemnified by its insurers, (3) Cosmopolitan did not contribute toward its defense or the settlement of the Underlying Moradi Action, and (4) Cosmopolitan has not suffered any breach of contract damages. (*Compare* Mot. 17 *with* Opp. 23-24.) These undisputed facts require the Court to dismiss St. Paul's subrogation breach of contract claim.

Failing to address these undisputed facts, the Opposition's irrelevant arguments only emphasize how St. Paul is seeking extra-contractual damages for an alleged breach of the duty to settle. (Opp. 24.) But those damages cannot be recovered under a breach of contract theory. Even if St. Paul could step into Cosmopolitan's shoes (which it cannot), St. Paul would only have the same remedies available to Cosmopolitan. Because Cosmopolitan has suffered no damages for any alleged breach of contract, St. Paul likewise has no claim. The subrogation cause of action against National Union for breach of contract cannot survive summary judgment.

V.

THE CONTRIBUTION CLAIM CANNOT SURVIVE SUMMARY JUDGMENT

The Nevada state courts have never established an equitable contribution claim by an insurer against another insurer. (Mot. 19.) The Opposition concedes the Nevada Supreme Court has never done so. (Opp. 25.) Rather, it erroneously contends this case is still "at the pleading stage" (*id.*), which is clearly not the case. And that somehow being "at the pleading stage" precludes the Court from granting summary judgment as to St. Paul's unfounded contribution claim. Not so.

But even if such a claim existed under Nevada law (which it does not), equitable contribution does not allow for the recovery of damages beyond the limits of an insurer's policy. *See* Mot. 19-20 (citing *Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, 2012 WL

870289 at *3 (D. Nev. Mar. 14, 2012) ("once the [limits are] reached, the insurer's duties under the policy are extinguished.")). No jurisdiction permits for contribution beyond policy limits and there are numerous cases explicitly finding equitable contribution does not allow for recovery beyond policy limits. *See, e.g., Nucor Corporation v. Employers Ins. Co. of Wausau*, 2014 WL 11514491 (D. Ariz. Nov. 18, 2014); *Century Indemnity Company v. American Home Assurance Company*, 2017 WL 5983716 (App. Ct. Ill. Nov. 29, 2017); *Travelers Indem. Co. v. Liberty Mut. Ins. Co.*, 1997 WL 102506 (N.D. Cal. Feb. 5, 1887). The Opposition does not dispute that National Union exhausted its policy limit in settlement of the Underlying Moradi Action nor that St. Paul seeks extra-contractual damages. (*Compare* Mot. 10, 19 *with* Opp. 26.)

The Opposition ignores the case law cited in National Union's Motion. (Opp. 26.) It has no meaningful answer to this purely legal issue. (*Id.*) St. Paul's only response, which is factually unsupported and irrelevant under the law, is to allege that National Union somehow only exhausted its policy limit through payments made on behalf of Marquee, rather than Cosmopolitan. (Opp. 26.) St. Paul provides no evidence or legal authority in support of this contention. (*Id.*) Because National Union has no further obligation under its exhausted policy, St. Paul cannot obtain contribution from National Union. *Everest Indem. Ins. Co.*, 2012 WL 870289 at *3

For the reasons stated in National Union's moving papers and above, the Court should grant its Motion as to St Paul's equitable contribution claim.

VI.

THE EQUITABLE ESTOPPEL CLAIM CANNOT SURVIVE SUMMARY JUDGMENT

In its Motion, National Union accurately asserted that St. Paul's equitable estoppel claim cannot "seek monetary damages." (Mot. 20, n.2.) St. Paul does not dispute its equitable estoppel claim cannot and does not seek damages. (Opp. 26-27.) Although the Opposition appears to dispute that its equitable estoppel claim is not dependent on the legal viability of its other causes of action, St. Paul provides no explanation for how that is the case here. St. Paul offers no meaningful argument why this claim should survive summary judgment if its other claims do not. Because St. Paul's subrogation and contribution claims cannot survive summary judgment, neither can its equitable estoppel claim.

