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 XII of XIX

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

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

21	[09/27/2019] St. Paul Fire & Marine Insurance Company's Response to National Union Fire Insurance Company of Pittsburgh PA's Statement of Undisputed Facts in Support of Motion for Summary Judgment	IX	AA01229-AA01234
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23	[10/02/2019] St. Paul Fire & Marine Insurance Company's Reply Supporting Its Motion for Partial Summary Judgment as to Aspen Specialty Insurance Company and Opposition to Aspen's Countermotion for Summary Judgment	X, XI	AA01491-AA01530
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45	Zurich American Insurance Company Policy of Insurance issued to Nevada Property I LLC, Policy Number PRA 9829242-01	XVIII, XIX	AA02449-AA02608

FACTS/EVIDENCE	OBJECTION
Derewetzky Decl., ¶ 36.	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 ¶ 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.
25. "St. Paul had no knowledge, and therefore no reasonable opportunity to settle." (Opp., at 23:1-2.)	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 had no knowledge, and therefore no reasonable opportunity to settle, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
26. "And AIG would not even by arguing this point had it not insisted that the defense of Marquee and Cosmo be handled by a single firm which never informed Cosmo that its representation of both defendants created a conflict that at a minimum entitled Cosmo to independent counsel." (Opp., at 23:2-5.)	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

FACTS/EVIDENCE	OBJECTION
	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 insisted that the defense of Marquee and Cosmo be handled by a single firm which never informed Cosmo that its representation of both defendants created a conflict that at a minimum entitled Cosmo to independent counsel, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
27. "But AIG beached its obligations to Cosmo when it agreed to pay its limits only on behalf of Marquee. It paid nothing on behalf of its other insured, Cosmo." (Opp., at 26:4-6.)	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 breached its obligations to Cosmo when it agreed to pay its limits only on behalf of Marquee and paid nothing on behalf of its other insured, Cosmo, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
28. "On the other hand, the exhaustion argument ignores the problem that AIG decided unilaterally to forgo multiple opportunities to settle all claims against both its insureds within its own limits, prejudiced Cosmo's rights and then choose to exhaust the policy limits to protect only Marquee while contributing nothing for Cosmo." (Opp., at 26:9-12.)	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 decided unilaterally to forgo multiple opportunities to settle all claims against both its insureds within its own limits, prejudiced Cosmo's rights and

FACTS/EVIDENCE	OBJECTION
	then choose to exhaust the policy limits to protect only Marquee while contributing nothing for Cosmo, whether through affidavit, declaration, or any other evidence. NRCP 56(c)(1).
29. "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 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 ¶ 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 any party in the Underlying Action that participated in trial of the Underlying Action.

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DATED: October 10, 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 10, 2019, service of 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) 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.

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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 ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S REPLY IN SUPPORT OF MOTION 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 Reply Points and Authorities in support of Marquee's Motion for Summary Judgment and in response to Plaintiff St. Paul Fire & Marine Insurance Company's ("St. Paul") Opposition to that Motion.

I.

INTRODUCTION

St. Paul's Opposition makes no meaningful attempt to rebut the undisputed record supporting Marquee's Motion. The Opposition provides no statement of contested facts. It does not dispute that (1) Cosmopolitan signed the NMA; (2) the NMA contained a waiver of subrogation provision; (3) the waiver of subrogation applies to "Owner Policies" (defined as including Cosmopolitan); (4) the Cosmopolitan Lease attached to the NMA states that Cosmopolitan agreed to procure and maintain the insurance required under the NMA; (5) the St. Paul policy contains a waiver of subrogation endorsement; (6) that endorsement corroborates the NMA's waiver of subrogation; (7) St. Paul invoked the NMA in seeking indemnification on behalf of Cosmopolitan; (8) the NMA's indemnity obligations apply only to losses not covered by insurance; (9) Cosmopolitan was defended and indemnified by the insurers in the underlying action; (10) Cosmopolitan did not sustain any uninsured losses. These undisputed facts prevent St. Paul's subrogation claims for express indemnity and contribution from surviving summary judgment.

With dismissal looming, St. Paul's Opposition resorts to desperate measures during desperate times. *First*, St. Paul largely bases its untimely filed Opposition on the unsupported and false assertion that Cosmopolitan was never bound by NMA. But the NMA, St. Paul's invocation of it (through its third-party beneficiary contentions), and the Cosmopolitan Lease (attached to the NMA) establish, as a matter of law, that Cosmopolitan was bound by the NMA's terms.

Second, rather than muster a single fact witness to support its allegations, St. Paul relies heavily on its own litigation counsel's sworn statements about disputed events obviously outside their personal knowledge. The Court should address the lack of foundation for these sworn statements and reject the assertions therein.

Third, contrary to the Opposition's misrepresentations, this Court did not previously reject the arguments in Defendants' pending Motions. The Opposition 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." This Court's denial of Marquee's second motion to dismiss was "without prejudice" to allow it to properly authenticate and lay the foundation for the NMA and the relevant St. Paul policy, which Marquee has now done.

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

II.

THE NMA AND ST. PAUL'S POLICY BAR ITS SUBROGATION CLAIMS

In its Opposition, St. Paul has double-downed on its inaccurate and unsupported contention that it can somehow step into its insured Cosmopolitan's shoes to bring claims against Marquee when the NMA contains a "waiver of subrogation" provision. But the NMA is now properly authenticated, and the undisputed record before the Court establishes that (1) Cosmopolitan signed the NMA, (2) St. Paul invoked that agreement as the basis for its express indemnity claim against Marquee, and (3) Cosmopolitan, and now St. Paul by attempting to step into the shoes of Cosmopolitan, are each bound by the terms of the NMA. (Declaration of Bill Bonbrest ("Bonbrest Decl."), Ex. 1 at T000152; Opp., at pp. 12-13; Motion, at pp. 14 – 16.) St. Paul cannot rely on the NMA for third-party beneficiary status of Cosmopolitan in one argument yet disavow the NMA terms fatal to its subrogation claims in another. The NMA's waiver of subrogation puts an end, as a matter of law, to St. Paul's subrogation claims against Marquee.

The Opposition similarly fails to rebut how Cosmopolitan expressly assumed – through the Cosmopolitan Lease attached to the NMA – the obligation to procure insurance compliant with the NMA's terms, including the NMA's waiver of subrogation obligation. Section 17.2 of the Lease attached as Exhibit D to the NMA delegated NRV1's insurance requirements under the NMA to Cosmopolitan. Under Section 17.2, Cosmopolitan agreed to "carry and maintain all insurance required under paragraph 1(h)" of the Lease. (Bonbrest Decl., Ex. 1, at T000183.) Paragraph 1(h) of

the Lease titled "Landlord Insurance" in turn provided that Cosmopolitan would maintain "[a]ll insurance required to be obtained by [NRV1] under Section 12.1 of the [NMA]." (Bonbrest Decl., Ex. 1, at T000172.) In sum, Cosmopolitan agreed to procure and maintain the insurance required by NRV1 subject to the NMA, including its waiver of subrogation. The Opposition offers no meaningful argument in rebuttal.[1]

St. Paul also ignores how the NMA's express terms provide that the waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies," with "Owner Policies" defined as including Cosmopolitan. (Bonbrest Decl., Ex. 1, at T000126.) And although St. Paul asserts the NMA's waiver of subrogation is somehow unenforceable, the Opposition cites no authority to support this argument. The cases cited (at Opp. 9) – none of which are Nevada authorities – are inapposite because they did not involve waivers of subrogation. The Opposition also ignores case law holding that agreements to waive subrogation are enforceable even when there are misconduct allegations. *See, e.g., Abacus Federal Savings Bank v. ADT Security Services, Inc.*, 18 N.Y.3d 675, 684 (2012).

Since the beginning of this case, St. Paul refused to attach to its pleadings or introduce the relevant St. Paul policy insuring Cosmopolitan. That document has now been produced, authenticated, and is properly before this Court. (Declaration of Nicholas B. Salerno ("Salerno Decl."), Ex. 2.) It is obvious why St. Paul wanted to hide its own policy: it includes an endorsement precluding St. Paul from pursuing its subrogation claims against Marquee. (Salerno Decl., Ex. 2, at T000038.) The St. Paul policy precluding subrogation corroborates the NMA's waiver of subrogation provision preventing the same. The Opposition is silent about this corroboration. There simply is no legitimate dispute that, as a matter of law, the NMA and St. Paul's policy bar St. Paul from stepping into Cosmopolitan's shoes to pursue Marquee.

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[1] St. Paul argues that because NRV1 was not a party in the Underlying Moradi Action, that fact somehow negates Cosmopolitan's assumption of the obligation to procure the insurance required by the NMA. But the Opposition provides no explanation – let alone any legal or factual basis – for how that in any way alters what Cosmopolitan agreed to do, and did do. St. Paul's other argument – that the NMA did not require Cosmopolitan to procure insurance for itself – is similarly specious and irrelevant because Cosmopolitan did procure a policy – the very one at issue here that St. Paul refused to provide to the Court – and it included St. Paul's waiver of subrogation.

Although St. Paul argues that Cosmopolitan was somehow never bound by the terms of the NMA, Nevada law prevents St. Paul from picking and choosing 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"). The Opposition cites no Nevada case law to the contrary.[2]

St. Paul also offers no declaration or other evidence from Cosmopolitan to support its flawed arguments.[3] Instead, the Opposition relies on the inadmissible and speculative declaration testimony from St. Paul's two lead litigators in this action. But St. Paul's litigation advocates clearly have no personal knowledge about the NMA, Marquee, Cosmopolitan, or other past events, and they should be reprimanded for swearing – under penalty of perjury – that they do. 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.

For the reasons stated above and in Marquee's moving papers, St. Paul's subrogation claims for contribution and express indemnity fail, as a matter of law, because Cosmopolitan and St. Paul waived their subrogation rights.

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[2] St. Paul cites non-Nevada cases (at Opp. 7-8) that stand for the irrelevant proposition that non-signatories to an agreement "cannot avail themselves of the waiver-of-subrogation clauses" of the agreement. *See, e.g.*, Opp. at 8 citing *St. Paul Fire & Marine Ins. Co. v. FD Sprinkler Inc.*, 908 N.Y.S.2d 637, 639 (2010). Here, Cosmopolitan was a signatory to the NMA, it expressly assumed the obligation to obtain the insurance required under the NMA, and St. Paul is invoking that agreement for its third-party beneficiary arguments against Marquee. (Bonbrest Decl., Ex. 1 at T000152, T000172, T000183; FAC ¶ 122.)

[3] Even if St. Paul offered a declaration from Cosmopolitan contending it never intended to be bound by the NMA, the Court should still grant Marquee's Motion. 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.

III.

THE EXPRESS INDEMNITY CLAIM CANNOT SURVIVE SUMMARY JUDGMENT BECAUSE COSMOPOLITAN DID NOT SUSTAIN ANY UNINSURED LOSSES

Even if St. Paul's subrogation claims had not been waived, its express indemnity claims fails for the independent reason that Cosmopolitan did not sustain any uninsured losses. In its Opposition, St. Paul does not dispute the following facts requiring dismissal of its express indemnity claim:

- The indemnity obligations owed under Section 13 of the NMA only apply to losses not covered by insurance. (Mot. 11-12, 17.)
- Cosmopolitan was defended and indemnified by the insurers in the Underlying Moradi Action. (Mot. 17.)
- Cosmopolitan did not sustain any uninsured losses. (*Id.*)

Based on these undisputed facts, Marquee owes no express indemnity to Cosmopolitan and by extension, St. Paul, whose rights are no greater than its insured. (*Id.*)

The Opposition provides little in response, except to repeat that Cosmopolitan was somehow "not bound by" the NMA and "not required to maintain any insurance." (Opp. 8.) As addressed above, the Opposition provides no evidence from Cosmopolitan in support of these arguments. It ignores Nevada law precluding St. Paul from choosing those NMA terms it will live by, and those it will not. *Canfora*, 121 Nev. at 779; *Gibbs*, 96 Nev. at 246-247. And it ignores the undisputed facts that the NMA and the Cosmopolitan Lease required Cosmopolitan to procure and maintain insurance. (Bonbrest Decl., Ex. 1, at T000172, T000183.)

As a matter of law, St. Paul's express indemnity claim fails, independent of the subrogation waiver, because any indemnity obligation owed by Marquee to Cosmopolitan only applies to losses not covered by insurance, and Cosmopolitan has no such losses.

IV.

THE CONTRIBUTION CLAIM CANNOT SURVIVE SUMMARY JUDGMENT

In its Opposition, St. Paul concedes, as it must, that a litigant has no right to contribution under Nevada's Uniform Contribution Act when the litigant's rights are governed by a contractual indemnity provision. *See* Opp. at 12 (citing *Van Cleave v. Gamboni Const. Co.*, 101 Nev 524 (1985),

holding NRS 17.625 "provides that no contribution exists where indemnity exists). The Opposition also ignores the leading Nevada authority – *Calloway v. City of Reno* – cited in Marquee's Motion. (Mot. 19.) In *Calloway*, the Supreme Court held that "implied indemnity theories are not viable in the face of express indemnity agreements." 113 Nev. 564, 578 (1997). The Opposition has no answer to these Nevada authorities. Because there is no genuine dispute that St. Paul is attempting to pursue Cosmopolitan's express indemnity rights, the Court must dismiss Plaintiff's contribution claim under the Act.

St. Paul's Opposition also fails to rebut Marquee's other legal argument for why St. Paul's contribution claim fails: the jury's verdict in the Underlying Moradi Action unambiguously provided that Cosmopolitan and Marquee were jointly and severally liable for intentional torts. (FAC ¶¶ 13-14, Ex. C.) Under Nevada law, there is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury. NRS 17.255. Because Cosmopolitan was found liable for several intentional torts in the underlying action, St. Paul's statutory subrogation claim for contribution fails under NRS 17.255.

The Opposition erroneously contends the Moradi verdict is of no consequence under NRS 17.255 because that case settled before entry of judgment. St. Paul's argument relies on an unpublished federal decision, *Terrell v. Cent. Washington Asphalt, Inc.*, 2016 WL 8738266 at *3 (D. Nev. Mar. 4, 2016). (Opp. 10-11.) The *Terrell* court denied a motion for summary judgment which argued certain parties were not entitled to contribution under NRS 17.225 because the parties were intentional tortfeasors. But the court reasoned that such a denial was correct because "[n]o jury has found the CW Defendants engaged in intentional conduct..." *Terrell*, at *3. Unlike *Terrell*, the settlement here occurred after the Moradi jury already found Cosmopolitan liable for multiple intentional torts.[4]

///

///

[4] Likewise, St. Paul's reliance on Hanson v. Johnson, 2011 WL 3847203 at *4 (D. Nev. Aug. 30, 2011) is similarly misplaced. That case involved defendants found jointly and severally liable for negligence claims, not intentional torts.

Even if its subrogation claims had not been waived, St. Paul's contribution claim fails, as a matter of law, for the above reasons and those in Marquee's moving papers. The Opposition provides to adequate reason why this claim should not be dismissed on summary judgment.[5]

V.

CONCLUSION

For foregoing reasons, Marquee's Motion for Summary Judgment should be granted. In addition, because St. Paul's Opposition failed to address the portion of Marquee's Motion regarding its right to recover attorneys' fees, Marquee should also be awarded its attorneys' fees and costs in defending against this action.

DATED: October 10, 2019

HEROLD & SAGER

By: _____

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

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

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

[5] St. Paul also asserts its Opposition was timely filed. (Opp. 14-15) 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 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 ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was made to the following interested parties in the following matter:

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

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
Ramiro Morales, Esq. Email: rmorales@mfrlegal.com William C. Reeves, Esq. Email: wreeves@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106	(702) 699-7822 (702) 699-9455 FAX	Plaintiff, ST. PAUL FIRE & MARINE INSURANCE COMPANY
Michael M. Edwards, Esq. Email: medwards@messner.com Nicholas L. Hamilton, Esq. Email: nhamilton@messner.com MESSNER REEVES LLP efile@messner.com 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	Defendant ASPEN SPECIALTY INSURANCE COMPANY
Jennifer L. Keller, Esq. (*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 10th day of October, 2019.

JuRee A. Bloedel

RPLY
Ramiro Morales [Bar No.: 007101]
William C. Reeves [Bar No.: 008235]
Marc J. Derewetzky [Bar No.: 006619]
MORALES FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Telephone: 702/699-7822
Facsimile: 702/699-9455

Attorneys for Plaintiff
St. Paul Fire & Marine Ins. Co.

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INS. CO., Plaintiff, v. ASPEN SPECIALTY INS. CO., et al., Defendants.	Case No.: A758902 Dept. No.: XXVI REPLY TO OPPOSITION TO PLAINTIFF'S COUNTERMOTION DATE: October 15, 2019 TIME: 9:30 a.m.

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiff St. Paul Fire & Marine Ins. Co. ("St. Paul") files the following Reply to Marquee's Opposition to St. Paul's countermotion.

Introduction

In its Opposition, Marquee boldly argues that only it is entitled to file a dispositive motion. In so doing, however, Marquee cites to no Order or ruling prohibiting Cosmo from filing a dispositive motion based on undisputed facts. Marquee's protestations, therefore, are neither justified nor warranted.

In opposing the countermotion seeking a ruling that Marquee owes a duty to indemnify St. Paul, Marquee ignores that the following core facts at issue in the countermotion, each of which are undisputed:

- Cosmo is not a party to the Management Agreement
- Cosmo had no affirmative obligation to insure itself

- Marquee solely operated and managed the nightclub
- Cosmo had no active role in any aspect of the nightclub

Of significance, these facts are derived from the Management Agreement itself (which Marquee relies upon in its motion) as well as court filings and trial testimony made by and on behalf of Marquee, all of which is subject to judicial notice. See Appendix, Exs. A, N-R. All core facts, therefore are supported and undisputed.

While Marquee argues that its own prior admissions and court filings are somehow neither inadmissible nor binding, it fails to offer any cogent explanation as to why its prior admissions made in the underlying matter do not remain binding on it in this case. More importantly, in opposing the relief St. Paul requests, Marquee fails to do two (2) core things:

- Offer any evidence to rebut its prior admissions that it solely operated and managed the nightclub and/or that Cosmo had no active role in any aspect of the nightclub
- Identify any discovery needed to rebut these prior admissions.

Marquee's failure to do either is legally significant as it confirms that all core facts are undisputed and that no additional (but unavailable) controverting facts exist.

Marquee's inability to offer controverting facts is both not surprising and legally significant since it, as both the nightclub operator and named defendant in the underlying matter, is intimately familiar with the facts and circumstances at issue in this case, and therefore readily able to dispute that it solely operated and managed the nightclub and/or that Cosmo had no active role in any aspect of the nightclub. Stated simply, if contrary facts existed, Marquee is in a position to offer them without the need for any discovery. Having failed to offer any controverting facts, this Court is empowered to adjudicate the issue of whether Marquee owes a duty to indemnify Cosmo for the sum St. Paul paid.[1]

Finally, Marquee's contention on page 15 of its Opposition that St. Paul's countermotion was somehow untimely (which it was not) is undercut by the agreement reached between the parties (at

[1] As the sum St. Paul paid toward the settlement is confidential, its countermotion omits the sum sought. Regardless, as the sum St. Paul paid is known to the parties and undisputed, however, the granting of the countermotion will have the effect of resolving all claims asserted against Marquee.