VII.

THE OPPOSITION RAISES IRRELEVANT MISINFORMATION UNRELATED TO THE MOTION'S "PURELY QUESTIONS OF LAW" AND RELIES ON INADMISSIBLE ALLEGATIONS

St. Paul unsuccessfully attempts to muddy the clear questions of law presented in National Union's Motion. The Opposition's strategy is to bog this Court down with unnecessary allegations that have no bearing on National Union's Motion. (*See*, *e.g.*, Opp. 3-4.) As stated above, the Court previously found that National Union's pertinent arguments present "no material questions of fact and the only issues remaining are purely questions of law." The Opposition raising allegations about National Union's alleged bad faith has no legal effect on the "purely questions of law" that are the grounds for National Union's Motion.

Not only does the Opposition attempt to inject these pointless distractions into National Union's Motion, but it also relies almost exclusively on inadmissible misinformation that fails to rebut the evidence in National Union's Motion or support the Opposition's erroneous arguments. For example, the Opposition cites liberally to the declaration of St. Paul's litigation counsel in this case, Marc Derewetzky. (*See*, *e.g.*, Opp. 3-4.) But Mr. Derewetzky clearly lacks personal knowledge to make under-oath declarations about, among other things, National Union, the Underlying Moradi Action, what National Union did or did not do in connection with that case, Marquee, Cosmopolitan, or the NMA. (*See*, *e.g.*, Derewetzky Decl., ¶¶25-36; *see generally*, National Union's Objections to Facts not Supported by Admissible Evidence.)

It is simply false – and outrageous – for Mr. Derewetzky to claim in his declaration that he has "personal knowledge of all facts set forth in this Declaration" and in that same document, make purported factual assertions about disputed events obviously outside his personal knowledge. Examples of inaccurate statements Mr. Derewetzky makes in his declaration for which he has absolutely no personal knowledge – and are irrelevant to the Motions for Summary Judgment – include the following: "AIG provided a single attorney to represent Cosmo and Marquee"; "Aspen and AIG mishandled the claims"; "AIG elected to . . . unreasonably take its chances"; "AIG lost this gamble"; and "AIG did not want St. Paul interfering in the handling of the defense." Each of

these statements (and several others) should be stricken from the record. If Mr. Derewetzky's statements are not stricken, and this case continues, he will need to sit for a deposition in this action about his purported factual testimony.

VIII.

ST. PAUL'S RULE 56(D) REQUEST SHOULD BE DENIED

The Opposition fails to articulate why St. Paul needs any discovery to address the purely legal issues in National Union's Motion. It similarly fails to identify what discovery St. Paul purportedly needs to address those legal issues. Although the Mr. Derewetzky's declaration lists a few bullet points as "areas of inquiry" (Derewetzky Decl. p. 6), St. Paul fails to explain how those "areas" have any connection to the dispositive legal issues in National Union's Motion. For example, St. Paul fails to explain how the "areas of inquiry" would:

- Affect St. Paul's concession that the Nevada Supreme Court has never recognized a subrogation claim or an equitable contribution claim between insurers.
- Locate Nevada state court case law permitting an insurer to pursue subrogation or equitable contribution against another insurer.
- Alter the fact that National Union and St Paul each provided excess coverage to Cosmopolitan on the same level under different towers of insurance coverage.
- Change the fact Cosmopolitan has not suffered any breach of contract damages.
- Challenge that National Union exhausted its policy limit in settlement of the underlying action.

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The "areas of inquiry", if relevant at all, relate to St. Paul's allegation of bad faith. But National Union is not moving on bad faith. This Court can and should rule on the legal issues raised in National Union's Motion without the distraction of allegations or discovery that relate to issues not presented in that Motion. For the reasons set forth above, St. Paul's Rule 56(d) request should be denied.[6]

IX.

CONCLUSION

For the above reasons, and those in the moving papers, National Union's Motion for Summary Judgment should be granted.