Marquee's request) to set a briefing schedule and extend the hearing date. See Exhibit W attached hereto. While Marquee ostensibly had the right to change its mind and renege on the agreement, it cannot now complain that it sustained any prejudice given its decision to do so.

Accordingly, for the reasons set forth herein, it is respectfully submitted that the countermotion is properly granted.

Discussion

A. Cosmo Is Not A Party To The Management Agreement And Had No Affirmative Obligation To Procure Insurance To Protect Itself.

The Management Agreement expressly provides that it is entered by and between Marquee (Operator) and the Master Tenant (Owner). Appendix, Ex. A, p 2. Cosmo (defined as Property Owner), while a beneficiary of certain terms of the Management Agreement, is not a party to the agreement. Appendix, Ex. A, p 2.

Instead, as reflected in the Management Agreement, Cosmo is the owner of the real property that houses the Marquee Nightclub. As Cosmo leased the space to Master Tenant, the latter had legal possession of the nightclub such that, per the terms of the Management Agreement, the Master Tenant (and not Cosmo) retained Marquee to solely and exclusively operate the nightclub.

The fact that Cosmo was (and is) not a party to the Management Agreement is legally significant. In arguing that Cosmo's claims are legally barred, Marquee relies upon provisions in the Management Agreement obligating Master Tenant (defined as Owner) to procure insurance. **Absent from the Management Agreement is any requirement that Cosmo (defined as Property Owner) procure insurance for itself.** In the absence of this requirement, the provisions in the Management Agreement regarding "all [Master Tenant/Owner] policies" and insurance "required hereunder" are irrelevant.

The fact that Cosmo, via a separate, unexecuted version of a lease agreement with Master Tenant (not Marquee), agreed to procure and pay for insurance for Master Tenant is irrelevant. Per the express terms of the Management Agreement, Cosmo was under no obligation to procure insurance. Absent any requirement to do so, it is not bound by any limitations provided for via the Management Agreement.

B. Exculpatory Provisions Do Not Apply To Reckless And/Or Intentional Conduct.

Exculpatory contractual clauses such as "waiver of subrogation" provisions are unenforceable as to conduct which is willful, wanton, reckless or intentional. *Rhino Fund, LLP v. Hutchins*, 215 P.3d 1186, 1193 (Colo. App. 2008); *Wright v. Sony Pictures Entm't, Inc.*, 394 F.Supp.2d 27, 33 (D.D.C.2005); *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 158 P.3d 232, 240 (App.2007); *Finch v. Southside Lincoln–Mercury, Inc.*, 274 Wis.2d 719, 685 N.W.2d 154, 160, 163–64 (App.2004); *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952, 956–57 (Wyo.1999).

In this case, Marquee was held liable for assault and battery. Appendix, Ex. R. Given this, any damages arising from or relating to these claims cannot be the subject of a waiver of subrogation provision.

C. Neither NRS 17.255 nor NRS 17.265 Precludes St. Paul from Asserting A Statutory Subrogation Claim for Contribution Under NRS 17.225.

The express indemnity provision in the Management Agreement provides as follows:

> Operator shall indemnify, hold harmless and defend Owner 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 Operator of any term or condition of this Agreement, or (ii) the negligence or willful misconduct of Operator or any of its owners, principals, officers, directors, agents, employees, Staff, members, or managers ("Operator Representatives") and not otherwise covered by the insurance required to be maintained hereunder.

Appendix, Ex A, p. 64.

Meanwhile, NRS 12.225 provides as follows:

> 1. [W]here two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> 2. The right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability, and the tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share. No tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability.

St. Paul's express indemnity claim is based on the fact that Cosmo is an intended third party beneficiary of the contractual indemnity provision itself such that it has the right to enforce the indemnity provision. *Morelli v. Morelli*, 102 Nev. 326 (1986) (recognizing that a nonparty to a contract has standing to enforce the contract only when the nonparty is an intended third-party beneficiary); see also *De Los Reyes v. Bank of America, N.A.*, 2016 WL 8735707 (D. Nev. 2016) (ruling that an intended third party beneficiary has standing to enforce a contract provision). As Cosmo is not a party to the Management Agreement, however, St. Paul (by standing in the shoes of Cosmo) is not bound by the Management Agreement such that St. Paul is separately entitled to pursue a claim for contribution against Marquee for the amount of St. Paul's settlement payment that exceeds Cosmo's fair share. NRS 17.225.

If St. Paul succeeds on its express indemnity claim and Marquee is ordered to pay the amount of St. Paul's settlement contribution, neither Cosmo nor Marquee may then pursue one another for contribution per NRS 17.225. If, however, the express indemnity provisions is held not to apply then St. Paul is entitled to pursue Cosmo's rights via statute. See *Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524 (1985) (holding NRS 17.265 merely provides that no contribution exists where indemnity exists.)

Either way, both causes of action are validly pled, appropriate and meritorious in light of the undisputed facts before this Court.

D. This Court Is Empowered To Rule On The Countermotion As No Controverting Facts Exist And No Showing Has Been Made Of Any Need For Discovery.

It is axiomatic that a Court is empowered to adjudicate legal issues framed by undisputed facts where no material disputed facts exist.

In its countermotion, St. Paul seeks a ruling that Marquee owes a duty to indemnify St. Paul. Facts that bear on this issue are as follows:

- Cosmo is not a party to the Management Agreement
- Cosmo had no affirmative obligation to insure itself
- Marquee solely operated and managed the nightclub
- Cosmo had no active role in any aspect of the nightclub

Of significance, these facts are undisputed. See Appendix, Exs. A, N-R.

While Marquee argues that its prior admissions and court filings in the underlying matter are somehow neither admissible nor binding in this case, its explanation for this position is non-sensical, More importantly, Marquee fails to do the following in its Opposition:

- Offer any evidence to rebut its prior admissions that it solely operated and managed the nightclub and/or that Cosmo had no active role in any aspect of the nightclub
- Identify any discovery needed to rebut these prior admissions.

Marquee's failure to do either, while not unexpected given its familiarity with the nightclub and direct involvement in the underlying matter, is legally significant.

If controverting facts existed, Marquee (as the nightclub operator) could have raised them in its Opposition. It did not.

Meanwhile, if discovery was needed, Marquee (as direct party to the underlying matter) could have identified any discovery needed in its Opposition. It did not.

Marquee's argument that its prior admissions and court filings are not admissible and/or binding is non-sensical and patently wrong. Accordingly, in the absence of any controverting facts and/or need for discovery, this Court is empowered to adjudicate now the issue of whether Marquee owes a duty to indemnify Cosmo without the need for any further discovery.

E. The Countermotion Is Timely.

Per this Court's website, the Local Rules provide that the deadline to file and serve Oppositions and Counter-Motions is ten (10) court days from the date the Motion was filed. Absent from the Local Rules available via the Court's website is any change or modification to this deadline. The countermotion was filed in conformance with these rules.

Regardless, based on arguments otherwise, St. Paul agreed (at Marquee's request) to extend all dates. See Exhibit W attached hereto. While an agreement was reached to extend the dates, Marquee reneged. In so doing, Marquee is precluded and barred from claiming any conceivable prejudice.

Conclusion

For the reasons set forth herein, it is respectfully submitted that Marquee's motion be denied,

that St. Paul's countermotion be granted and that this Court enter an Order holding that St. Paul is entitled to be indemnified by Marquee as a matter of law.

Dated: October 10, 2019

MORALES FIERRO & REEVES

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

Supporting Declaration

I, William Reeves, declare as follows:

1. I am an attorney for St. Paul in this matter.

2. Attached hereto as Exhibit W is a true and correct copy of my exchange with counsel for Marquee in this matter.

I declare that the foregoing is true and correct based on my own personal knowledge. Executed in Concord, California on the date specified below.

Dated: October 10, 2019

William C. Reeves

Exhibit W

William Reeves

From: Jeremy Stamelman <jstamelman@kelleranderle.com>
Sent: Monday, October 07, 2019 10:32 AM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com
Subject: RE: St. Paul

Bill,

After further reflection and work since raising this issue, our clients have decided to proceed on October 15 with the hearing of the National Union and Marquee motions and St. Paul's countermotion, along with the current filing deadlines associated with those motions leading up to the 10/15 hearing.

Regards,

Jeremy

-----Original Message-----
From: William Reeves <wreeves@mfrlegal.com>
Sent: Sunday, October 6, 2019 11:40 AM
To: Jeremy Stamelman <jstamelman@kelleranderle.com>
Cc: nsalerno@heroldsagerlaw.com
Subject: RE: St. Paul

Extension proposed below is acceptable.

Please circulate a draft stip.

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

-----Original Message-----
From: William Reeves [mailto:wreeves@mfrlegal.com]
Sent: Friday, October 04, 2019 4:25 PM
To: Jeremy Stamelman
Cc: nsalerno@heroldsagerlaw.com
Subject: RE: St. Paul

Got it. I will inquire on our end and advise.

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

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 4:19 PM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com

Subject: Re: St. Paul

The proposal is to move the hearing on your countermotion, Marquee's motion, and National Union's motion. Along with the other proposals below.

On Oct 4, 2019, at 4:14 PM, William Reeves <wreeves@mfrlegal.com> wrote:

Perhaps I was not clear. We are only interested if we move the hearing on the motions filed on behalf of AIG and Marquee.

Please confirm and we will inquire with our client.

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

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 4:08 PM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com
Subject: Re: St. Paul

Right. Move the hearing on our motion and your cross motion to November.

On Oct 4, 2019, at 3:51 PM, William Reeves <wreeves@mfrlegal.com> wrote:

No interest in splitting the hearing date on your motions. Move everything to November?

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

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 3:46 PM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com
Subject: Re: St. Paul

We move the hearing date to an workable date for the parties and the Court in November. Your reply is due on a November date of your choosing (or by five days before the new hearing date). Our opposition to your countermotion is due October 21. When you free up today, do you want to discuss?

Jeremy

On Oct 4, 2019, at 3:35 PM, William Reeves <wreeves@mfrlegal.com> wrote:

As stated, tied up.

What do you propose?

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

Concord, CA 94520
(925) 288-1776

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 3:20 PM
To: William Reeves
Cc: nsalerno@heroldsagerlaw.com
Subject: Re: St. Paul

We would like to discuss a briefing schedule for your counter motion that would give you a reply and move the October 15 hearing.

Can we talk today for five minutes? Let me know what time works for you.

Thank you,

Jeremy

On Oct 4, 2019, at 3:14 PM, William Reeves <wreeves@mfrlegal.com> wrote:

Unfortunately tied up. What's up?

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

-----Original Message-----
From: Jeremy Stamelman [mailto:jstamelman@kelleranderle.com]
Sent: Friday, October 04, 2019 2:45 PM
To: wreeves@mfrlegal.com
Cc: nsalerno@heroldsagerlaw.com
Subject: St. Paul

Bill,

Are you free this afternoon for a very brief call? We have a quick question for you. You can reach me at 310.428.1867.

Thank you,

Jeremy

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:

REPLY TO OPPOSITION TO PLAINTIFF'S COUNTERMOTION

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:

Michael Edwards
Messner Reeves
8945 West Russell Road Ste. 300
Las Vegas, NV 89148

Nicholas Salerno
Herold & Sager
550 Second Street, Suite 200
Encinitas, CA 92024

Jeremy Stamelman
Keller Anderle
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

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 10, 2019

William Reeves

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 15, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

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

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, October 15, 2019

[Case called at 10:05 a.m.]

MR. REEVES: Your Honor, William Reeves for Plaintiff. I have a -- I used the Court's application for some illustrative exhibits.

THE COURT: Okay.

THE CLERK: Mr. Reeves, your Bar number, please?

MR. REEVES: 8235.

THE CLERK: Thank you.

MR. REEVES: So I have it here on my phone. I don't know whether I did it correctly or not.

THE CLERK: Did you send exhibits by email?

MR. REEVES: No. I used the court's app. My partner did it last week, so there's --

THE COURT: Oh you mean to use the audio visual?

MR. REEVES: Yes.

THE COURT: So we'll just need to turn that on, Kerry.

MR. SALERNO: Is this something that we've seen? Are these existing exhibits?

MR. REEVES: Yeah.

MR. DEREWETZKY: Good morning, Your Honor. Mark Derewetzky, also appearing on behalf of Plaintiff, St. Paul. Bar number is 6619.

MS. KELLER: Good morning, Your Honor. Jennifer Keller, appearing on behalf of National Union and Marquee, and I'm appearing

pro hac vice.

THE COURT: Thank you.

MR. SALERNO: Good morning, Your Honor. Nick Salerno for National Union and Marquee, as well.

THE COURT: Thank you.

Okay. So at this point in time then -- so in just a minute here we're going to get the system up and running.

MR. LOOSVELT: Your Honor, Ryan Loosvelt for Aspen. I'm just observing today.

THE COURT: Understood. Thank you, sir.

Is the system booted up here? I guess not.

MR. REEVES: I did press play, and I did the code, 1004.

THE CLERK: Did you already hit play?

MR. REEVES: I did. And it's not that important. I mean --

THE CLERK: Let's see.

MR. REEVES: -- a couple choice pages.

[Pause]

THE COURT: But you said you have paper you could just put on the Elmo?

MR. REEVES: Yeah. There's no need to wait.

THE COURT: All right. Okay. All right. So if that's going to work then just to use the Elmo to do anything on display instead of the electronic -- okay, great.

So then we will proceed then. We have two motions on. We have Defendant Roof Deck's motion for summary judgment, and

Defendant National Fire Union's motion for summary judgment. Both have been exhaustively briefed. We have an opposition and counter motion on the duty to indemnify. Okay.

So at this point in time, I don't know which one it makes more sense to start with. As I said, they've both been thoroughly briefed and reviewed. So I don't know who wants to start.

MR. REEVES: Well, it doesn't much matter to us. I do think there's a clean separation between the AIG National Union piece, and then the Cosmo Marquee piece. And so I would defer to the Court in terms of how --

THE COURT: Yeah.

MR. REEVES: -- it wants to do that.

THE COURT: So I want to start with the Roof Deck.

MS. KELLER: Well, we -- yeah, sure. We could -- we're going to split the argument, Your Honor, if we can.

THE COURT: Oh okay.

MS. KELLER: So I'll do St. Paul, and my colleague will do Roof Deck.

THE COURT: Okay. Go ahead.

MR. SALERNO: Good morning, Your Honor. Given that this has been argued and briefed, Your Honor, a couple times now, this is the third time, I'll be brief on my opening points and reserve for reply, if I may. But the primary thing I'd like to point out here that I am seeing in the opposition that's been submitted is the faulty notion on the part of St. Paul that our argument is premised on the belief that Cosmo had to

be a signator or bound by the night club management agreement.

Our position is not based on that. We think that's true. Our position though is just based on the fact that that's the operative agreement that they're trying to subrogate under. They've now clarified it's under the tentative third-party beneficiary status, which actually puts them in the same place no matter how you look at it.

Nevada law is clear that as an intended third-party beneficiary, you don't get to pick and choose the parts of the contract that suit you and favor your position and discard the ones that you don't saying you're not bound by them. That's simply not how it works. There's two aspects of the nightclub management agreement. And that's the -- we cite those cases for Your Honor in our reply; the *Gibbs* case and the *Canfora* case. Pretty long established Nevada law that as an intended third-party beneficiary, you're strapped with the terms of the contract.

This contract has two provisions that are fatal to the claims against Marquee, which Your Honor is probably familiar with by now. There's the subrogation waiver provision, which is part of the insurance requirements on the part of both parties. And Cosmo tries to distinguish themselves by saying they're not bound by those. Even if that were true, which it's not because they're bound by the terms of the contract and the subrogation waiver requirements, which are found in its insurance policy, you have an express indemnity cause of action that they're trying to subrogate to. And by its very express terms, that express indemnity provision only applies to losses that are not covered by insurance.

The other aspect of Cosmo's opposition seems to be that it only thinks that that aspect of the express indemnity provision, which is found in provision 13.1, applies if it's insurance required to be maintained under the nightclub management agreement. We've gone through our papers, and I'll reserve on reply if necessary to clarify this. But why the St. Paul policy is insurance that was required to be maintained under this -- the nightclub management agreement. They took on the obligation to procure it. They're part of the definition of the owner policies. And in fact, that's the insurance that applied, and has the subrogation waiver provision that was required under the nightclub management agreement.

Just as importantly though, Your Honor, if you look at provision 13.1, the express indemnity provision that they're trying to subrogate under, it only applies to capital L losses. And losses is a defined term in the nightclub management agreement. If you look at the nightclub management agreement on page 9, which is Bates stamped page T-72, it defines losses as any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses, and disbursements of a person not reimbursed by insurance. So the term itself, "losses", under the expressed indemnity provision is a loss not paid by insurance, not reimbursed by insurance.

There's no dispute in this case that all the money at issue that was part of the settlement in the underlying case was funded by insurance. So no matter how you look at this equation, these claims -- the claims that they're trying to seek against Marquee are barred by the

subrogation waiver provisions of the nightclub management agreement, and under the expressed terms of the expressed indemnity provision that they're trying to subrogate under. That's the main point I would like to emphasize before my reply points. As to the contribution -- on the expressed indemnity cause of action.

As to the contribution cause of action, there seems to be another faulty notion on the part of St. Paul, that the contribution cause of action is permissible as an alternative cause of action in the event they don't prevail on the expressed indemnity cause of action. And that's also not how it works under the uniform contribution act, Your Honor, and under the *Calloway* case that we cite for Your Honor.

In the *Calloway* case, the court made very clear not only that common law causes of action like contribution, but also common law causes of action like equitable indemnity, cannot be pursued by a party who is contracted under express indemnity rights. And it's not if you win under your express indemnity rights; it's if there's the mere presence of an express indemnity arrangement that the party is contracted for. That's what governs.

You don't get your cake and eat it, too. And if you fail under what you've contracted and bargained for, you get an additional bite at it under a common law cause of action. The Calloway case makes that very clear. And I'll just reserve for a reply, Your Honor.

THE COURT: Okay. Thank you.

MR. SALERNO: Thank you.

MR. REEVES: Your Honor, when we were here with you

before, you -- and this is our third time around on this stuff. We pointed out, and Your Honor agreed, that Cosmo is not a party to the agreement; it's a party to portions of the agreement that it agreed to be a signatory to.

Let's just see if this works. Do I need to do something?

THE CLERK: Hit that little pod behind there -- that little square that has the blue light on the backside of the -- okay. Thank you.

MR. REEVES: All right.

THE COURT: And then you just need to focus.

THE CLERK: Yeah. Hit the auto focus button. I think that's what it's called.

MR. REEVES: Auto focus? Auto tune?

THE CLERK: Yes, auto tune.

MR. REEVES: There we go. All right. So in order to be assistive, I came up with titles for everybody. And so we've got the operator; that's Marquee. We've got the master tenant; and that's the LLC, and that's a signatory to the agreement. And then we've got Cosmo; and that's the property owner.

And so this Court was -- had pointed out previously and was intimately aware that the agreement first of all, is between Master tenant and Marquee, not Cosmo. And then relative to Cosmo, it was a signatory, but only as to limited provisions. And what you haven't heard from counsel is that any of those provisions bear upon anything that's going on today. So they haven't said that Cosmo by virtue of acknowledging and agreeing to any of these provisions bear on any of

this.

So I see repeated efforts to conflate Master tenant and Cosmo, and they're separated entities, and they're treated separately. And they're -- by virtue, that there are different obligations, duties, and remedies that flow from each.

Let's go first of all to the common law claim. We have pled in the disjunctive that Cosmo is entitled to indemnity pursuant to the expressed indemnity provision, not as a signatory, but as an intended beneficiary. But in the alternative, we've pled that Cosmo is entitled to indemnity by virtue of statute, and that's 17.225. And by virtue of that latter, we moved to file a counter-motion. And the counter-motion is premised on the concept that we have joint tortfeasors, at least the verdict form suggests that. And the verdict form is not crystal clear relative to what liability Cosmo faces. But the Court said it was non-delegable duty, and so it's vicarious.

And 17.225 says that where you have joint tortfeasors, then you can work out a portion between them, because that was never adjudicated in the underlying case. And we've pointed out that there's no facts that Cosmo had -- did anything in this. It was simply the owner of the real estate and wasn't -- had no active role out there.

And so what I hear counsel say is that well, you don't get the benefit of that because you're bound by the contract. And I'm not understanding that because if I'm -- if Cosmo is not a signatory to the contract -- and I'll put the first page up for you, if you'd like. And again, this is Exhibit A I'm pulling from. And again, we have owner and

operator. Owner and operator; that's Marquee and Master tenant. That's who the agreement is between. You have Cosmo mentioned as the project owner, but they're not a party to the agreement. The agreement is between Marquee and Master tenant.

And so by virtue of that, not being a party to the agreement, there's no -- we're not trying to do an end around here relative to any of this. Rather, we're trying to work within the law. And the law is that if you are a signatory and you're bound by expressed indemnity provision, then that's your exclusive remedy. But if you're not bound by it, but rather you're -- you get the benefit of it, but you're not bound by it, then you can pursue recovery in terms of the contribution -- the statutory act.

And in that regard, we move for summary judgment. And if this Court were to grant summary judgment as to the statutory claim, I'd abandon the expressed indemnity claim. It's superfluous. It simply adds on. I don't -- I'm going to address counsel's argument relative to the expressed indemnity claim, but let's be clear, Cosmo, because it's not a party to the agreement, has the right to seek recovery per statute. It is doing so in this case. It has made a prima facie showing that it did nothing out there; that all the conduct was by Marquee. And it's unrebutted. And there's not even a request for discovery on that point.

THE COURT: But isn't there a -- under gaming law, an obligation on the part of -- you called them project owner -- the licensee -- the gaming licensee to exercise a certain amount of control over their tenants?

MR. REEVES: Not to my knowledge, Your Honor. Certainly

not argued. But more importantly, where we're weighing the --

THE COURT: Well, there is. So I mean, as a matter -- and that's what I think was the issue for Judge Johnson, was under Nevada gaming law, the licensee of the casino -- the all-encompassing licensee has obligations to the public. And --

MR. REEVES: Fair enough.

THE COURT: -- their -- any of their tenants, they have a non-delegable duty over their tenants to make sure that the public is protected because they're the gaming licensee. And if they have a tenant who does something that be violative of Nevada gaming law that would get the licensee in trouble, then the licensee has an obligation to exercise control over that.

MR. REEVES: And relative -- understood and agreed. Relative to that obligation, is that a primary obligation, or is that a secondary obligation as it bears upon Marquee? Because in the underlying case where we're dealing with the public, and that which you are articulating, that which Judge Johnson held, is that you may have delegated operation of the club --

THE COURT: Right.

MR. REEVES: -- but you're still on the hook. But then you get over to the statute -- the contribution statute, and it says all right, now we're going to look at the relative fault of the parties. And again, this is an issue that was not tested in the underlying case. There was no cross-claim between Marquee and Cosmo. There was one lawyer that represented both.

THE COURT: Uh-huh.

MR. REEVES: And so that's what we're here doing. We are now going now to the next step. What is the relative fault between Cosmo and Marquee? We filed a counter-motion on the basis that the relative fault is -- it's all on Marquee because Cosmo didn't do anything.

So as it pertains to the general public, understood and agreed. And that's what the underlying case was about. But this is our round two litigation. This is now dealing with the fallout from an adverse result and a very substantial settlement. And relative to that, and relative to our counter-motion, we're pointing out to this Court that if you're weighing culpability, liability between Marquee and Cosmo, it all falls on Marquee. It doesn't fall on Cosmo whatsoever.

And again, I can't stress this enough. There's no contrary evidence. There's no request for discovery. It is a pure legal issue as framed by the undisputed facts that are before this Court. And so we would ask this Court to certainly rule on the motion, and relative to what's before it, grant the motion.

THE COURT: All right. So that's with respect to your counter-motion?

MR. REEVES: It certainly is.

THE COURT: Okay. So -- all right.

MR. REEVES: So relative to the thrust of their motion, which is that the -- first of all, I went to the contribution of the statute and I pointed out that it's in the disjunctive because we're not a signatory to the management agreement. When I say that, Cosmo is not a signatory

to the management agreement. And so it's not bound by the management agreement.

But even within the management agreement, expressed indemnity applies because the only carve out is insurance required under the agreement. And if Cosmo is not bound to obtain insurance, then it is not insurance required by the agreement. I could show you that provision, as well. And again, I'm pulling from Exhibit A. And it's -- the key point is here, "and not otherwise covered by the insurance required to be maintained hereunder".

THE COURT: Okay.

MR. REEVES: No obligation of Cosmo to get any insurance in this agreement. It didn't obligate itself to do so. It's not addressed in it. So by virtue of that, the indemnity -- and again, you haven't heard counsel say the indemnity doesn't apply. What you've heard is that the carveout, or the manner in which it's taken away applies. The indemnity applies. What we're quibbling over is is it taken away because it's covered by insurance. And the answer is no, because the St. Paul policy was not insurance required to be maintained hereunder. And so contractually, Marquee, master tenant didn't obligate Cosmo to get insurance. And because of that, it falls outside of it, and we get the expressed indemnity.

But again, it's -- we state in the disjunctive they're elected remedies. And you know, maybe the cleanest way is to deal with the statutory claim because again, the evidence before this Court is that Cosmo had no active role out there.

We'll submit, Your Honor.

THE COURT: Okay. Thank you very much.

MR. SALERNO: Your Honor, we've said repeatedly that the express indemnity provision doesn't apply by its terms. I'm looking at the same provision as I mentioned. The term "Losses" is capitalized with an L.

THE COURT: Uh-huh.

MR. SALERNO: Your Honor seems familiar with that. That's a defining term. I probably don't need to show you the definitions. So by its express terms, express indemnity does not apply. And whether they are a signatory to it or not doesn't matter. They are part of the owner indemnities defined in there. So that's the provision they're attempting to subrogate under, and that provision doesn't apply. The express indemnity claim fails because it only applies to losses that are not covered by insurance.

Further, the intent is clear where it has this additional language, otherwise covered by insurance required to be maintained here under it, that's an end. So we've gone through the analysis here with the lease agreement attached. I'll spare Your Honor pulling those out and showing them to you. I have the impression you've done that, but Cosmopolitan took on the obligation to procure the insurance required by the owner in the lease agreement attached to the nightclub management agreement.

So there's no question that that's the party's intent, and no question that that's the insurance required to be maintained hereunder,

and there's no legal dispute that the St. Paul policy has the subrogation waiver provision that further corroborates that intent by all the parties. In other words, Cosmopolitan complied. They obtained insurance with the subrogation waiver provision.

It sounds like St. Paul is now backing off that position and focused more on the contribution cause of action. That contribution claim fails because this is what the parties bargained for. They're included in the definition of owner indemnities. They've even tried to proceed under this provision, although now they're trying to back away from it.

And the law is clear in Nevada under *Calloway* and the Uniform Contribution Act that where there's an existing express indemnity arrangement -- not whether you prevail under it, but if it exists, that's what governs, and that's what we have here. Further, on top of that the law in the *Calloway*, expressed in the *Calloway* case, the contribution statutes provide that contribution is not available to a party who has been found liable for an intentional tort.

I don't think there's any dispute here either that the verdict -- this is what's been argued by St. Paul, it was issued jointly and severally against Cosmopolitan and Roof Deck, Marquee, that included intentional torts, like battery, assault, and false imprisonment. There's just no question here that contribution is not a viable cause of action, both because there's an express indemnity provision which governs, and therefore precludes that ability, which by the way, precludes the ability to proceed under equitable indemnity too, and under the statute because

of the intentional torts.

As far as this cross-motion, I've had trouble following today exactly what it is, as we did with the papers. They're mixed together. When counsel says there's no facts that have been raised, I don't know what facts they're relying on. I don't know what cause of action it's based on. They've talked about this active passive distinction. They nowhere frame in their motion -- and it's procedurally defective and fatally deficient in that regard -- they don't say what claim or defense it pertains to, and that's because it doesn't pertain to any claim or defense.

The active/passive distinction has been discussed in the long line of Nevada law in the equitable indemnity context. That's your Piedmont Equipment's, your Black & Decker's, your Medallions. When you look at those cases, they all talk about the importance of the active/passive distinction of being one element in the ability to pursue an equitable indemnity. For all the reasons we've discussed, they don't have the ability to pursue equitable indemnity because there's an express indemnity provision.

There's nothing in this express indemnity provision that mentions an active/passive distinction. They don't say why it matters. They've asked Your Honor to find that there's an obligation on the part of Marquee to indemnify Cosmo that St. Paul can subrogate into, but they don't say why. They're asking the Court to find, as a matter of law, a factual question that is disputed, that there's an active/passive distinction that was never determined or addressed in the underlying case by their own admission. They don't say what evidence supports that. It's

impossible for us to oppose that. There's no separate statement.

There's not even an indication of what evidence they're relying on, but the bottom line is that the active/passive distinction, Your Honor, is only relevant under Nevada law to equitable indemnity claims. It's not relevant to a contribution claim. Contribution claims involves comparative fault where it applies and where it's available.

You can pursue equitable indemnity and shift all of the fault in Nevada, which follows the distinction. Some jurisdictions have abandonment between equitable indemnity and contribution, but in Nevada, you can pursue equitable indemnity and shift all the fault, and sometimes a portion of fees and costs, if one party is only passively at fault.

Those issues have not been properly presented to you, Your Honor. It's not a cause of action they have. They don't have a cause of action for equitable indemnity. They have one for express. And they're not able to pursue a cause of action for equitable indemnity for all the same reasons they can't pursue contribution. The *Calloway* case actually dealt with that precise argument, and *Calloway* made it clear. In *Calloway*, the argument -- the decision in the District Court was that the express indemnity provision in the permit application was a contract of adhesion, so it didn't apply.

So it wasn't a situation in *Calloway* where they lost on express indemnity, so they were able to pursue equitable indemnity or contribution. The Court said no. You have -- this exists, you bargained for it. You don't get equitable indemnity, you don't get common law

remedies.

So I don't know what this counterclaim -- what this counter-motion even pertains to. It's not properly brought. What evidence are they relying on?

THE COURT: All right. So in looking at the complaint, since your point is what causes of action are -- and this is the amended complaint. Fourth cause of action subrogation against the AIG insurance contract only.

MR. SALERNO: That's AIG.

THE COURT: Statutory subrogation contribution against Marquee.

MR. SALERNO: Right.

THE COURT: Sixth cause of action, subrogation express indemnity against Marquee.

MR. SALERNO: Right. Those are the two.

THE COURT: And then equitable estoppel against the carriers.

MR. SALERNO: Correct.

THE COURT: Then let me see. What's our next cause of action? Oh, okay. Eighth is equitable contribution against, again, AIG only, and then we have the prayers for relief, so.

MR. SALERNO: And so the two causes of action --

THE COURT: Uh-huh.

MR. SALERNO: -- against Marquee -- and I'm only addressing those. My colleague will address the others.

THE COURT: Right. Uh-huh.

MR. SALERNO: Is the contribution and the express indemnity, which I have addressed. This active passing thing that they've sort of made up from what I -- the best I can tell, haven't fit to any cause of action, haven't said what evidence is undisputed that supports it, has no bearing on any of their causes of action. If they had a claim for equitable indemnity that was permissible, it would have a bearing on that, but they don't have a claim for equitable indemnity, nor can they for all the reasons we've discussed. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. REEVES: May I respond, Your Honor?

THE COURT: Yeah.

MR. REEVES: Thank you. *Calloway*, Your Honor, is a case where a party was bound by what it had agreed to. Cosmo is not a party to the management agreement. That is the core distinguishing factor, and the reason I separated out the causes of action is because counsel is continuously arguing that Cosmo is a party to the management agreement. I continuously hear that, and Cosmo is not. And so for purposes of everything that's going on here, let's assume -- you know, let's distance ourselves from the express indemnity and just focus on the contribution claim -- the statutory contribution claim. Cosmo is not a party to the agreement.

In terms of our counter-motion I just -- you know, we gave this Court a binder, and hopefully it received it.

THE COURT: Yeah.

MR. REEVES: I think we've got A through V in there. I'm looking at our paperwork here, and we have a fact section, background facts, it begins on page 3. We cite to portions of the appendix, declaration validating the exhibits. I'm not understanding, procedurally, what is amiss here, and I fear that's an effort to simply throw things against the wall, much like this active/passive. The thrust of our position is not active/passive.

THE COURT: Uh-huh.

MR. REEVES: It's no evidence of any conduct. Cosmo did nothing. And so by virtue of doing nothing, it made them liable because of non-delegable duty, but by doing nothing, it was entitled to contribution from Marquee. And again, you're not hearing contrary evidence. You're hearing what are the facts, what are the facts.

Well, what are the facts? The facts are that there are no facts that Cosmo did anything. I cite to the briefs filed in the underlying case, that Marquee filed, so Marquee says, Cosmo did nothing, Cosmo did nothing. And so then to come here and suddenly, there's no evidence, there's no evidence. Well, I've got your own admissions. I've got your own representations. I've got trial testimony from Marquee's representative. And so I'm at a loss to understand what it is procedurally that is missing. I'm asking for a ruling regarding duty. Motion for summary judgment, partial summary judgment, is appropriate as to duty.

So again, core points we wish to make. Cosmo is not a party to the management agreement. It is certainly an intended third-party

beneficiary, but it's not a party to it, and it's therefore not bound by it, and it is therefore not barred and solely seeking recourse through the contract. Contribution claim is based on undisputed evidence for which there's no request for discovery, and I -- counsel was just up here, and he didn't say he needed discovery on it. He raises procedural issues, which I don't understand, but there's nothing substantive. Cosmo did nothing. It is entitled to reimbursement for what it was saddled for by virtue of how this case played itself out. We'll submit, Your Honor.

THE COURT: Okay.

MR. SALERNO: Your Honor, counsel raised a new issue just now. May I address that?

THE COURT: Okay. And then certainly, if you have a response --

MR. REEVES: What new issue did I raise?

MR. SALERNO: That they're moving on duty.

MR. REEVES: Yes. It's in our paper.

MR. SALERNO: That's not in your papers.

MR. REEVES: Yes, it is.

MR. SALERNO: Show me where.

THE COURT: In the counter-motion?

MR. REEVES: St. Paul's counter-motion presents a pure legal issue, given that it's undisputed that Cosmo's liability in the underlying matter was derivative from Marquee's act of negligence.

MR. SALERNO: Where's the word "duty"?

MR. REEVES: Cosmo is entitled to be indemnified by

Marquee. Duty.

MR. SALERNO: Entitled is not duty.

MR. REEVES: Entitle is not duty?

THE COURT: Okay.

MR. SALERNO: Anyways, may I be heard --

THE COURT: Okay.

MR. SALERNO: -- on that, Your Honor?

THE COURT: So --

MR. REEVES: What? I didn't use the magic word?

THE COURT: Here we go. On 9/27, this is the Plaintiff's opposition to the motion for summary judgment by Marquee in counter-motion, duty to indemnify --

MR. REEVES: Thank you, Your Honor.

THE COURT: -- in the caption.

MR. SALERNO: May I address that?

THE COURT: Okay. Sure.

MR. SALERNO: We've had an opposition and a counter-motion that don't delineate anything from each other. We don't know what's an opposition point intended to be a materially disputed fact that goes to the opposition, and what goes to the counter -- there's no delineation. So it's impossible for us to know what they claim we need discovery on. We've submitted objections to every piece of their so-called evidence, their counsel's declarations, and some transcript testimony from the underlying case. I don't know if Your Honor wants to address those independently, but counsel still hasn't sat here before and

said what evidence they think supports this duty --

MR. REEVES: Happy to do --

MR. SALERNO: -- claim.

MR. REEVES: -- so, Your Honor.

MR. SALERNO: May I just complete?

THE COURT: Well, you'll have the final word.

MR. SALERNO: Yeah. And what does duty go to? What cause of action? It's not part of the express indemnity cause of action. It's not part of the contribution cause of action. So they're asking for relief that has no relevance and bearing to any claim or defense in this case. They don't outline for Your Honor -- setting aside all of these procedural problems, these evidentiary problems -- they don't outline how that goes to any claim or defense in any way.

THE COURT: So you would say that that's not relevant to the fifth cause of action, statutory subrogation contribution for NRS 17.225 against Marquee only?

MR. SALERNO: The element -- duty is not an element of contribution.

THE COURT: Duty can be --

MR. SALERNO: And contribution has many more elements than duty. And I don't know what facts they're even relying on to say that there was a duty and that we breached the duty. That's a negligence thing. It can come into play in other causes of action. It can be an element, but that's the problem with what they've done here with their opposition and counter-motion. I just -- we don't know what they're

moving on, and what facts it's based on, what elements, claims, and defenses.

MR. REEVES: All right.

THE COURT: Thank you.

MR. REEVES: Briefly?

MR. SALERNO: Thank you, Your Honor.

THE COURT: Yes. Uh-huh.

MR. REEVES: I'm reading from page four of our brief on the counter-motion.

MR. SALERNO: The opposition or the counter-motion?

MR. REEVES: Again, page four, line 22. "In joint filings made on behalf of Marquee of Cosmo, Marquee conceded that Cosmo had no express or implied authority to control the Marquee nightclub, such that Mauradi was not a business and invitee of Cosmo." It's appendix, Exhibit P, page 5, line 20, through page 6, line 4.

"Given this, Marquee conceded that Cosmo was, at most, an alleged passive tort fees with no active role in any aspect of the operations of the Marquee Nightclub." That's appendix, Exhibit O, page 4, line 27, through page 5, line three. See also Exhibit N. Page four, line 26. Page 5, line 1. "Trial testimony from the Marquee representative was in accord. In accord that Marquee alone, and not Cosmo, operated or managed the Marquee Nightclub." And I've got a cite there. And that's Exhibit O --

THE COURT: Uh-huh.

MR. REEVES: -- page 3, line 15 through page -- or through

line 24. So --

MR. SALERNO: May I address the objections to his evidence.

MR. REEVES: Stop. Stop. I'm still talking.