DATED: October 10, 2019

HEROLD & SAGER

By: _____

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[6] St. Paul asserts its Opposition was timely filed. (Opp. 3, n.3) It was not. Pursuant to the Court's Administrative Order effective March 12, 2019, the Opposition needed to be filed by September 23. It was not filed until September 27. The Court can disregard the Rule 56(d) request, the Opposition in its entirety, or reject any or all of its arguments due to St. Paul's failure to meet its required filing deadline.

CERTIFICATE OF SERVICE

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

That on October 10, 2019, service of DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

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

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Executed on the 10th day of October, 2019.

JuRee A. Bloedel

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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 NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S OBJECTIONS 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 REQUEST FOR DISCOVERY PER NRCP 56(d)

Hearing Date: October 15, 2019
Hearing Time: 9:30 a.m.

Pursuant to NRCP 56(c)(1), National Union Fire Insurance Company of Pittsburgh, PA ("National Union") hereby submits the following objections to facts not supported by admissible evidence filed in support of Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Opposition to Motion for Summary Judgment and Request for Discovery for Discovery Per NRCP 56(d).

FACTS/EVIDENCE	OBJECTION
1. "There was no evidence presented at trial that Cosmo was directly liable for Moradi's injuries and no evidence that Cosmo had any role in hiring, training or supervising the Marquee personnel. Declaration of Marc J. Derewetzky in Support of Opposition to AIG's Motion for Summary Judgment, filed concurrently herewith ('Derewetzky Decl.'), ¶ 25." (Opp., at 3:7-11.) Declaration of Marc J. Derewetzky ("Derewetzky Decl."), ¶ 25	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 25. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
2. "No Cosmo employee or manager testified at trial. Derewetzky Decl., ¶ 25." (Opp., at 3:11-12.) Derewetzky Decl., ¶ 25	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance

FACTS/EVIDENCE	OBJECTION
	Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 25. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
3. "Prior to trial, the Court denied Cosmo's motion for summary judgment finding instead that Cosmo had a non-delegable duty to exercise reasonable care so as to not subject others to an unreasonable risk of harm. Derewetzky Decl., ¶ 25." (Opp., at 3:12-14.) Derewetzky Decl., ¶ 25.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 25. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for

FACTS/EVIDENCE	OBJECTION
	any party in the Underlying Action that participated in trial of the Underlying Action.
4. "In response to a tender, Aspen agreed to provide a joint defense to both Marquee and Cosmo while AIG, based on the large exposure, agreed to do the same. Exhibits L., M." (Opp., at 4:1-3.) Declaration of William Reeves ("Reeves Decl."), ¶ 2. Derewetzky Decl., ¶¶ 14-15. Consolidated Appendix of Exhibits in Support of Plaintiff's Opposition to Motions for Summary Judgment Filed by AIG and Marquee ("Appendix"), Ex. L – March 21, 2017 Letter from Robin Green of AIG to Randy Conner of the Cosmopolitan of Las Vegas; Ex. M – March 21, 2017 Letter from Robin Green of AIG to John R. Ramirez of Roof Deck Entertainment, LLC and the Restaurant Group.	St. Paul offers two pieces of correspondence issued by defense counsel for defendants in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits L and M through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 14-15. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit L is a true and correct copy of a March 21, 2017 Letter from Robin Green of AIG to Randy Conner of the Cosmopolitan of Las Vegas, and/or whether Exhibit M is a true and correct copy of a March 21, 2017 Letter from Robin Green of AIG to John R. Ramirez of Roof Deck Entertainment, LLC and the Restaurant Group. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibits L and M are inadmissible hearsay. NRS § 51.065.
5. "AIG provided a single set of attorneys to represent Cosmo and Marquee jointly, despite the fact that Cosmo was entitled to be	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the

FACTS/EVIDENCE	OBJECTION
indemnified by Marquee pursuant to contract, thus improperly waiving Cosmo's rights. Exhibit A, Derewetzky Decl., ¶ 26." (Opp., at 4:4-6.) Derewetzky Decl., ¶ 26.	claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 26. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
6. "AIG mishandled the claims and then failed to accept reasonable settlement offers within their limits. Exhibits G, H, I, K; Derewetzky Decl., ¶ 27." (Opp., at 4:6-8.) Reeves Decl., ¶ 2. Derewetsky Decl., ¶¶ 9-11; 13; 27. Appendix, Ex. G – Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000; Ex. H – December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle; Exhibit I – November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000; Exhibit K – March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and	St. Paul offers an offer of judgment served by Moradi in the Underlying Action, as well as three pieces of correspondence issued by counsel for the parties in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits G, H, I, and K through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 9-11; 13; 27. Marc Derewetzsky and William Reeves lack personal knowledge

FACTS/EVIDENCE	OBJECTION
Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.	whether Exhibit G is a true and correct copy of Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000, whether Exhibit H is a true and correct copy of a December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle, whether Exhibit I is a true and correct copy of a November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000, and/or whether Exhibit K is a true and correct copy of a March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence and the offer of judgment offered by St. Paul through Exhibits G, H, I and K are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits G, H, I and K purporting to offer evidence assume facts that have been established in the evidence.

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FACTS/EVIDENCE	OBJECTION
7. Aspen and AIG failed to inform either Cosmopolitan or St. Paul or opportunities to settle before the offers expired. Derewetzky Decl., ¶ 28." (Opp., at 4:8-9.) Derewetzky Decl., ¶ 28.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 28. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
8. "These offers included a statutory offer of judgment for $1.5 million dated December 10, 2015 and offers to settle for $26 million (the undisputed amount of the combined Aspen and AIG limits) presented on November 2, 2016 and March 9, 2017, shortly before trial commenced. Exhibits G, H, I, K." (Opp., at 4:9-12.) Reeves Decl., ¶ 2. Derewetsky Decl., ¶¶ 9-11; 13; 27. Appendix, Ex. G – Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000; Ex. H – December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle; Exhibit I – November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy	St. Paul offers an offer of judgment served by Moradi in the Underlying Action, as well as three pieces of correspondence issued by counsel for the parties in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits G, H, I, and K through the Declaration

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Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000; Exhibit K – March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.	of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 9-11; 13; 27. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit G is a true and correct copy of Plaintiff's Offer of Judgment in the Underlying Action Dated December 10, 2015 in the Amount of $1,500,000, whether Exhibit H is a true and correct copy of a December 18, 2015 Letter From Tyler Watson of Kravitz Schnitzer & Johnson to Rahul Ravipudi of Panish Shea & Boyle, whether Exhibit I is a true and correct copy of a November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000, and/or whether Exhibit K is a true and correct copy of a March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence and the offer of judgment offered by St. Paul through Exhibits G, H, I and K are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits G, H, I and K purporting to offer evidence assume facts that have been established in the evidence.

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9. "And throughout the Underlying Action, AIG consistently represented that its coverage for Cosmopolitan was primary to St. Paul's coverage and, therefore, that AIG was responsible for defending and resolving the Underlying Action. Derewetzky Decl., ¶ 29." (Opp., at 4:12-15.) Derewetzky Decl., ¶ 29.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 29. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
10. "Rather than accept a settlement demand within its limits that would have insulated both Marquee and Cosmo, AIG elected to reject the demands and instead unreasonably take its chances that they would do better at trial." (Opp., at 4:16-18.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that rather than accept a settlement demand within its limits that would have insulated both Marquee and Cosmo, AIG elected to reject the demands and instead unreasonably take its chances that they would do better at trial, whether through affidavit,

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	declaration, or any other evidence. NRCP 56(c)(1).
11. "Having lost its gamble AIG then took the position that its exposure was capped at the limits of its policy ($26,000,000 when combined with the limits Aspen claimed were available), and that they would pay the alleged policy limit to protect Marquee but not Cosmo. Derewetzky Decl., ¶ 31." (Opp., at 4:20-23.) Derewetzky Decl., ¶ 31.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 31. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
12. "Throughout, AIG conducted itself by word and deed as though its policy was obligated to pay the Moradi claims before St. Paul was required to pay, rendering the St. Paul policy excess to the AIG policy. Derewetzky Decl., ¶ 32." (Opp., at 4:23-25.) Derewetzky Decl., ¶ 32.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 32. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set