THE COURT: Please don't interrupt each other, counsel, please.

MR. SALERNO: I'm sorry, I thought you were done.

THE COURT: So, yeah.

MR. REEVES: I don't know what we're doing here, Your Honor.

THE COURT: All right. And perhaps you can clarify because with respect to -- if we're talking about Marquee, the fifth cause of action against Marquee is statutory subrogation for contribution pursuant to NRS 17.225, and then the sixth cause of action is subrogation for express indemnity against Marquee only.

MR. REEVES: Agreed.

THE COURT: So --

MR. REEVES: Within those two causes of action, there are duty --

THE COURT: Which are disjunctive.

MR. REEVES: -- yes, which are disjunctive.

THE COURT: Pled in the alternative. Okay. Right.

MR. REEVES: Yes.

THE COURT: Uh-huh.

MR. REEVES: And so we're seeking an adjudication as to duty under either.

THE COURT: And so when you say duty, because counsel pointed out, the duty is kind of like -- I'm not exactly sure it's an element of either contribution or subrogation. So duty -- but duty to indemnity.

MR. REEVES: Yes.

THE COURT: How does that relate to contribution? I understand your concept under express indemnity, but how does it relate to contribution?

MR. REEVES: My client paid a substantial amount of money on behalf of Cosmo. My client is entitled to be indemnified for that sum. It is entitled to be reimbursed. These are words that I'm using interchangeably relative to what we are seeking. We are seeking an award of money that was paid on behalf of Cosmo, and so the motion -- because the dollars are subject to protective order, and the dollars are not pled in the complaint.

THE COURT: Right.

MR. REEVES: We're moving for partial summary judgment that Marquee is under an obligation to reimburse St. Paul for the sums that it paid on behalf of Cosmo. I characterize that as a duty, duty to indemnity, but it could very well easily say entitled to reimbursement.

THE COURT: Okay.

MR. REEVES: A right to reimbursement.

THE COURT: Thank you.

MR. REEVES: A right to reimbursement.

THE COURT: Thank you. All right. Great. Thanks. All right. So yes, with respect to --

MS. KELLER: St. Paul, Your Honor.

THE COURT: -- St. Paul. Uh-huh.

MS. KELLER: So as the Court pointed out, there are four causes of action against National Union brought by St. Paul. The second cause of action for subrogation, three, bad faith, the fourth cause of action for subrogation re: breach of contract, the eighth for equitable contribution, which was pled in the alternative in the second and fourth. And the seventh cause of action for equitable estoppel, which can't and doesn't seek money damages.

So the key issue, I think, overall -- and we were talking about this when we were here way back toward the beginning of the year is can an excess insurer in one tower subrogate against an excess insurer in a different tower? And at the time, the Court didn't have the policy, the St. Paul policy in front it, but now it does. So it's very clear that as to Marquee, Aspen is primary and sitting on top of it is National Union. And as to Cosmo, Zurich is primary and sitting on top of it is St. Paul. They're on an equal level in different towers.

So, no Nevada State Court case has ever recognized this or even recognized subrogation between any two insurers. More importantly, no case in any jurisdiction has ever recognized subrogation between two excess carriers on the same level in different towers. So if the Court denies the motion for summary judgment, this Court, I guess would be the first in the nation to recognize such a possibility. And I think it's pretty clear what the policy reasons are against it and why we haven't even found a case nationwide where anyone has even asked for

that. We haven't found a case where an excess insurer in a different tower has even asked for subrogation against an excess in a different tower.

THE COURT: Well, it seems that the dispute here is you define your relationship as coequal excess carriers in separate towers and they don't view it that way. They define it differently. So is that issue a question of fact or a question of law?

MS. KELLER: It's a question for the Court. It's a question of law.

THE COURT: Okay.

MS. KELLER: And the Court has the policies. And I think the Court recognized that last time, Your Honor, in your order. You said based on the record before the Court at this time, there appear to be no material questions of fact and the only issues remaining are purely questions of law and that's why you denied without prejudi -- you denied the motion to dismiss without prejudice to raise these issues in a motion for summary judgment. That's what it said in the order.

So now, the Court has the relevant policies from both. They're properly before the Court. So there's no factual dispute about what they say. Therefore, it's a pure question of law. So there's no question by their terms as to what they are. You know, the -- our learned opponents can say whatever they want, but the law is the law. The policy is the policy. And one is primary, and one is excess in each tower. So it would be launching off in a new territory that from a policy point of view would be disastrous.

You really would never have finality of settlements anymore. You'd have carriers settling and then immediately attacking each other, much as happened here. If the Court -- if there's anything more sacrosanct than the public policy in favor of settlements, I'm not sure what it is. We do everything humanly possible to facilitate them and to promote them. And --

THE COURT: And so -- but isn't that their whole complaint is that there was an opportunity to settle this case and it was missed and therefore, a greater loss was suffered than the case could have settled for $1.5 million at one point in time. Instead, it -- the jury verdict was for $145 million. Settlement was for some dollar amount less, which we will not discuss in public.

MS. KELLER: And if they were excess coming after primary --

THE COURT: Uh-huh.

MS. KELLER: -- they'd be right. The Colony case that they cite, which is the only Nevada case. It's not really a Nevada State Court case, but a federal case, that was the case where a district court, for the first time that we could find in Nevada, did find the ability to subrogate between two insurance carriers, but one was primary, and one was excess. And it was sort of a classic subrogation in terms of the type we see in California, which is the primary, for lack of a more elegant term, screwed around.

THE COURT: Uh-huh.

MS. KELLER: There was clear liability. It was a driver of a

truck owned by a company that was insured by the primary and the excess. Clear liability. The person sustained really bad injuries and the primary carrier didn't bother to settle it. Just kind of screwed around and screwed around and screwed around. Several demands were made within policy limits and they said no. Finally, after the person had had three back surgeries and was in horrible, constant pain and the tab was escalating, finally the primary settled.

But by now, the demand was in excess the policy and the excess had to pick up that excess and they then turned around and said hey primary, you were driving this train and you refused to settle. You could have gotten rid of this a long time ago. Our loss is directly attributable to you. And had they been standing in the shoes of the insured, the insured would have faced that additional loss. So that's kind of classic, excess against primary. That's where you see these claims.

Or in one case that they cited from Illinois, you had a stack of excess carriers, but they were all in the same stack. That was four excess carriers and they were essentially seeking subrogation, because again, the primary carrier didn't settle within limits and they all ended up getting triggered. But it was a straight up stack. And I think the reason for that is because generally speaking, the lower carrier, the primary carrier, is the one so-called driving the train.

They're the one providing the defense. They're the one with the ability, if there is an ability to settle within policy limits early, they're the ones who have it. But you have never -- there isn't a single case in the whole country, where you have excess versus excess in two different

towers. And the only multiple excess in the same tower subrogation case they cited you was that one Illinois case I talked about. So this is -- these are uncharted waters.

And if something this dramatic is going to happen, where you're never going to have as among insurance carriers any sort of finality, where they can all come after each other and there's going to be a may lay, there will be endless litigation after the litigation that was supposedly settled, then that's something that should be done by the legislature or it should maybe be decided by the Nevada Supreme Court. But I don't think that a trial Court should be creating this new law, which is going to have such a potentially dramatic impact.

So back to the causes of action. The equitable contribution claim that St. Paul -- that's they're alternative theory. No Nevada State Court has recognized equitable contribution between two insurers. Equitable contribution doesn't allow for the recovery of damages beyond the limits of the insurer's policy and it's undisputed that National Union here paid the full policy limit. So that can't survive.

And what about causes of action two and four? St. Paul can't sue National Union for breach of contract. They didn't have a contract. National Union and St. Paul had no contract. So similarly, St. Paul can't sue National Union for bad faith, breach of the duty to settle. It owed no such duty. And that -- you know, when we're -- we can't really start using the term duty interchangeably with a whole bunch of other duties, when it's a term of -- a whole bunch of other terms, when it's a term of art. National Union did not owe St. Paul a duty to settle.

And so that's why St. Paul is attempting to shoehorn these unfounded subrogation theories into the so-called stepping into the shoes of Cosmo. But again, they have to invent subrogation claims that don't exist in Nevada. So -- and I think if you look at the St. Paul opposition to our motion, Your Honor, they cite Nevada State cases that have nothing to do with subrogation between insurers. Every one. Let alone between two excess insurers, let alone two excess in different towers.

The *Lafroncini* [phonetic] case they cite is subrogation between two mortgagees. *American Sterling Bank*. That was subrogation between mortgage lien holders. *AT&T Technologies* was employer verses employee. *Federal Insurance Company*, surety verses bank. *Globe*, surety versus contractor. *Fountainblow* was a mechanics lien case and *Lumberman's* was an insurer against a subcontractor.

St. Paul has got a duty to provide authority, if we're going to talk about duty.

THE COURT: Well, isn't it a well-established principal in Nevada that there's no third party bad faith, which is essentially what they're trying to create here?

MS. KELLER: Yes.

THE COURT: That if this were a car accident, you -- and you were injured in the car accident and I was the person who had the insurance company, you could not sue my insurance company for bad faith?

MS. KELLER: Correct.

THE COURT: It's not your insurance company.
MS. KELLER: Right.
THE COURT: Same thing they're trying to create here, is a right to sue somebody else's insurance company.
MS. KELLER: Under a different guise.
THE COURT: Yeah.
MS. KELLER: Yes.
THE COURT: Instead of bad faith, they're calling in indemnity or subrogation. But that's Nevada policy.
MS. KELLER: Yes.
THE COURT: Okay.
MS. KELLER: That's right.
THE COURT: Thanks. All right. Fine. Thanks.
MS. KELLER: And --
THE COURT: Anything else?
MS. KELLER: -- just very quickly, if I could have a second, Your Honor --
THE COURT: Sure.
MS. KELLER: -- to see if there's anything we have missed. Does the Court have any additional questions for me?
THE COURT: No. I think that that was the one I wanted answered. I think I had -- oh, that there's no -- that's why I asked about the question of fact. I think you answered that one, that we don't have a Choi affidavit, so we don't know what issues of fact there would be, but your position being there really aren't any issues of fact. This is purely a

question of law for the Court. So that was the one that I wanted to determine, that this whole question of equity -- this is all just questions of law. We don't have any fact questions here.

MS. KELLER: I think that's correct, Your Honor.

THE COURT: All right. Great.

MS. KELLER: If the Court has nothing further.

THE COURT: Yeah. And then there's just this distinction -- no. And I'll talk to counsel about -- because it's just this distinction between the two different parties as to how they distinguish or how they identify two equal but separate towers versus this -- but somehow they're in the same -- I'll ask counsel to explain that.

MS. KELLER: Well, they're trying to interpret the nightclub management agreement in such a way as to somehow implicate us.

THE COURT: Yeah.

MS. KELLER: And they can't do that, either. I mean, the -- it's pretty much blackletter law that the insurance policy governs. Two individuals can't make an a -- let's say that the agreement was what they said it was -- and it isn't. But let's say it were. The two individuals can't contract between themselves to create obligations for insurance carriers that don't exist in the polices.

THE COURT: Right. Thanks.

MS. KELLER: The insurance contract is paramount.

THE COURT: Got it. Thank you.

MS. KELLER: Thank you, Your Honor.

THE COURT: Counsel.

MR. DEREWETZKY: Good morning, Your Honor. Not exactly sure where to begin. On the issue of whether there's third party bad faith in Nevada --

THE COURT: Right.

MR. DEREWETZKY: -- this isn't a third party bad faith case, Your Honor.

THE COURT: Yeah, but that's what -- it's analogous. I -- it --

MR. DEREWETZKY: No, it's not actually analogous in any way.

THE COURT: Okay. All right.

MR. DEREWETZKY: Cosmopolitan is an insured under National Union's policy. It's Cosmopolitan's bad faith claim that we're seeking to subrogate to. It's a claim by the insured against its own carrier, not a third party claim at all. It seems that a key issue in his motion is going to be whether there are any factual questions or whether --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- everything can be resolved as a question of law. The -- National Union cited a case in its briefs called *Travelers Casualty and Surety v. American Equity Insurance Company,* 93 Cal App 4th 1142, and this is in the context of cases that are trying to determine the priority of coverage, Your Honor, the issue of which tower things go in and who goes first. And the case they cited says all courts will assess whether the factual circumstances create a relationship between the indemnity contract and insurance allocation issues. It is a

factual question and we raise at least three different factual issues that have to be decided by the Court.

Your Honor, in the management agreement, the management agreement itself provides that all insurance coverage maintained by Marquee will be primary to any insurance coverage maintained by any owner insured parties. There is an indemnity provision in the management agreement that flows from --

THE COURT: Okay. But owner. How are we defining owner? Because as it was pointed out, there is the project owner versus the owner that's defined in the management contract.

MR. DEREWETZKY: Well, it refers to owner insured parties, Your Honor --

THE COURT: Okay.

MR. DEREWETZKY: -- so parties that are insured by the owner.

THE COURT: Okay.

MR. DEREWETZKY: There's the indemnity provision in the management agreement. There's a dispute between National Union and St. Paul about whether the indemnity agreement has any effect on the relation between the parties. This is the area where National Union cited the *Travelers* decision. One of the key distinguishing factors -- well, there's -- I don't want to say there's a split of authority. They're actually cases that go make a variety of different conclusions about the priority of coverage under California law.

THE COURT: Uh-huh.

MR. DEREWETZKY: We cited the *Rossmore* decision and *Mt. Holly v. Hartford* and some other cases for the proposition that under certain circumstances, the Court should look to the indemnity provision, because otherwise what happens is the result is contrary to the intent of the parties with respect to who bears the responsibility for an incident or claim.

One of the things that is said in the *Travelers* policy that -- *Travelers* case that National Union relies on is there was language in the policy that says nothing here shall be construed to make this policy subject to the terms, conditions and limitations of other insurance, reinsurance or indemnity. That provision, which the Court in Travelers relied on heavily, is not in the National Union policy. So we can distinguish the *Travelers* case in many ways from the arguments that are being made.

One of the other key distinctions in the cases cited by National Union and the cases we cite, Your Honor, is that our case involves not only the insurance companies, but the insureds as well. We have a claim, subrogated claim by the insured, Cosmo, against the insured, Marquee, based on indemnity principals. And that is a key distinction in how you look at whether indemnity provisions will be considered in determining the priority of coverage. The -- our argument, Your Honor, is there's one tower of coverage for Cosmopolitan.

THE COURT: Uh-huh.

MR. DEREWETZKY: There can only be one tower of coverage. And the coverage goes Aspen, National Union and then the

St. Paul policy on top. The St. Paul policy is excess. And Your Honor, I was not here. I didn't have the benefit of being at the hearing last week, but it's my understanding that the Court denied Aspen's motion for summary judgment on the subrogation claims that were brought against it by St. Paul.

THE COURT: I just said I wasn't going to hear them.

MR. DEREWETZKY: I'm sorry?

THE COURT: I didn't deny them. I just said I wasn't going to hear them. We -- because we -- my concern here was were, they going to be seeking a 54(b) ruling on the decision, such that we would need to certify that and that would go up. So then I felt like we shouldn't get into the whole issue of their subrogation claim. That seemed premature to me, so I said I wasn't going to consider those -- that part of the motion.

MR. DEREWETZKY: The countermotion granted only as to coverage. I'm just reading from the --

THE COURT: Right. Uh-huh.

MR. DEREWETZKY: -- minute order. And what was the Court's decision with respect to the --

THE COURT: Because -- my question to them was are you going to be appealing this? Do you need a 54(b) certification?

MR. DEREWETZKY: Is Aspen going to apply? I thought you were asking --

THE COURT: No. Your client. Was your client going to be appealing it? So based on that, then it just seemed to me that going forward with this issue, this question on of the Aspen subrogation issue,

which is very different, seemed premature, if we -- if they were -- because they hadn't made a determination whether you were going to seek a 54(b) certification on that with respect to Aspen.

MR. REEVES: He had understood -- with the feedback we got, he had understood you were -- that question was posed as to number of limits and so your 54(b) question was directed to--

THE COURT: Right. Exactly.

MR. REEVES: But --

THE COURT: And so then that's why I said I just -- I wanted to know if that was going to be -- if they were going to seek 54(b) certification on the limits.

MR. REEVES: Yes.

THE COURT: If so, then it seemed like we needed to figure that out before we got into this whole issue of subrogation.

MR. REEVES: he had understood you found questions of fact otherwise, so this is new information to us.

THE COURT: No. I said -- I wanted to know what was going on with the 54(b) certification on this question of limits, because it seemed like we wouldn't want to get into the all the subrogation, if we first had to take the subroga --

MR. REEVES: I guess he wanted to get into --

THE COURT: -- take the 50 --

MR. REEVES: -- all the subrogation, so --

THE COURT: Yeah, well, I didn't, so.

MR. DEREWETZKY: Well, Your Honor, one of our additional

arguments in opposition to the National Union summary judgement motion on subrogation is that it was the intent of the parties, as evidenced by the conduct in the case --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- that the National Union policy would pay first, and the Cosmopolitan policy would pay second. And that's evidenced by all kinds of conduct, including the fact that AIG did not even provide notice to St. -- to St. Paul until February, when the case was set for trial in March that National Union didn't provide notice of opportunities to settle within the limits, not of our policy, but of the National Union policy. They wanted to control the defense. They wanted to control the case. And that is contrary to the idea that they thought that our policy was co-insurer with theirs. If it had been, they would have behaved differently any number of ways.

THE COURT: And so -- and so that's -- in talking to counsel, I think it was kind of like the key distinction between your analysis of the case, and their analysis of the case. Their analysis of the case is two very separate and distinct, separate towers. There's no right to sue across those towers, for any kind of contribution indemnity, anything, because they're separate towers. So your view, as to why this should be considered one tower is course of dealing?

MR. DEREWETZKY: Our view is that the -- it says so in the management agreement. It says so in the indemnity agreement. There's caselaw to the effect that the indemnity agreement should be enforced under the circumstances of this case, and that there's a course of

conduct, and course of dealing. And, Your Honor, Your Honor asked me a number of times when we were here previously for Rule 16 conferences, whether I thought there would be a necessity for discovery.

THE COURT: Uh-huh.

MR. DEREWETZKY: And I said I needed to see the papers. Now that we've seen the papers, there are three places in our opposition where I specifically asked for discovery on a number of issues. Counsel complains about my declaration, because it misstates facts, I don't have sufficient knowledge, et cetera and so forth, well, I've been prevented from doing any discovery whatsoever, Your Honor. It's as if we're still at the pleading stage. We haven't done any discovery at all. We haven't had the right to do anything.

So it's a little disingenuous for counsel to argue that I don't have sufficient knowledge to state facts, when I haven't had the opportunity to go get the people with sufficient knowledge to state those facts.

THE COURT: Okay. So then looking at your declaration, starting at the bottom of page 5, which is the, in support of the request for relief under 56(d), the issues are the number of issues with respect to which discovery is requested, AIG's retention of a single set of lawyers to defend Marquee and Cosmo jointly without seeking a conflict waiver. Express and implied representation by AIG that its policy would respond prior to St. Paul's. So this makes it de facto excess. Whether St. Paul had a reasonable opportunity to settle the underlying action. I mean I don't know what discovery would be necessary on that one. AIG's

history of pursuing subrogation claims, where it has paid the loss on behalf of its insured.