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	forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
13. But AIG failed to avail itself of opportunities to spend its limits to protect *both* of its insureds, opportunities that were never presented to St. Paul. Derewetzky Decl., ¶ 32, Exhibits, I, K." (Opp. At 4:25-27.) Reeves Decl., ¶ 2. Derewetsky Decl., ¶¶ 11, 13. Appendix, Exhibit I – November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000; Exhibit K – March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.	St. Paul offers two pieces of correspondence issued by counsel for Moradi in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibits I, and K through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶¶ 11, 13. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit I is a true and correct copy of a November 2, 2016 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith Offering to Settle the Underlying Action for $26,000,000, and/or whether Exhibit K is a true and correct copy of a March 9, 2017 Letter from Rahul Ravipudi of Panish Shea & Boyle to David Dial, D. Lee Robert and Jeremy Alberts of Weinberg Wheeler Hudgins Gunn & Dial and Josh Aicklen, David Avakian and Paul Shpirt of Lewis Brisbois Bisgaard & Smith offering to settle the Underlying Action for $26,000,000.

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	NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibits I and K are inadmissible hearsay. NRS § 51.065. In addition, the portions of Exhibits I and K purporting to offer evidence assume facts that have been established in the evidence.
14. "With a joint and several judgment hanging over its named insured's head, St. Paul funded Cosmo's portion of the settlement. Derewetzky Decl., ¶ 32." (Opp., at 4:27-28.) Derewetzky Decl., ¶ 32.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 32. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for

FACTS/EVIDENCE	OBJECTION
	any party in the Underlying Action that participated in trial of the Underlying Action.
15. "AIG's argument that St. Paul should have settled the case simply ignores that fact that St. Paul had no opportunity to do so in part because AIG did not inform St. Paul of the settlement opportunities." (Opp., at 17:5-7.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that rather than accept a settlement demand within its limits that would have insulated both Marquee and Cosmo, AIG elected to reject the demands and instead unreasonably take its chances that they would do better at trial, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
16. "Therefore, because this claim arose out of the negligent or willful acts of Marquee's employees, and Cosmo was only vicariously liable and did not itself commit any negligent or will act, Marquee owes Cosmo indemnity." (Opp., at 18:7-9.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that because this claim arose out of the negligent or willful acts of Marquee's employees, and Cosmo was only vicariously liable and did not itself commit any negligent or will act, Marquee owes Cosmo indemnity, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
17. "St. Paul was not notified about the *Moradi* claim until February 13, 2017, so it could not have accepted either the December 10, 2015 $1.5 million Offer of Judgment or the November 2, 2016 $26 million written	St. Paul offers correspondence issued in the Underlying Action, through the declarations of William Reeves and Marc Derewetzky, in support of its position that National Union mishandled the claim in the Underlying Action

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settlement demand. Exhibit J." (Opp., at 20:17-19.) Reeves Decl., ¶ 2. Derewetzky Decl., ¶ 12. Appendix, Ex. J – E-Mail Dated February 13, 2017 From Crystal Calloway to BSIclaims and First Report.	and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to establish the authenticity of Exhibit J through the Declaration of William Reeves at ¶ 2 and Marc Derewetzky at ¶ 12. Marc Derewetzsky and William Reeves lack personal knowledge whether Exhibit J is a true and correct copy of an E-Mail Dated February 13, 2017 From Crystal Calloway to BSI claims and First Report. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action. The portions of correspondence offered by St. Paul through Exhibit J are inadmissible hearsay. NRS § 51.065.
18. "As to the March 9, 2017 $26 million demand, AIG 'failed' to report it to St. Paul until *after the demand had expired* and trial had commenced. Derewetzky Decl., ¶ 33." (Opp., at 20:19-21.) Derewetsky Dec., ¶ 33.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 33. Marc Derewetzsky lacks personal knowledge as

FACTS/EVIDENCE	OBJECTION
	to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
19. "To the contrary, after it became known that Cosmo had a policy with St. Paul, it is unlikely that Moradi would have settled for just the limits of the St. Paul policy as evidenced by the fact that the settlement demand post-verdict was for the limits of all insurance, including the St. Paul policy. Derewetzky Decl., ¶ 34." (Opp., at 20:24-27.) Derewetzky Decl., ¶ 34.	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 34. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
20. "Notably, events played out this way because AIG itself, contrary to its current position, knew St. Paul was a higher-level excess carrier and did not want St. Paul	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul

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interfering in the handling of the defense. Derewetzky Decl., ¶ 35." (Opp., at 21:9-11.) Derewetzky Decl., ¶ 35	has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul attempts to offer this evidence through the Declaration of Marc Derewetzky at ¶ 35. Marc Derewetzsky lacks personal knowledge as to the facts regarding the Underlying Action set forth in his declaration. NRS §§ 52.015, 52.025; NRCP 56(c)(4); Eighth Judicial District Court Local Rule 2.21(c). Although Mr. Derewetzky's Declaration states at Paragraph 1 that he has personal knowledge of the facts set forth in his Declaration, he fails to explain how he has personal knowledge of the matters to which he avers and provides no information from which one can infer personal knowledge. He was neither the author nor the recipient of any of the documents he attests to, nor was he counsel for any party in the Underlying Action that participated in trial of the Underlying Action.
21. "AIG's argument, ludicrous as it sounds, is that a carrier (AIG) can provide a conflicted defense for years, fail to assert all of its insureds' rights to their detriment (e.g. failing to assert Cosmo's indemnity rights against Marquee) and refuse at least two opportunities to settle within limits and nevertheless have superior equities to a carrier that was not even tendered to, and was kept in the dark about the litigation to prevent it from interfering in AIG's determination to gamble with Cosmo's and St. Paul's money." (Opp., at 21:11-16.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that National Union provided a conflicted defense for years, failed to assert all of its insureds' rights to their detriment (e.g. failing to assert Cosmo's indemnity rights against Marquee) and refused at least two opportunities to settle within limits and nevertheless has superior equities to a carrier that was not even tendered to, and was kept in the dark about the litigation to prevent it from interfering in National Union's determination to

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	gamble with Cosmo's and St. Paul's money, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
22. "Here, Marquee's employees actually committed the beating that caused the underlying claimant's injuries." (Opp., at 22:2-3.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that Marquee's employees actually committed the beating that caused the underlying claimant's injuries, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
23. "St. Paul was only notified about the Underlying Action on February 13, 2017, shortly before trial began, and *after* AIG had already rejected an offer to settle the entire case against both Cosmo and Marquee within the AIG limits." (Opp., at 22:25-27.)	St. Paul offers this unsupported factual assertion in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St. Paul's causes of action set forth in the First Amended Complaint against National Union for Subrogation – Breach of the Duty to Settle; Subrogation – Breach of the AIG Insurance Contract; Equitable Estoppel; and Equitable Contribution. NRS § 48.025. St. Paul fails to provide any evidentiary support for its assertion that St. Paul was only notified about the Underlying Action on February 13, 2017, shortly before trial began, and *after* AIG had already rejected an offer to settle the entire case against both Cosmo and Marquee within the AIG limits, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
24. "As to the March 9, 2017 offer within the AIG limits, although St. Paul had been notified about the case on February 13, 2017, AIG concealed the March 9 offer from St. Paul until after it had expired. Derewetzky Decl., ¶ 36." (Opp., at 22:27 – 23:1.)	St. Paul offers this portion of Marc Derewetzky's declaration in support of its position that National Union mishandled the claim in the Underlying Action and that St. Paul has priority because Marquee caused the loss. These arguments have no relevance to St.