So are you talking about other cases where AIG has pursued the same --

MR. DEREWETZKY: Oh, yes, Your Honor. They make -- they take the position that subrogation is this bizarre unicorn thing that nobody knows anything about it. I want to discover what they do with subrogation claims, and how many they've brought in Nevada.

THE COURT: And then concealment of the settlement offer, and then generally concealment of -- like just not disclosing this earlier to avoid interference in their defense? So those are --

MR. DEREWETZKY: Those are what I know based on no discovery to date. That's -- that's where we stand --

THE COURT: Uh-huh.

MR. DEREWETZKY: -- at the moment. And, you know, there's a lot of case law also in this jurisdiction that where a summary judgment motion is brought early in the litigation, a Rule 56(d) motion for additional time should be granted, as a matter of course.

THE COURT: Okay. Anything else?

MR. DEREWETZKY: Just let me check my notes, Your Honor, if you don't mind. On the issue of contribution, Your Honor, we're sort of in the same boat as the other motion. They're pled really in the alternative. If there is a finding that we're co-insurers, co-insurers are entitled to equitable contribution between themselves. The fact that there's no case in Nevada that says that, so far, is probably attributable

to the fact that insurers don't really want to find out what the Nevada Supreme Court would say about it. But in my practice, everybody behaves as though contribution is the rule.

That's all I have, Your Honor.

THE COURT: Okay. Thanks.

MS. KELLER: Well, starting with last first, we did complain about counsel's declaration. We did think that it was full of things that had nothing to do with legal issues in this case. It is -- it's interesting that St. Paul seems to take the position that gosh, we're just this poor little company that was just relying on National Union to handle everything for us.

And yet they were co-equal excess carriers with the same amount of -- ultimately paid the same amount in settlement. We're not going to go into what that is, but it was identical. If they decided to at some point save money by sitting back and not paying sufficient attention, that's their problem. They were not primary.

And you notice that in discussing the tower, Your Honor, Zurich has disappeared. They said Aspen was primary and then -- you know, and then St. Paul, and then -- anyway, Aspen -- Zurich is gone. Zurich doesn't appear anywhere. The reason is because Zurich was primary for Cosmopolitan. And so they don't want to mention that, because they were excess to Zurich.

At any rate, we continue to object to the declaration. We think it's -- it is -- has zero to do with the legal issues that are before the Court, which have to do with those policies. Counsel mentioned contract

damages, and stepping into the shoes, and all that. There can't be any claim for a contract breach, without contract damages. Because this is an insurance case, damages for breach of a policy are limited to the policy benefits owed, Defense and indemnification costs.

St. Paul doesn't dispute Cosmo's lack of contract damages. Cosmo's defense was fully paid for. Cosmo's indemnification settlement was fully paid for. Cosmo contributed no money to the defense or the settlement. So St. Paul is seeking extracontractual damages for alleged bad faith duty to settle. Those tort damages are not recoverable under a breach of contract theory. And even if St. Paul could step into Cosmo's shoes, it would only get the remedies as Cosmo. Cosmo has no contract damages. If Cosmo were to sue National Union, it would get nothing. It couldn't get anything. How could it sue for bad faith, when everything was paid?

So no contract damages are available to St. Paul through subrogation. You can't -- it again is exactly what Your Honor pointed out earlier, it's a backdoor attempt to get bad faith damages on a third-party basis. That's all it is. Because Cosmo has no contract damages.

MS. KELLER: Thank you, Your Honor.

THE COURT: Okay. Thanks.

MR. DEREWETZKY: Yeah, very briefly, Your Honor.

THE COURT: Okay. I'm going to let counsel have the last word. It's your motion.

MR. DEREWETZKY: The whole idea of contact damages as framed by National Union is a complete red herring. We've now briefed

this issue for the Court any number of times. Subrogation is based on the fact that the insurance company pays on behalf of the insured, and then has the insured's rights to pursue somebody else. No insured ever has any damages in a subrogation cases. It's the way that subrogation operates that, you know, the insurance company pays, and then has -- assumes the rights to go over the liable third-party.

In this case, Your Honor, the liable third-party is the insurance company, National Union AIG, which failed to take its insured Cosmopolitan out of harm's way. One issue that sort of hasn't been explored completely, Your Honor, is the argument that we can't get contribution because the National Union policy is exhausted. Our position, and we can develop that in discovery, is that National Union improperly exhausted its limits because it failed to pay on behalf of Cosmopolitan.

It paid everything on behalf of Marquee. It had to have paid everything on behalf of Marquee, because St. Paul has no obligation to Marquee. And if anything was not paid as to Marquee, then it wouldn't have -- the case wouldn't have settled.

So the exhausting argument has no legs, and we can develop that further in discovery.

THE COURT: Thanks again. And the final word.

MS. KELLER: Exhaustion, Your Honor, being developed in discovery is that -- speaking of red herrings, that's another legal issue for the Court. The Court's got all the information before it. There isn't going to be a magical new witness popping up with any additional information.

MR. REEVES: We submit it.

THE COURT: Thank you. Okay.

On the surface this appears to be very complex. I don't think it is. I think it's actually a really simple question. Because Judge Johnson found a non-delegable duty on the part of Cosmo, which, you know, I believe, and although not articulated, that he's going back to gaming law. The obligation of a gaming licensee over their tenants. These nightclubs have been a particular problem in the state for gaming licensees for many years. That's a non-delegable duty. We know that.

So I believe that that really is the basis of how the rest of this falls out. Because Judge Johnson found that duty, I'm -- because I know I read these letters, and I saw where early on in the case, they're like oh, well, Cosmo didn't do anything, they're going to get out on summary judgment. No, they're not. No, they're not. You're wrong about that.

So maybe that set everything off on -- you know, maybe they were looking at it wrong from the beginning. But very clearly, Cosmo had its own obligations. I understand the argument that it boils down to this question of well, do we have two towers or one tower here. With all due respect, I believe we have two separate towers of insurance. These are totally separate towers, and I appreciate you don't like my analogy to third-party bad faith, but that's essentially what it is. You can't sue somebody else's insurance company. They don't owe you any duty. I get the point that what we have here is a problem in that National Union initially, or Aspen, whoever it was, took on the joint defense of Cosmo and -- when it was tendered and Marquee. And they only used one

attorney. I don't believe that creates a question of fact, with all due respect. I think they were obligated to -- you know, to take on that joint defense. But Aspen does have its own independent issues.

Should they have had a separate attorney? Well, maybe they should have. But I don't know that that necessarily gives rise to any kind of a cause of action to recover here. They could have demanded that, and they didn't. So that's how it proceeded, fine. It came out in a way that I don't think anybody anticipated. I think pretty much everybody -- everybody in this building was kind of shocked. It's a very large verdict. But I think that it just all starts with that simple question of who's being sued here.

And I understand that Cosmo was not being sued directly as, you know, Cosmo, but there is still an obligation. And it's a duty owed to the public, because they're a gaming licensee. So that's I think where Judge Johnson was coming from, and where he said he felt they just had a non-delegable duty and that even though early on they were -- it carries the registry, don't worry, they didn't do anything, that duty creates this problem for us, that then carries through that litigation and into this litigation. I think it's two completely separate towers of insurance. You cannot sue somebody else's insurance company.

And so for that reason I'm going to grant the motion with respect to National Union. I'm going to also grant the motion with respect to Marquee, because again -- and part of the problem we had early on is we didn't have complete agreements. And I do believe now that we have -- everything is complete. I didn't see anybody alleging that

you didn't really give us the full operating agreement. You didn't really give us your full insurance policy. That was our problem early on, is that we didn't have policy. We didn't have agreements. We've got it all now. It's really well documented, as I said. Exhaustively briefed, and fully -- every single potential exhibit is here.

I do not see that we have any questions of fact here. I think these are all issues of law in the end. And the duty, as I indicated, I believe that it could go all the way back to this operating agreement. There is -- they all had separate insurance. And that's what was intended. So I didn't see that they were acting as if they somehow had created an obligation through their actions, that one of the excess carriers was more excess than the other excess carrier.

You're going to say that. If I'm the first lawyer of excess, you're going to say that in your agreements. And there's nothing here that says -- as was pointed out, there was a primary and an excess for Cosmo, and a primary and excess for Marquee. It wasn't primary, excess one, excess two, excess three. It wasn't like that. It wasn't set up that way. It was set up as two completely separate towers.

So for that reason, I'm granting both the motions and denying the counter-motion. You finding -- and again, here's my -- my question. Now I think we're down to my question from last week, because we only had Aspen last week. Now my question is, do we have 54(b), because technically -- and that's the reason why I didn't want to get into this whole issue of their subrogation problems last week, because it was just them.

I'm assuming we're going to have an appeal. That's why I said everything is here. Everything is in this file. So that's my question. Is where are we on all that? Because --

MR. SALERNO: Your Honor, if I may clarify that question. And attempt to answer it.

THE COURT: Yeah.

MR. SALERNO: Did you view the ruling as to Aspen to be dispositive of the claims against Aspen?

THE COURT: That's why -- that was my question. Was like is it -- is this just a question of it's just -- they just want to know if they have a million dollar policy, or do they have this other issue. Since we hadn't looked at this yet, that -- it made me uncomfortable making a ruling in that -- in that case, totally in a vacuum --

MR. SALERNO: Yeah.

THE COURT: -- not having looked at this other part of the case.

MR. SALERNO: Because we would be a 54(b) is Aspen is not getting out completely. If they are, then it's just -- it's not.

THE COURT: And so that's, I guess the question. And that's why I asked. I just --

MR. SALERNO: We asked -- we asked them to address that.

THE COURT: I didn't know where we left them and we -- because they were done separately, it was a -- I just felt it was awkward at that point in time to get into all of these issues with Aspen when we hadn't looked at any of these issues for these other carriers. And

because they are primary.

MR. SALERNO: Are you going to -- maybe a related question. Are you going to ask us to prepare findings?

THE COURT: Yeah. Yes.

MR. SALERNO: So --

THE COURT: And that's why -- that was my question --

MR. SALERNO: -- and we're going to have to --

THE COURT: -- about 54(b).

MR. SALERNO: -- include a 54()b) in that event.

THE COURT: That was my question. Was, you know, where are we now with this, because I think you're going to -- you're going to need --

MR. SALERNO: I think it's our preference to do --

THE COURT: -- assuming you're going --

MR. SALERNO: -- a 54(b). We don't want to get locked up in whatever dispute remains with Aspen. And if it ends up being that that ruling carries over to be completely dispositive as to Aspen, then the whole case is over at that point.

I think that's the proper way to do it. Ours should be a 54(b). It can go immediately up for appeal if they still lock horns with Aspen, and they --

MR. DEREWETZKY: I think that's probably right, so that we should have the findings relative to what this Court is ruling today.

THE COURT: Uh-huh.

MR. DEREWETZKY: And then with those -- then extrapolate

from that. So as I understand you're granting their motion relative to Marquee, Cosmo vs. Marquee.

THE COURT: Correct.

MR. DEREWETZKY: So Cosmo vs. Marquee does not survive the motion?

THE COURT: Correct.

MR. DEREWETZKY: Okay.

THE COURT: I'm granting their motion for summary judgment. I'm -- with respect to the operating agreement. I'm also granting the motion for summary judgment on the insurance agreements.

MR. DEREWETZKY: Well, and I guess, just so we're clear, it's Cosmo vs. -- you're -- you're -- Cosmo vs. Marquee. Marquee filed a motion for summary judgment.

THE COURT: Correct.

MR. DEREWETZKY: So Cosmo may not bring a claim against us. And you're ruling in favor of --

THE COURT: Cosmo, correct.

MR. DEREWETZKY: -- Marquee relative to that.

THE COURT: Correct.

MR. REEVES: Both motions.

MR. DEREWETZY: Yes, and St. Paul.

THE COURT: Under that -- under the management agreement. And as I said, early on we did not have complete agreements. We didn't have complete insurance policies, we didn't have

complete operating agreement. It's -- I did not see anybody raise an issue. I know there's -- you objected to each other's questions of fact, and each other's representations in your motions. But I didn't see anybody say that's not the complete operating agreement, or that's not a complete insurance policy. My belief is the problem we had here is we didn't have complete record. I think we have it now.

MR. DEREWETZY: Your Honor.

MR. SALERNO: Oh, go ahead.

MR. DEREWETZY: We have a pending motion before the Discovery Commissioner. I think that your ruling would render that moot, but we're not going to get an order before the hearing, so --

THE COURT: You can --

MR. DEREWETZY: Can we take that off calendar?

MR. SALERNO: We'll go ahead and withdraw it. We have a record of today, so if that comes up for any reason, we'll have a record.

THE COURT: Okay. All right.

MR. SALERNO: We'll withdraw it without prejudice.

THE COURT: Okay. Thanks.

MR. SALERNO: Based on the ruling.

THE COURT: Thanks, yes. And so now we've done this one and that leaves us with Aspen. And as I said, I just was not comfortable last week, because I hadn't even looked at this, so --

MR. SALERNO: Sure. One other housekeeping matter, we had a motion to seal Exhibit 1, it as the micromanagement agreement, and I have an order on that.

THE COURT: Okay. Thank you, yes.

MR. SALERNO: So may I approach?

THE COURT: Yes.

MR. SALERNO: Do you need to see that?

THE COURT: And was that the only thing that we needed to seal, because one of the insurance policies was not redacted. I think it was --

MR. REEVES: I don't think -- I think this is it, Your Honor.

THE COURT: Okay.

MR. SALERNO: At least that's the only we filed.

THE COURT: Okay, because, yeah, I did see that we -- I just want to make sure that we're not -- see, it's sealed for purposes of anybody viewing it publicly, but, of course, it would be --

MR. SALERNO: Yeah.

THE COURT: -- it's available in the record.

MR. SALERNO: In the record. Yes.

THE COURT: And so I want to be really clear. We've got a complete record because this one -- this is --

MR. SALERNO: Yes.

THE COURT: -- really sure that we've got everything clear in the record.

MR. SALERNO: Yeah, so I would think the transcript today, to the extent it refers to any aspects should be sealed. I don't know if it's easier just to seal the whole transcript.

THE COURT: Nobody --

MR. REEVES: No, the transcript shouldn't be sealed.

THE COURT: We were pretty careful.

MR. REEVES: Yeah. Agreed.

THE COURT: I don't think anybody mentioned anything about policy limits.

MR. REEVES: I don't think there's anything to be sealed.

THE COURT: I think the only time it was mentioned was that they were equal policy limits, and they paid equally. But nobody mentioned --

MR. REEVES: No, counsel --

THE COURT: I think we're -- I'm pretty sure we were careful. If you get the transcript and you have a concern about it, and you want to seal it, you can certainly ask after the fact. I don't think we need to seal it. I think that everybody was really careful.

MR. SALERNO: And, Your Honor, I want to clarify, too, that our motion included request for attorney's fees, on behalf of Marquee, the prevailing party under the Nightclub Management Agreement.

THE COURT: That would be a separate -- I would have to look at that as a separate motion.

MR. SALERNO: It's part of our motion. Do you --

THE COURT: Right, but because we need all the documentation on that --

MR. SALERNO: So right now I have a motion for fees and costs.

THE COURT: They have the right then to oppose it.

MR. SALERNO: Very good.

MR. REEVES: Thank you, Your Honor.

MR. SALERNO: Thank you, Your Honor.

THE COURT: Okay.

[Proceedings concluded at 11:27 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

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

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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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S MOTION FOR SUMMARY JUDGMENT

Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's ("Marquee") Motion for Summary Judgment ("MSJ") came on for hearing on October 15, 2019 in Department XXVI of this Court, the Honorable Gloria Sturman presiding. Nicholas A. Salerno of Herold & Sager and Jennifer L. Keller of Keller/Anderle LLP appeared for Defendant Marquee, William Reeves and Marc J. Derewetzky of Morales Fierro & Reeves appeared for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and Ryan A. Loosvelt of Messner Reeves LLP appeared for Defendant Aspen Specialty Insurance Company ("Aspen").

The Court, having reviewed and considered the voluminous pleadings and papers on file,[1] having heard and considered argument of counsel, and good cause appearing, hereby GRANTS Marquee's Motion for Summary Judgment.

On October 15, 2019, the Court issued a minute order granting Marquee's Motion for Summary Judgment. However, the Court's decision set out herein is not based solely on the contents of the minute order, but is also based on the record on file herein. The Court hereby issues the following Findings of Facts and Conclusions of Law.

I.

FINDINGS OF FACT

A. The Underlying Action

1. 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"). (*See* Plaintiff's First Amended Complaint ("FAC") ¶ 6.)

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[1] Marquee's Motion for Summary Judgment, Marquee's Request for Judicial Notice in Support of Motion for Summary Judgment, Marquee's Appendix of Exhibits in Support of Motion for Summary Judgment, Declaration of Nicholas B. Salerno in Support of Motion for Summary Judgment, Declaration of Bill Bonbrest in Support of Motion for Summary Judgment, St. Paul's Opposition to Motion for Summary Judgment and Countermotion re: Duty to Indemnify, St. Paul's Response to Statement of Undisputed Facts, St. Paul's Consolidated Appendix of Exhibits in Support of Opposition to Motions for Summary Judgment, Declaration of Marc J. Derewetzky in Support of Opposition to Motion for Summary Judgment, Declaration of William Reeves in Support of Opposition to Motion for Summary Judgment, National Union's (defined below) Opposition to St. Paul's Countermotion for Summary Judgment, Marquee's Reply in Support of Motion for Summary Judgment, and Marquee's Objections to Facts Not Supported by Admissible Evidence Filed in Support of Opposition to Motion for Summary Judgment and Countermotion re: Duty to Indemnify.

2. 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. (FAC ¶¶ 6-7.)

3. 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.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id*. ¶ 9, Exhibit A.)

5. Roof Deck Entertainment, LLC owns and operates the Marquee Nightclub. (FAC ¶ 4.)

6. Nevada Property 1, LLC owns and operates The Cosmopolitan of Las Vegas. (*Id.* ¶ 10.)

7. 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.)

8. NRV1 entered into a written agreement (discussed *infra* Section I.D) with Marquee to manage the nightclub. (FAC ¶ 10.)

9. Marquee is a named insured under the National Union Excess Policy defined below. (FAC ¶ 30.)

10. Cosmopolitan is a named insured under the St. Paul Excess Policy defined below. Cosmopolitan is also an additional insured to the National Union Excess Policy defined below. (FAC ¶¶ 40 and 44.)

11. Marquee is not an insured to the St. Paul Excess Policy defined below. (FAC ¶ 41.)

12. Aspen Insurance Company, which issued a primary insurance policy, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union subsequently

/ / /

appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

13. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

14. The Court held in the Underlying Action that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (*See* Request for Judicial Notice in Support of Marquee's Motion for Summary Judgment, Ex. 3.)

15. 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 jointly and severally against Marquee and Cosmopolitan and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the judgment would have been joint and several against Marquee and Cosmopolitan. *See* NRS 41.141(5)(b). (FAC, Ex. C.)

16. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

17. Aspen and National Union Fire Insurance Company of Pittsburgh PA ("National Union") as the primary and excess insurers of Marquee, and Zurich American Insurance Company ("Zurich") and St. Paul as the primary and excess insurers of Cosmopolitan, 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.)

18. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money toward the settlement. (FAC ¶¶ 67-70.)

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B. Insurance Policies and Insured Parties

19. Cosmopolitan is a named insured to a primary policy issued by Zurich American Insurance Company to Nevada Property 1 LLC, under policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012, with limits of $1,000,000 per occurrence and $2 million general aggregate (the "Zurich Primary Policy"). (FAC ¶ 69; MSJ p. 14, Undisputed Fact No. ("UF") 25.)

20. Cosmopolitan is also a named insured to the St. Paul commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013 issued to Premier Hotel Insurance Group (the "St. Paul Excess Policy"), which is excess to the Zurich Primary Policy. (FAC ¶ 40; MSJ pp. 13-14, UF 24 and 25.)

21. Marquee is a named insured to a primary policy issued by Aspen Specialty Insurance Company to The Restaurant Group et al., under policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 (the "Aspen Primary Policy"). (FAC ¶ 15.)

22. Marquee is also a named insured to the National Union commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, issued to The Restaurant Group, et al. (the "National Union Excess Policy"), which is excess to the Aspen Primary Policy (FAC ¶ 30; MSJ p. 13, UF 23.) Cosmopolitan was an additional insured under the Aspen Primary Policy and the National Union Excess Policy. (FAC ¶¶ 24 and 30; MSJ p. 14, UF 26.)

23. The St. Paul Excess Policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if Cosmopolitan has agreed in a written contract to waive its rights to recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery of such payment. (MSJ p. 14, UF 27.)

C. St. Paul's Claims Against Marquee

24. In the Fifth Cause of Action of the FAC for Statutory Subrogation – Contribution Per NRS 17.225 ("Fifth Cause of Action"), 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 asserts 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 NRS 17.275 for all sums paid by St. Paul as part of the settlement of the Underlying Action. (FAC ¶¶ 119-120.)

25. In the Sixth Cause of Action of the FAC for Subrogation – Express Indemnity ("Sixth Cause of Action"), St. Paul asserts that "[p]er written agreement," Marquee was obligated to "indemnify, hold harmless and defend Cosmopolitan for Moradi's claims in the Underlying Action." (*Id*. ¶ 122.) St. Paul further alleges that Marquee did not provide indemnification to Cosmopolitan for the claims asserted in the Underlying Action and that, as a result, St. Paul was forced to contribute to the settlement of the Underlying Action to protect Cosmopolitan's interests as well as its own. (*Id*. ¶¶ 125, 127.) St. Paul further 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.)

D. Nightclub Management Agreement

26. Marquee and NRV1 entered the Nightclub Management Agreement ("NMA"), dated April 21, 2010, with regard to the Marquee Nightclub located within The Cosmopolitan Hotel & Casino. (MSJ p. 8, UF 17.) In the NMA, Marquee agreed to manage and operate the Marquee nightclub in The Cosmopolitan Hotel & Casino.

27. 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 Cosmopolitan is the Managing Member. (MSJ p. 8, UF 13.)

28. The NMA provides in pertinent part:

1. Definitions

. . .

> **"Losses"** shall mean any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance, including, without limitation, all reasonable attorneys' fees and all other reasonable professional or consultants' expenses incurred in investigating, preparing for, serving as a witness in, or defending against any action or proceeding, whether actually commenced or threatened.

(MSJ p. 9, UF 18.)

29. Section 12 of the NMA sets out the insurance requirements among the parties, and provides, in pertinent, part as follows:

> **12. Insurance**
>
> 12.1 [NRV1's] Insurance. During the Term of this Agreement, [NRV1] shall provide and maintain the following insurance coverage, at its sole cost and expense . . .
>
> . . .
>
> 12.1.2 Commercial general liability insurance, including contractual liability and liability for bodily injury or property damage, with a combined single limit of not less than Two Million Dollars ($2,000,000) for each occurrence, and at least Four Million Dollars ($4,000,000) in the aggregate, including excess coverage; and
>
> 12.1.3 Any coverage required under the terms of the Lease to the extent such coverage is not the responsibility of [Marquee] to provide pursuant to Section 12.2 below.
>
> 12.2 [Marquee's] Insurance.
>
> 12.2.1 During the Term of this Agreement, [Marquee] shall provide and maintain the following insurance coverage (the "[Marquee] Policies"), the cost of which shall be an Operating Expense:
>
> 12.2.1.1 Commercial general liability insurance (occurrence form), including broad form contractual liability coverage, with minimum coverages as follows: general aggregate - $4,000,000; products-completed operations aggregate - $4,000,000 personal and advertising injury - $5,000,000; liquor liability - $1,000,000 with $4,000,000 liquor liability annual aggregate each occurrence - $2,000,000; . . . and medical expense (any one person) - $5,000;
>
> 12.2.1.2 Excess liability insurance (follow form excess or umbrella), liquor liability, commercial general liability, automobile liability and employers liability), with minimum coverages as follows: each occurrence - $25,000,000; aggregate - $25,000,000;
>
> . . .

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

(MSJ pp. 9-11, UF 19.)

30. Section 12.2.6 of the NMA includes the following provision requiring that any insurance required under the NMA by both NRV1 and Marquee include a waiver of subrogation:

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.

(MSJ p. 11, UF 19.) (emphasis added).

31. Section 13 of the NMA includes the following express indemnity provision:

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.

(MSJ pp. 11-12, UF 20.)

32. Section 13 of the NMA expressly provides that any express indemnity obligation owed by Marquee to Cosmopolitan applies only to the extent any and all Losses (as defined above) are not reimbursed by insurance.

33. Section 17.2 of the Lease attached as Exhibit D to the NMA provides, in relevant part, that Cosmopolitan shall procure "all insurance required to be obtained by" NRV1 under Section 12.1 of the NMA. (Ex. 1 to MSJ, at T000183.)

34. Section 20 of the NMA provides as follows:

> **20. <u>Third Party Beneficiary</u>**
>
> Except as otherwise expressly provided herein, the Parties acknowledge and agree that [NRV1] may assign, delegate or jointly exercise any or all of its rights and obligations hereunder to or with any one or more of the following: [Cosmopolitan], Hotel Operator, Casino Operator and/or their Affiliates, or any successors thereto (collectively "Beneficiary Parties"). All such Beneficiary Parties to whom certain rights and obligations of [NRV1] have been assigned shall, to the extent of such assigned, delegated or shared rights and obligations, be an express and intended third-party beneficiary of this Agreement. Without limiting the generality of the foregoing, Beneficiary Parties shall have the right to enforce the obligations of [NRV1] to the extent of the rights and obligations assigned to, delegated to or shared with the Beneficiary Party by [NRV1]. Except as provided above, nothing in this Agreement, express or implied, shall confer upon any person or entity, other than the Parties, their authorized successors and assigns, any rights or remedies under or by reason of this Agreement.

(MSJ pp. 12-13, UF 21.)

II.

MARQUEE'S MOTION FOR SUMMARY JUDGMENT

1. On September 13, 2019, Marquee filed Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub's Motion for Summary Judgment. Marquee's MSJ asserts that the NMA entered between Marquee and NRV1 contains a waiver of subrogation provision that prevents Cosmopolitan from pursuing any claims against Marquee. As such, St. Paul cannot not step into

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Cosmopolitan's shoes to pursue the subrogation claims against Marquee set forth in the Fifth and Sixth Causes of Action of the FAC as a matter of law.

2. Marquee's MSJ further asserts as a separate and independent ground to grant summary judgment that the Sixth Cause of Action in the FAC for express indemnity fails because the express indemnity provisions set out in Section 13 of the NMA applies by its express terms only to losses not reimbursed by insurance. As such, Marquee contends the Sixth Cause of Action fails as a matter of law because the damages sought by St. Paul under the Sixth Cause of Action pertain to a loss that was reimbursed by insurance.

3. Marquee's MSJ also asserts as a separate and independent ground to grant summary judgment that that the Fifth Cause of Action fails as a matter of law because Cosmopolitan was found jointly and severally liable with Marquee in the Underlying Action for the intentional torts of assault, battery, and false imprisonment, and NRS 17.255 provides "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury." Marquee further asserts as a separate and independent ground to grant summary judgment that that the Fifth Cause of Action fails as a matter of law because Nevada common law and NRS 17.265 provide that "[w]here one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation." As such, Marquee contends the Fifth Cause of Action in the FAC for Statutory Subrogation – Contribution Per NRS 17.225 fails as a matter of law based on the application of NRS 17.255 and NRS 17.265.

III.

CONCLUSIONS OF LAW

A. Standard of Review

1. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in

the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. St. Paul's Fifth And Sixth Causes of Action For Subrogation Are Barred By The Subrogation Waiver Provisions Contained In The Nightclub Management Agreement And The St. Paul Excess Policy

2. St. Paul asserts that, as an insurer for Cosmopolitan, it is subrogated to the rights of Cosmopolitan for contribution and express indemnity against Marquee. (FAC ¶¶ 116 and 126.)

3. Pursuant to Section 12.2.6 of the NMA, however, the insurance policies required under the NMA must "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" as defined in the NMA.

4. Section 12.2.3 of the NMA defines "Owner Insured Parties" to include the Owner (NRV1), the Project Owner (Cosmopolitan), the landlord and tenant under the Lease (also Cosmopolitan and NRV1), their respective parents, subsidiaries, affiliates, and other related persons and entities.

5. Section 12.2.6 of the NMA also provides that the waiver of subrogation requirement applies to both "Operator Policies" and "Owner Policies."

6. "Operator Policies" are defined as Marquee's insurance policies, while "Owner Policies" are defined in section 12.2.5 as insurance maintained by any "Owner Insured Parties."

7. In accordance with the requirement under Section 12.2.6 of the NMA, the St. Paul Excess Policy contains an endorsement entitled "Waiver of Rights of Recovery Endorsement," which provides that if the Named Insured has agreed in a written contract to waive its rights to

recovery of payment for damages for bodily injury, property damage, or personal injury or advertising injury caused by an occurrence, then St. Paul agrees to waive its right of recovery for such payment. (Ex. 2 to MSJ, at T000038.)

8. Cosmopolitan is a Named Insured under the St. Paul Excess Policy pursuant to the Designated Premises Limitation endorsement. (Ex. 2 to MSJ, at T000057.)

9. Waiver of subrogation provisions are universally enforced. *See Davlar Corp. v. Superior Court*, 62 Cal. Rptr. 2d 199, 201-02 (Cal. Ct. App. 1997); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 32 Cal. Rptr. 2d 144, 146-49 (Cal. Ct. App. 1994) (waiver of rights for damages covered by insurance barred insurer's subrogation suit.); *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.*, 86 Cal. Rptr. 3d 715, 718-20 (Cal. Ct App. 2008) (holding tenant's failure to obtain the full amount of liability insurance required by lease did not preclude enforcement of subrogation waiver); *Commerce & Indus. Ins. Co. v. Orth*, 458 P.2d 926, 929 (Or. 1969) (holding insurer waived its subrogation rights against various contractors); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc.*, 831 P.2d 724, 728 (Wash. 1992) (finding subrogation waiver to be valid); *Amco Ins. Co. v. Simplex Grinnell LP*, No. 14-cv-890 GBW/CG, 2016 WL 4425095, *7 (D. N.M. Feb. 29, 2016) (finding subrogation waivers serve important public policy goals, such as "encouraging parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity" (internal quotation marks omitted)).

10. The intent of the parties to the NMA to waive subrogation rights for losses paid by insurance proceeds is clear and unambiguous as expressed in Section 12.2.6 of the NMA. To find otherwise would be inconsistent with the terms of the NMA and the Waiver of Rights of Recovery Endorsement contained within the St. Paul Excess Policy.

11. In opposition to Marquee's MSJ, St. Paul asserts that the subrogation waiver requirements of the NMA and the St. Paul Excess Policy do not apply because Cosmopolitan, as the Project Owner, only agreed to be bound with respect to certain provision of the NMA, which did not include the subrogation waiver provision contained in 12.2.6 of the NMA. This argument fails because it 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 Section 12.1 of the NMA. (*See* National Union's Appendix of Exhibits in Support of MSJ, Ex. 1, T000172, T000183.) Thus, Cosmopolitan assumed NRV1's obligation to provide the insurance as required by Section 12.1 of the NMA. Accordingly, 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. Regardless of whether Cosmopolitan agreed to be bound by the subrogation waiver provision contained in 12.2.6 of the NMA or assumed NRV1's insurance obligations under the NMA, the clear intent of the parties to the NMA was to waive any claims for losses against each other that were paid by insurance proceeds including claims against the Owner Insured Parties (as defined in NMA), which includes Cosmopolitan.

12. St. Paul nonetheless contends that Cosmopolitan is not a party to the NMA. Even if St. Paul's subrogation rights under the NMA are not based on Cosmopolitan's status as a party to the NMA, Cosmopolitan is still a third-party beneficiary of the NMA and is bound by its terms. (*See* NMA, Section 20); *See also Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005) (recognizing that "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, 607 P.2d 118, 120 (1980) (recognizing that "a third-party beneficiary takes subject to any defense arising from the contract that is ascertainable against the promisee"). St. Paul is pursuing subrogation claims by attempting to step into Cosmopolitan's shoes as a third-party beneficiary of the NMA and the intent of the parties to the NMA was to waive such subrogation rights.

13. Accordingly, St. Paul's subrogation claims set forth in the Fifth and Sixth Causes of Action of the FAC fail as a matter of law.

C. <u>St. Paul's Sixth Cause of Action For Subrogation – Express Indemnity Also Fails Because Cosmopolitan Did Not Sustain Any Uninsured Losses</u>

14. The Sixth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that Cosmopolitan did not sustain any uninsured losses.

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15. Pursuant to Section 13.1 of the NMA, Marquee agreed to indemnify, hold harmless and defend NRV1 and its parents, subsidiaries and affiliates (including Cosmopolitan), from and against Losses (as defined in the NMA) to the extent incurred as a result of the breach or default by Marquee of any term or condition of the Agreement, or the negligence or willful misconduct of Marquee that is "not otherwise covered by the insurance required to be maintained" under the NMA. (Emphasis added.)

16. The NMA defines "Losses", in pertinent part, as "liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses and disbursements of a Person not reimbursed by insurance." (Emphasis added.)

17. Nevada courts strictly construe indemnity obligations and will enforce them in accordance with the terms of the contracting parties' agreement. *See United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 673, 289 P.3d 221, 226 (2012); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 339-40, 255 P.3d 268, 274 (2011); *Contreras v. American Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1231 (D. Nev. 2015); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F. Supp. 2d 1262, 1268 (D. Nev. 2008) ("It is well settled that a court should enforce a contract as it is written, should not create a new contract by rewriting unambiguous terms, and has no power to create a new contract.").

18. As explained by the Nevada Supreme Court in *United Rentals Highway Technologies*:

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

128 Nev. at 677, 289 P.3d at 229 (internal quotation marks and citations omitted).

19. The exclusion of insurance payments from the definition of "Losses" in Section 1 of the NMA and the indemnity provision set out in Section 13.1 expressly limits any purported indemnity obligation by Marquee to Cosmopolitan to uninsured losses. (UF 18, 20.)

20. Cosmopolitan's defense in the underlying action and its joint-and-several liability for the verdict and resulting settlement were paid for by insurance. Thus, there is no uninsured loss for which Cosmopolitan could pursue indemnity against Marquee.

21. Accordingly, St. Paul has no valid subrogation claim for express indemnity, and thus, the Sixth Cause of Action against Marquee fails as a matter of law.

D. St. Paul's Fifth Cause of Action For Statutory Subrogation For Contribution Pursuant To NRS 17.225 Also Fails Pursuant to NRS 17.255 Because Cosmopolitan Was Found Liable In The Underlying Action For Intentional Torts

22. The Fifth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that Cosmopolitan was found jointly and severally liable in the underlying action for intentional torts.

23. NRS 17.255 provides, in relevant part, that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death."

24. In the trial of the Underlying Action, Cosmopolitan was found liable with Marquee on all of Moradi's asserted claims, including the intentional tort claims for assault, battery, and false imprisonment, which made Cosmopolitan jointly and severally liable with Marquee. *See* NRS 41.141(5)(b). Prior to trial, the Court held that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers" and that Marquee and Cosmopolitan can be jointly and severally liable for Moradi's injuries. (*See* Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.) Cosmopolitan had its own obligation pursuant to the nondelegable duty to keep patrons of The Cosmopolitan Hotel & Casino safe. *Rockwell v. Sun Harbor Budget Suites,* 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) ("[I]n the situation where a property owner hires security personnel to protect his or her premises and patrons, that property owner has a personal and nondelegable duty to provide responsible security personnel.")

25. Given that the jury in the Underlying Action found Cosmopolitan liable with Marquee for the intentional tort claims of assault, battery, and false imprisonment that contributed to Moradi's injury, Cosmopolitan is precluded from pursuing a contribution from Marquee pursuant to the application of NRS 17.255. As such, St. Paul's subrogation claim for contribution set out in the Fifth Cause of Action premised on stepping into the shoes of Cosmopolitan is also precluded as a matter of law.

E. St. Paul's Fifth Cause of Action For Statutory Subrogation For Contribution Pursuant To NRS 17.225 Also Fails Pursuant to NRS 17.265 Because A Claim For Contribution Is Not Available When The Parties Have Contracted For Express Indemnity

26. The Fifth Cause of Action against Marquee also fails as a matter of law for the separate and independent reason that the parties have contracted for express indemnity.

27. When a tortfeasor has a right to indemnity from another tortfeasor, there is no right to contribution under the Uniform Contribution Act. NRS 17.265 (Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his or her indemnity obligation."); *Calloway v. City of Reno*, 113 Nev. 564, 578, 939 P.2d 1020, 1029 (1997) ("[I]mplied indemnity theories are not viable when an express indemnity agreement exists between the parties.")

28. Section 13 of the NMA contains an express indemnity provision in which Marquee agreed to indemnify, hold harmless and defend NRV1 and Cosmopolitan unless the loss was paid by insurance.

29. Given the existence of the contractually bargained for right to indemnity set out in Section 13 of the NMA, Cosmopolitan has no statutory or equitable right to contribution under Nevada common law or the Uniform Contribution Act pursuant to NRS 17.265. St. Paul asserts the contribution claim is permitted because it is an alternative theory of recovery in the event the express indemnity claim does not prevail. However, a contribution theory of recovery is not permitted when a contract for express indemnity exists to govern the obligations of the respective parties. Accordingly, St. Paul cannot pursue a contribution claim against Marquee based on the alleged subrogation principles as a matter of law.

F. Certification under NRCP 54(b)

30. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

31. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting Marquee's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of Marquee's Motion for Summary Judgment, and the arguments of the parties and good cause existing, Marquee's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2020.

Honorable Gloria Sturman
District Judge, Department XXVI

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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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA'S MOTION FOR SUMMARY JUDGMENT

Defendant National Union Fire Insurance Company of Pittsburgh PA's ("National Union") Motion for Summary Judgment ("MSJ") came on for hearing on October 15, 2019 in Department XXVI of this Court, the Honorable Gloria Sturman presiding. Nicholas B. Salerno of Herold & Sager and Jennifer L. Keller of Keller/Anderle LLP appeared for Defendant National Union, William Reeves and Marc J. Derewetzky of Morales Fierro & Reeves appeared for Plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and Ryan A. Loosvelt of Messner Reeves LLP appeared for Defendant Aspen Specialty Insurance Company ("Aspen").

The Court, having reviewed and considered the pleadings and papers on file,[1] having heard and considered argument of counsel, and good cause appearing, hereby GRANTS National Union's Motion for Summary Judgment.

On October 15, 2019, the Court issued a minute order granting National Union's Motion for Summary Judgment. However, the Court's decision set out herein is not based solely on the contents of the minute order but includes the entire record on file herein. The Court hereby issues the following Findings of Facts, Conclusions of Law and Order.

I.

FINDINGS OF FACT

A. The Underlying Action

1. 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.)

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[1] The pleadings and papers reviewed and considered by the Court include, among other things, National Union's Motion for Summary Judgment, National Union's Request for Judicial Notice in Support of Motion for Summary Judgment, National Union's Appendix of Exhibits in Support of Motion for Summary Judgment, Declaration of Nicholas B. Salerno in Support of Motion for Summary Judgment, Declaration of Richard C. Perkins in Support of Motion for Summary Judgment, St. Paul's Opposition to Motion for Summary Judgment and Request for Discovery Per NRCP 56(d), St. Paul's Response to Statement of Undisputed Facts, St. Paul's Consolidated Appendix of Exhibits in Support of Opposition to Motions for Summary Judgment, Declaration of Marc J. Derewetzky in Support of Opposition to Motion for Summary Judgment, Declaration of William Reeves in Support of Opposition to Motion for Summary Judgment, National Union's Reply in Support of Motion for Summary Judgment, and National Union's Objections to Facts Not Supported by Admissible Evidence Filed in Support of Opposition to Motion for Summary Judgment and Request for Discovery Per NRCP 56(d).

2. 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. (FAC ¶¶ 6-7.)

3. 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.)

4. Moradi alleged that, as a result of his injuries, he suffered past and future lost wages/income and sought general damages, special damages and punitive damages. (*Id*. ¶ 9, Exhibit A.)

5. Aspen, who issued a primary insurance policy to Marquee, agreed to provide a joint defense to both Cosmopolitan and Marquee. National Union, who issued an excess policy to Marquee, subsequently appointed separate counsel to jointly represent both Cosmopolitan and Marquee. (St. Paul Appendix, Exs. C, D, L, M.)

6. During the course of the Underlying Action, Moradi alleged that Cosmopolitan, as the owner of The Cosmopolitan Hotel and Casino (where the Marquee Nightclub was located), faced exposure for the conduct of Marquee by breaching its non-delegable duty to keep patrons safe, including Moradi. (FAC ¶ 13.)

7. The Court held in the Underlying Action that that Cosmopolitan, as owner of the property, "had a nondelegable duty and can be vicariously held responsible for the conduct of the Marquee security officers." and that Marquee and Cosmopolitan can be jointly and severally liable as a matter of law. (*See* Request for Judicial Notice in Support of Motion for Summary Judgment, Ex. 5.)

8. 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 and awarded compensatory damages in the amount of $160,500,000. Because the jury found for Moradi on his intentional-tort claims, the

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judgment would have been joint and several against Marquee and Cosmopolitan. *See* NRS 41.141(5)(b). (FAC, Ex. C.)

9. After the verdict and during the punitive damages phase of the trial, Moradi made a global settlement demand to Marquee and Cosmopolitan. (FAC ¶ 66.)

10. Aspen and National Union as the primary and excess insurers of Marquee, and Zurich American Insurance Company and St. Paul as the primary and excess insurers of Cosmopolitan, 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.)

11. The settlement was funded entirely by the insurance carriers for Cosmopolitan and Marquee. No defendant in the underlying case contributed any money out-of-pocket towards the settlement. National Union on behalf of Marquee and St. Paul on behalf of Cosmopolitan contributed the same amount towards the settlement of the Underlying Action. (FAC ¶ 67-70.)

12. National Union contends its contribution towards the settlement of the Underlying Action on behalf of Marquee resulted in the exhaustion of the National Union Excess Policy. (MSJ p. 10, Undisputed Fact No. ("UF") 17.)

13. The combined defense of Cosmopolitan and Marquee was funded entirely by Aspen and National Union. (FAC ¶ ¶ 27-28, 35-36.)

B. <u>Insurance Policies</u>

1. The Cosmopolitan Insurance Tower

a. <u>Cosmopolitan's Primary Policy with Zurich American Insurance Company</u>

14. Zurich American Insurance Company ("Zurich") issued commercial general liability policy number PRA 9829242-01, effective November 1, 2011 to November 1, 2012 to Nevada Property 1 LLC (the "Zurich Primary Policy"). (FAC ¶ 69; National Union's Appendix of Exhibits in Support of MSJ ("NU Appx."), Ex. 2, W005478.)

15. Cosmopolitan is a named insured under the Zurich Primary Policy. (FAC ¶ 69.) Marquee is not an insured under the Zurich Primary Policy. (*Id*.)

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16. The Zurich Primary Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶ 69; NU Appx., Ex. 2, W005508.)

17. The Zurich Primary Policy provides that Zurich will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 2, W005497 – W005498.)

18. The Zurich Primary Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (*Id.*)

b. Cosmopolitan's Excess Policy with St. Paul

19. St. Paul issued commercial umbrella liability policy number QK06503290, effective March 1, 2011 to March 1, 2013, to Premier Hotel Insurance Group (the "St. Paul Excess Policy"). (FAC ¶ 40; MSJ p. 11, UF 20.)

20. Cosmopolitan is a named insured under the St. Paul Excess Policy. (FAC ¶ 40.) Marquee is not an insured under the St. Paul Excess Policy. (FAC ¶ 41.)

21. The St. Paul Excess Policy contains liability limits of $25,000,000 with each occurrence and $25,000,000 general aggregate. (MSJ p. 11, UF 22.)

22. The St. Paul Excess Policy provides that it will pay on behalf of: (1) the insured all sums in excess of the "Retained Limit" that the insured becomes legally obligated to pay as damages by reason of liability imposed by law; or (2) the named insured all sums in excess of the "Retained Limit" that the named insured becomes legally obligated to pay as damages assumed by the named insured under an "Insured Contract." (MSJ p. 11, UF 23.)

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

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

(MSJ p. 11. UF 24.)

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2. The Marquee Insurance Tower

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

24. Aspen issued a commercial general liability policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012 to The Restaurant Group et. al. (the "Aspen Primary Policy"). (FAC ¶ 15; NU Appx., Ex. 4, ASPEN000032.)

25. Marquee is a named insured under the Aspen Primary Policy. (FAC ¶ 15.)

26. Cosmopolitan qualified as an additional insured to the Aspen Primary Policy with respect to the Underlying Action. (FAC ¶ 24.)

27. The Aspen Policy contains limits of $1,000,000 each occurrence and $2,000,000 general aggregate. (FAC ¶¶ 17, 23; NU Appx., Ex. 4, ASPEN000033.)

28. The Aspen Policy provides that Aspen will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (NU Appx., Ex. 4, ASPEN000042.)

29. The Aspen Policy provides that it applies to "bodily injury" and "property damage" only if caused by an "occurrence" that occurs during the policy period. (*Id.*)

b. Marquee's Excess Policy with National Union

30. National Union issued commercial umbrella liability policy number BE 25414413, effective October 6, 2011 to October 6, 2012, to The Restaurant Group, et al. (the "National Union Excess Policy") (MSJ p. 10, UF 11.)

31. Marquee is a named insured under the National Union Excess Policy. (FAC ¶ 30.)

32. Cosmopolitan qualified as an additional insured to the National Union Excess Policy with respect to the Underlying Action. (FAC ¶ 33; MSJ p. 11, UF 18.)

33. The National Union Excess Policy contains limits of $25,000,000 each occurrence and $25,000,000 general aggregate. (MSJ p. 10, UF 13.)

34. The National Union Excess Policy provides that National Union will pay on behalf of the insured "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage, or Personal and Advertising Injury to which this insurance applies or because of

Bodily Injury or Property Damage to which this insurance applies assumed by the Insured under an Insured Contract." (MSJ p. 10, UF 14.)

35. The National Union Excess Policy defines Retained Limit, in pertinent part, as the total applicable limits of Scheduled Underlying Insurance and any applicable Other Insurance providing coverage to the Insured. (NU Appx., Ex. 1, p. 30.)

36. The policy defines Scheduled Underlying Insurance as the policy or policies of insurance and limits of insurance shown in the Schedule of Underlying Insurance forming a part of the National Union Excess Policy. (*Id.*)

37. Other Insurance is defined in the National Union Excess Policy as a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy. (NU Appx., Ex. 1, p. 29.)

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

> If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the Other Insurance. However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.

(MSJ p. 10, UF 15.)

39. The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy. (MSJ p. 10, UF 16.)

40. National Union received notice of the Underlying Action against Marquee and Cosmopolitan and provided coverage to Cosmopolitan and Marquee in the Underlying Action under a reservation of rights. (FAC ¶ 35.)

41. Cosmopolitan and Marquee were insured under separate towers of insurance. Cosmopolitan was insured under one of the towers of insurance where it was a named insured under the Zurich Primary Policy and the St. Paul Excess Policy, and under the other tower of insurance

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where Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy that were issued to Marquee as the named insured.

C. St. Paul's Claims Against National Union

42. St. Paul's FAC asserts the following four causes of action against National Union:

1) Second Cause of Action for Subrogation – Breach of the Duty to Settle;
2) Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract;[2]
3) Seventh Cause of Action for Equitable Estoppel; and
4) Eighth Cause of Action for Equitable Contribution.

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

44. In the Fourth Cause of Action of the FAC for Subrogation – Breach of the AIG Insurance Contract, St. Paul makes similar allegations to those raised in the cause of action for breach of the duty to settle. St. Paul asserts that National Union breached its obligations to Cosmopolitan by failing to provide a conflict-free defense, favoring the interests of Marquee over Cosmopolitan, failing to pay all available limits under the National Union Excess Policy to resolve Cosmopolitan's liability, and failing to pay any amount on Cosmopolitan's behalf towards the settlement of the Underlying Action. (FAC ¶ 105.) St. Paul asserts that, unlike National Union, St.

[2] St. Paul's FAC refers to the National Union Excess Policy as the AIG Insurance Contract.

Paul did not breach its obligations to Cosmopolitan under the St. Paul Excess Policy in connection to the Underlying Action because Cosmopolitan's coverage under the St. Paul Excess Policy did not apply until the Aspen Primary Policy and National Union Excess Policy exhausted. St. Paul claims it was damaged because it was required to contribute to the settlement of the Underlying Action as a result of National Union's breach of its obligations to Cosmopolitan. (*Id*. ¶¶ 108, 111.) St. Paul alleges that pursuant to the express terms of the St. Paul Excess Policy and principles of subrogation, it is entitled to step into Cosmopolitan's shoes and pursue its rights of recovery against National Union for such breach. (*Id*. ¶ 110.)

45. In the Seventh Cause of Action of the FAC for Equitable Estoppel, St. Paul asserts that both National Union and Aspen asserted throughout the Underlying Action "through both words and actions" that their coverage to Cosmopolitan was primary to Cosmopolitan's direct coverage under Cosmopolitan's own policies, including the St. Paul Excess Policy. (FAC ¶ 132.) St. Paul alleges that it and Cosmopolitan's other direct carriers did not participate in the defense or settlement negotiations on behalf of Cosmopolitan based on these representations. (*Id*. ¶ 134.) St. Paul alleges that equity requires that National Union be precluded from claiming that St. Paul and National Union were excess carriers and that St. Paul had the same obligation to resolve the Underlying Action.

46. In the Eighth Cause of Action of the FAC for Equitable Contribution, St. Paul asserts that in contributing to the settlement of the Underlying Action, it incurred amounts in excess of its equitable share and that National Union failed to contribute its fair and equitable share towards the settlement of the Underlying Action on behalf of Cosmopolitan (St. Paul's insured). (FAC ¶¶ 138-139.) St. Paul asserts that National Union is obligated under principles of equity to reimburse St. Paul for the amounts St. Paul contributed towards settlement of the Underlying Action that Aspen and National Union should have otherwise paid. (*Id*. ¶ 141.)

II.

NATIONAL UNION'S MOTION FOR SUMMARY JUDGMENT

47. On September 13, 2019, National Union's filed Defendant National Union Fire Insurance Company of Pittsburgh PA's MSJ. National Union's MSJ asserts that the Second and

Fourth Causes of Action for subrogation fail as a matter of law because the St. Paul Excess Policy is not excess to the National Union Excess Policy, rather St. Paul and National Union are both excess insurers at the same level of coverage in separate towers of coverage with equal obligations to their insured(s).

48. National Union's MSJ further asserts as a separate and independent ground to grant summary judgment that the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract fails as a matter of law because St. Paul has no legal basis or standing to step into the shoes of Cosmopolitan to pursue subrogation for breach of contract against National Union when Cosmopolitan was fully defended and indemnified by the insurers in the Underlying Action and, thus, has suffered no damages under the insurance contract. Additionally, National Union argues that the damages sought by St. Paul are extra-contractual damages that are not available under a breach of contract cause of action.

49. National Union's MSJ further asserts as a separate and independent ground to grant summary judgment that the Eighth Cause of Action for Equitable Contribution fails as a matter of law because National Union exhausted its policy limit in settlement of the Underlying Action and a claim for contribution does not apply to seek extra-contractual damages that fall outside of policy limits.

50. National Union's MSJ further asserts that the Seventh Cause of Action for Equitable Estoppel fails as a matter of law because such a claim is dependent on the legal viability of the other causes of action against National Union, which all fail for the reasons each cause of action against National Union fails as a matter of law.

III.

CONCLUSIONS OF LAW

A. Standard of Review

1. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some

metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); *Wood*, 121 Nev. at 732, 121 P.3d at 1031-32. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Bulbman*, 108 Nev. at 110, 825 P.2d 591 (quoting *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. St. Paul's Second Cause of Action For Subrogation – Breach of The Duty To Settle

2. In the Second Cause of Action of the FAC for Subrogation – Breach of the Duty to Settle ("Second Cause of Action"), St. Paul asserts a right of subrogation against National Union on the premise the St. Paul Excess Policy is excess to the National Union Excess Policy. (*see, e.g.,* FAC ¶ 44.)

3. As a threshold matter, the Second Cause of Action fails as a matter of law because the Nevada Supreme Court has never recognized an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

4. The Second Cause of Action also fails as a matter of law for the separate and independent reason that no jurisdiction, let alone Nevada, recognizes an equitable subrogation claim between excess carriers in separate towers of coverage. And this Court is unwilling to be the first to do so.

5. General insurance principles and the subject policies outlined above demonstrate that Cosmopolitan and Marquee are named insureds in separate towers of coverage. Cosmopolitan is a named insured under a separate tower of insurance that includes the Zurich Primary Policy and the St. Paul Excess Policy. Marquee is a named insured under a separate tower of insurance that includes the Aspen Primary Policy and the National Union Excess Policy. Cosmopolitan qualified as an additional insured under the Aspen Primary Policy and the National Union Excess Policy issued to Marquee as the named insured.

6. It is well-established that "[p]rimary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability," and that "[e]xcess or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted." *Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co.*, 113 Cal. Rptr. 2d 613, 618 (Cal. Ct. App. 2001) (citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 178 Cal. Rptr. 908 (Cal. Ct. App. 1981); *Carmel Dev. Co. v. RLI Ins. Co.*, 24 Cal. Rptr. 3d 588, 595 (2005) ("[U]mbrella coverage is generally regarded as true excess over and above any type of primary coverage, excess provisions arising in any manner, or escape clauses." (internal quotation marks omitted)).

7. St. Paul issued an umbrella policy to Cosmopolitan while National Union issued an umbrella policy to Marquee. Thus, St. Paul's and National Union's respective umbrella policies remain in separate towers of coverage and, as such, St. Paul and National Union are co-excess insurers that provided coverage to Cosmopolitan at equal levels of coverage under two separate and distinct coverage towers.

8. The St. Paul Excess Policy is a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured, Cosmopolitan. The scheduled underlying insurance to the St. Paul Excess Policy is the Zurich Primary Policy.

9. The National Union Excess Policy is also a general excess policy over scheduled underlying insurance and applicable other insurance providing coverage to the insured Cosmopolitan. The scheduled underlying insurance to the National Union Excess Policy is the Aspen Primary Policy.

10. Based on the aforementioned discussions herein, the St. Paul Excess Policy and the National Union Excess Policy contain nearly identical "other insurance" provisions. When two policies contain such language, neither policy shall be excess to the other. *See Everest Nat. Ins. Co. v. Evanston Ins. Co.*, No. 2:09-cv-2077-RLH-PAL, 2011 WL 534007 at *3 (D. Nev. Feb. 8, 2011) (ruling that judgment and defense costs were to be shared equally between insurers that contained the same amounts of limits and both contained Other Insurance clauses providing they were excess

to other available insurance); *CSE Ins. Group v. Northbrook Property & Cas. Co.*, 29 Cal. Rptr. 2d 120, 121-23 (Cal. Ct. App. 1994); *Century Surety Co. v. United Pac. Ins. Co.*, 135 Cal. Rptr. 2d 879, 884-85 (Cal. Ct. App. 2003).

11. The St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. Both St. Paul and National Union had independent obligations to Cosmopolitan, both discharged those obligations by settlement of the Underlying Action, both had the same limits of insurance, and neither is in an equitably superior position to the other.

12. Accordingly, St. Paul's Second Cause of Action For Subrogation – Breach of the Duty to Settle fails as a matter of law.

B. St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract

13. Although St. Paul is not a party to the National Union Excess Policy, in the Fourth Cause of Action for Subrogation – Breach of the AIG Insurance Contract ("Fourth Cause of Action"), St. Paul is pursuing a claim against National Union for an alleged breach of National Union's insurance contract as an alleged subrogee of Cosmopolitan.

14. However, for the same reasons proffered above in concluding that the Second Cause of Action fails as a matter of law, the Fourth Cause of Action must also fail as a matter of law. Specifically, the Nevada Supreme Court has never recognized the viability of an equitable subrogation claim between insurers, and this Court is unwilling to do so in the first instance.

15. And even if equitable subrogation claims among carriers were viable in Nevada, for the reasons explained above, the St. Paul Excess Policy is not excess to the National Union Excess Policy with regard to any coverage provided to Cosmopolitan. As such, St. Paul cannot pursue any claims against National Union based on an equitable subrogation theory of recovery.

16. The Fourth Cause of Action also fails as a matter of law because Nevada courts have expressly rejected contractual subrogation claims between insurers. In the insurance context, contractual subrogation generally is not applied by an excess insurer against a primary insurer, but between an insurer and a third-party tortfeasor. *See Colony Ins. Co. v. Colorado Cas. Ins. Co.*, No.

2:12-cv-01727-RFB-NJK, 2016 WL 3360943 at *6 (D. Nev. June 9, 2016). As noted by the *Colony* court, the Nevada Supreme Court has held that contractual subrogation in the context of insurers and insureds may contravene public policy and contractual subrogation may provide for windfalls in the insurance context. *Id.* (citing *Maxwell v. Allstate Ins. Cos.*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986)). As such, St. Paul cannot pursue claims against National Union based on a contractual subrogation theory of recovery.

17. The Second Cause of Action also fails as a matter of law for the separate and independent reason that Cosmopolitan has suffered no contractual damages.

18. General principles of subrogation allow an insurer to step into the shoes of its insured, but the insurer has no greater rights than the insured and is subject to all of the same defenses that can be asserted against the insured. *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.*, 49 Cal. Rptr. 3d 785, 790-91 (Cal. Ct. App. 2006).

19. A breach of contract claim requires (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *See Contreras v. American Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1224 (D. Nev. 2015) (*citing Richardson v. Jones*, 1 Nev. 405, 409 (1865)).

20. A claim for breach of contract is not actionable without damage. *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished) ("It is beyond cavil that a party must suffer actual loss before it is entitled to damages." (quoting *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1153 (1st Cir. 1992)); *California Capital Ins. Co. v. Scottsdale Indem. Ins. Co.*, 2018 WL 2276815, at *4 (Cal.Ct.App. May 18, 2018) (unpublished); *Bramalea California, Inc. v. Reliable Interiors, Inc.*, 14 Cal. Rptr. 3d 302, 306 (Cal. Ct. App. 2004). In the insurance context, damages for breach of an insurance policy are based on the failure to provide benefits owed under the policy. *Morris v. Paul Revere Life Ins. Co.*, 135 Cal. Rptr. 2d 718, 726 (Cal. Ct. App. 2003); *Avila v. Century Nat'l Ins. Co.*, No. 2:09-cv-00682-RCJ-GWF, 2010 WL 11579031 (D. Nev. Feb. 10, 2010). If the insured does not suffer "actual loss" from the insurer's breach of a duty under the policy, there can be no claim for

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damages. *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, 449 P.3d 1268 (Nev. 2019) (unpublished).

21. Here, St. Paul alleges that National Union breached its obligations to Cosmopolitan under the National Union Excess Policy and seeks extra-contractual damages for such breach. However, it is undisputed that Cosmopolitan's defense and indemnity in the Underlying Action were fully paid for by insurers. The damages sought by St. Paul are not contract damages suffered by Cosmopolitan due to any failure to provide policy benefits, but are instead an attempt to recoup extra-contractual damages to reimburse St. Paul for the money it was required to pay under its policy in discharge of its separate obligation to Cosmopolitan.

22. It is undisputed that Cosmopolitan was indemnified by National Union when it exhausted its policy limit by participating in the settlement of the Underlying Action. Cosmopolitan's defense in the Underlying Action was funded entirely by insurers. Accordingly, Cosmopolitan suffered no contract damages as a matter of law and, as such, has no viable claim for breach of contract against National Union. As Cosmopolitan has no viable claim for breach of contract against National Union, neither does St. Paul under subrogation principles as it holds no greater rights than Cosmopolitan.

23. The facts of this case are similar to *California Capital*, in which an insurer sued another insurer to recover amounts it paid in settlement (and defense) of its named insureds in an underlying bodily injury action. Like St. Paul, California Capital asserted causes of action against a co-carrier for breach of contract and breach of the covenant of good faith and fair dealing, among others, alleging its named insureds were additional insureds under the defendant insurer's policy and that its named insureds had expressly assigned all of their rights under the defendant insurer's policy to California Capital. 2018 WL 2276815, at *2-4. California Capital alleged the defendant insurer breached its policy by refusing to provide the additional insureds the benefits due under the policy and also alleged defendant insurer breached its obligations of good faith by failing to defend and indemnify the insureds when it knew they were entitled to overage under the policy, withholding payments under the policy when defendant insurer knew plaintiff's claim was valid, failing to properly investigate the insureds' request for policy benefits, and failing to provide a

reasonable explanation of the factual basis for denial of the insureds' claim for benefits under the policy. *Id.* at *4. The trial court held that California Capital had no cause of action for breach of contract or breach of the covenant of good faith and fair dealing because the insureds had sustained no damage as a result of defendant insurer's alleged failure to defend and indemnify them or its failure to settle the claim within its policy limit. *Id.* Given the insureds' defense and post-judgment settlement had been fully paid by California Capital, the trial court found the essential element of contract damages was absent from the breach of contract cause of action such that the insureds had no viable claims to assign to California Capital. *Id.* The trial court further found that California Capital had no direct cause of action against the defendant insurer because it was not a party to defendant insurer's policy. *Id.* at *6. The trial court in *California Capital* found that both insurers provided primary coverage for the loss. *Id.* at *8. The Court of Appeal affirmed the foregoing findings by the trial court and held that California Capital could not pursue assigned claims for breach of contract or breach of the covenant of good faith and fair dealing against the defendant insurer. *Id.* at *1, *30.

24. Like the plaintiff insurer in *California Capital*, St. Paul is not a party to the National Union Excess Policy and has no direct cause of action against National Union for breach of contract or breach of the covenant of good faith and fair dealing. Both St. Paul and National Union had independent obligations to Cosmopolitan, and both insurers discharged those obligations by settlement of the Underlying Action. As such, neither insurer is in an equitably superior position as to the other. Further, given the cost of Cosmopolitan's defense and the post-verdict settlement was fully funded by insurers in the Underlying Action, Cosmopolitan has no contract damages for policy benefits against National Union. Therefore, Cosmopolitan has no viable breach-of-contract claim for St. Paul to step into its shoes to pursue against National Union. Accordingly, St. Paul's Fourth Cause of Action For Subrogation – Breach of The AIG Insurance Contract fails as a matter of law.

C. <u>St. Paul's Eighth Cause of Action for Equitable Contribution</u>

25. The National Union Excess Policy provides that the "Limits of Insurance" as set forth in the declarations is the most that National Union will pay regardless of the number of

insureds, claims or suits brought, persons or organizations making claims or bringing suits, or coverages provided under the policy.

26. The National Union Excess Policy further provides the most National Union will pay for damages on behalf of any person or organization to whom the named insured is obligated to provide insurance is the lesser of the limits shown in the declarations or the minimum limits of insurance the named insured agrees to procure in a written insured contract.

27. Here, National Union exhausted its policy limit in contributing towards the settlement of the Underlying Action.

28. Given the National Union Excess Policy is exhausted, National Union has no further obligation under the policy. *See Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n*, No. 2:09-cv-01672-RCJ-RJJ, 2012 WL 870289 at *3 (D. Nev. Mar. 14, 2012) (concluding that "once the [limits are] reached, the insurer's duties under the policy are extinguished"); *Deere & Co. v. Allstate Ins. Co.*, 244 Cal. Rptr. 3d 100, 112 (Cal. Ct. App. 2019) (holding that "[a] 'policy limit' or 'limit of liability' is the maximum amount the insurer is obligated to pay in contract benefits on a covered loss." (internal quotation marks omitted)).

29. St. Paul seeks to step into Cosmopolitan's shoes to pursue extra-contractual damages outside National Union's policy benefits based a claim for equitable contribution. However, a claim for contribution is not available to pursue damages from a carrier that is in excess of the carrier's policy limit. Accordingly, St. Paul's Eighth Cause of Action for Equitable Contribution against National Union fails as a matter of law.

D. St. Paul's Seventh Cause of Action for Equitable Estoppel

30. In the FAC, St. Paul asserts the Seventh Cause of Action for Equitable Estoppel ("Seventh Cause of Action"), seeking to preclude National Union from asserting that: (1) National Union's policies were not primarily responsible for the defense and resolution of the Underlying Action; and (2) St. Paul, a non-defending carrier, had the same obligation to resolve the Underlying Action as Aspen and National Union. (FAC ¶ 135.)

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31. Typically, equitable estoppel is raised as an affirmative defense. However, under Nevada Law, equitable estoppel can be treated as an affirmative claim under the appropriate circumstances.

32. To establish equitable estoppel, the plaintiff must prove the following: (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; and (4) he must have relied to his detriment on the conduct of the party to be estopped. *See Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc*., 98 Nev. 609, 614, 655 P.2d 996, 999 (1982); I*n re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-1062 (2005).

33. Because the Second, Fourth, and Eighth Causes of Action fail as a matter of law, including for reasons that are unaffected by National Union's assertions that St. Paul seeks to estop, this Seventh Cause of Action must also fail.

E. St. Paul's Request for Discovery Per NRCP 56(d)

34. True and correct copies of the Nightclub Management Agreement ("NMA") and the St. Paul Excess Policy at issue in this matter have been provided as part of National Union's MSJ. As such, all necessary and potentially relevant exhibits to properly consider and determine National Union's MSJ are included in the moving papers and the record is complete.

35. There remains no genuine dispute of material facts with respect to National Union's MSJ that require further discovery.

36. Accordingly, St. Paul's Request for Discovery per NRCP 56(d) is denied.

F. Certification under NRCP 54(b)

37. "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." NRCP 54(b).

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38. This Court finds, pursuant to NRCP 54(b), that there is no just reason for delay of entry of final judgment granting National Union's MSJ against St. Paul's claims as discussed herein.

ORDER

Based on the pleadings, papers on file, the memorandum of points and authorities in support of National Union's Motion for Summary Judgment, and the arguments of the parties and good cause existing, National Union's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 14th day of May, 2019.

Honorable Gloria Sturman
District Judge, Department XXVI

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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 ORDER DENYING ST. PAUL FIRE & MARINE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING IN PART DEFENDANT ASPEN SPECIALITY INSURANCE COMPANY'S COUNTER-MOTION FOR SUMMARY JUDGMENT

Plaintiff St. Paul Fire & Marine Insurance Company's ("Plaintiff" or "St. Paul") Motion for Partial Summary Judgment against Defendant Aspen Specialty Insurance Company ("Defendant" or "Aspen"), and Aspen's Countermotion for Summary Judgment, having come on for hearing on October 8, 2019 before the Honorable District Court Judge Gloria Sturman in Department XXVI of the Eighth Judicial District Court, Clark County, Nevada. Ryan A. Loosvelt, Esq. of Messner Reeves, LLP appeared on behalf of the Defendant, and Ramiro Morales, Esq. of Morales Fierro Reeves appeared on behalf of the Plaintiff. The Court, having reviewed the papers and exhibits submitted by the parties, rules as follows:

I.

FINDINGS OF FACT

This action relates to a post-judgment settlement by St. Paul, Defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union"), Zurich Insurance, and Aspen following a jury trial in the personal injury case of *Moradi v. Nevada Property 1, LLC dba The Cosmopolitan, et al*., District Court Clark County, Nevada, Case No. A-14-698824-C ("*Moradi* Action"). St. Paul seeks to recover money it paid toward that settlement from the defendants in this action including Aspen.

In the *Moradi* Action, Plaintiff David Moradi ("Moradi") alleged that, on or about April 8, 2012, he was a patron at the Marquee Nightclub located within The Cosmopolitan Hotel and Casino when he was attacked and beaten by Marquee employees resulting in bodily injuries. 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.

Among other pre-trial settlement offers, Moradi issued a $1.5 million Offer of Judgment that lapsed.

The *Moradi* Action went to trial and resulted in a judgment against Marquee and Cosmopolitan, and there was a post-judgment settlement funded by St. Paul, National Union, Zurich, and Aspen. St. Paul contends Aspen has a $2 million policy limit for the *Moradi* Action because the Aspen Policy provides $1 million in applicable limits for damages because of bodily injury and $1 million in applicable limits for personal and advertising Injury, which St. Paul contends were both implicated by the *Moradi* Action, whereas Aspen contends its policy operates to limit coverage for the *Moradi* Action to a $1 million.

Aspen issued insurance policy number CRA8XYD11, effective October 6, 2011 to October 6, 2012, to the Restaurant Group, et. al. ("Aspen Policy"). Defendant Roof Deck Entertainment, LLC (i.e, "Marquee) is a named insured in the Aspen Policy by endorsement.

The Aspen Policy contains a $1 million each occurrence limit for damages because of

bodily injury and property damage, a $1 million per person limit for damages because of personal and advertising injury, and a $2 million general aggregate limit. The Aspen Policy contains a "Commercial General Liability Coverage Form" and a "Liquor Liability Coverage Form." The "Commercial General Liability Coverage Form" contains Section I, Coverages, which contains "Coverage A Bodily Injury and Property Damage", "Coverage B Personal and Advertising Injury Liability", and "Coverage C Medical Payments."

The "Commercial General Liability Coverage Form" of the Aspen Policy, Section I, "Coverage A Bodily Injury and Property Damage Liability" provides:

> SECTION I – COVERAGES
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

Section I, "Coverage A Bodily Injury and Property Damage Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **2.Exclusions**
>
> This insurance does not apply to:
>
> **a. Expected Or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
>
> ***
>
> **o. Personal And Advertising Injury**
>
> "Bodily injury" arising out of "personal and advertising injury".

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial

General Liability Coverage Form" of the Aspen Policy provides:

> **COVERAGE B PERSONAL AND ADVERTISING**
>
> **INJURY LIABILITY**
>
> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result.

Section I, "Coverage B Personal and Advertising Injury Liability" in the "Commercial General Liability Coverage Form" of the Aspen Policy also contains the following exclusions:

> **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".
>
> ***
>
> **d. Criminal Acts**
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

Section V in the "Commercial General Liability Coverage Form" of the Aspen Policy includes the following definitions:

> **SECTION V – DEFINITIONS**
>
> ***
>
> 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
>
> ***
>
> 13."Occurrence" means an accident, including continuous or

repeated exposure to substantially the same general harmful conditions.

14."Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

The Aspen Policy also contains the following Amendment by Endorsement (the "Other Insurance Endorsement"):

The Common Policy Conditions (IL 00 17 11 /98) are amended by the addition of the following:

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 policies shall not exceed 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.

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II.

CONCLUSIONS OF LAW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Nev. R. Civ. P. ("NRCP") 56(c). On a summary judgment motion it is the moving party's obligation to show that there is "no genuine issues of material fact." NRCP 56(c). The party moving for summary judgment bears the initial burden of production to show the absence of material fact. Cuzze v. Univ. & Cmty. College Sys., 123 Nev. 598, 602, 172 P.3d 131 (2007). If such a showing is made, the party opposing summary judgment assumes the burden of production to show the existence of material fact. Id. A party opposing summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Wood v. Safeway, Inc., 121 Nev. 732, 121 P.3d 1026 (2005).

An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion. EDCR 2.20(f). A counter-motion will be heard and decided at the same time set for the hearing of the original motion and no separate notice of motion is required. *Id.*

Plaintiff's motion for summary judgment and Aspen's Countermotion both seek a legal determination concerning the interpretation of the Aspen Policy's policy limits for the *Moradi* Action. Plaintiff contends that Aspen's policy limit for the *Moradi* Action was $2 million and Aspen's opposition and countermotion opposes such relief and countermoves for a determination that it's policy limit was $1 million for the *Moradi* Action. Aspen's Countermotion also seeks summary judgment on Plaintiff's claims arguing they are not viable and/or fail as a matter of law.

Regarding Aspen's Countermotion to the extent it seeks a ruling on the viability of Plaintiff's claims and/or whether they fail as a matter of law, the Court views these other issues as questions of fact.

This Court therefore focuses its ruling here on the interpretation of the Aspen Policy's policy limits as it applies to the *Moradi* Action. Interpretation of a contract is a question of law.

Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties. *Farmers Ins. Exch*., 119 Nev. at 64. The interpretation of an insurance policy presents a legal question. *Las Vegas Metropolitan Police Dept. v. Cregis Ins. Co*., 127 Nev. 548, 553, 256 P.3d 958, 961 (2011).

In determining the meaning of an insurance policy, the language should be examined from the viewpoint of one not trained in law or in the insurance business; the terms should be understood in their plain, ordinary and popular sense. *National Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc*., 100 Nev. 360, 364, 682 P.2d 1380, 1382 (1984). Where the language of the policy is not ambiguous, it should be given its plain meaning and construed as written. *Farmers Ins. Exchange v. Young*, 108 Nev. 328, 332, 832 P.2d 376, 378 (1992). Courts interpret the policy language according to its plain and ordinary meaning and will not rewrite contract provisions that are otherwise unambiguous or increase an obligation to the insured that was intentionally and unambiguously limited by the parties. *Vitale v. Jefferson Ins. Co. of NY*, 116 Nev. 590, 595, 5 P.3d 1054, 1057-1058 (2000).

Where an ambiguity in the language of the policy exists, the contract will be given a construction which will fairly achieve its object of providing indemnity for the loss to which the insurance relates. *Reno's Executive Air, Inc*., 100 Nev. at 365. If policy language is ambiguous, an interpretation in favor of coverage is reasonable only if it is consistent with the objectively reasonable expectations of the insured. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1265, 833 P.2d 545 (1992).

A policy must be read as a whole in order to give a reasonable and harmonious meaning and effect to all its provisions. *Reno's Executive Air, Inc*., 100 Nev. at 364. A court must look to the entire contract of insurance for a true understanding of what risks are assumed by the insurer and what risks are excluded. Id.

Nevada has adopted the "causal" approach to determining whether "a particular situation constitutes a single occurrence or multiple occurrences for the purposes of insurance liability." *Bish v. Guaranty Nat'l Ins. Co*., 109 Nev. 133, 135, 848 P.2d 1057, 1058 (1993). The focus of the

inquiry is not on the number, magnitude or time of the injuries, but rather on the cause or causes of the injury; as long as the injuries stem from one proximate cause there is a single occurrence. *Bish*, 109 Nev. at 135; see also *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co*., 178 Cal.App.4th 620, 633-634, 55 Ca.Rptr.3d 844 (2007). Policy limits are determined by the cause of the damage. See *Century Sur. Co. v. Casino West, Inc*., 99 F.Supp.3d 1262, 1264 (D. Nev. Mar. 27, 2015), citing *Bish*, 109 Nev. at 137; *Safeco Ins. Co. of America*, 178 Cal.App.4th at 634.

Plaintiff and Aspen do not dispute there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy. This Court also finds that all of Moradi's injuries are attributable to one proximate, uninterrupted and continuing cause and concludes there has been one "occurrence" under CGL Coverage Part A of the Aspen Policy implicated by the *Moradi* Action.

To the extent Moradi also sought damages because of personal injury under Coverage Part B of the Aspen Policy, the Court finds that the Other Insurance Endorsement to the Aspen Policy operates in a manner of anti-stacking of the Coverage Part A and Coverage Part B limits. See e.g., *Farmers Ins. Group v. Stonik By and Through Stonik*, 110 Nev. 64, 867 P.2d 389 (1994). Considering the Aspen Policy as a whole, the Court therefore concludes that the plain language of the Aspen Policy operates to limit coverage for the *Moradi* action to $1 million.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment is DENIED and Aspen's Countermotion for Summary Judgment is GRANTED IN PART in that the Court concludes the Aspen Policy's policy limit for the *Moradi* Action is a $1 million policy limit. Aspen's Countermotion on other issues presented is denied.

IT IS SO ORDERED this 14th day of May, 2020.

DISTRICT COURT JUDGE

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APPROVED AS TO FORM AND CONTENT:

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