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. 83794

Related to Nevada Supreme Court Case No. 81344

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

REPLY IN SUPPORT OF PETITION UNDER NRAP 21 FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF PROHIBITION

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PETITIONER, ASPEN SPECIALTY INSURANCE COMPANY ("Petitioner" or "Aspen") presents its Reply Brief in Support of its Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Prohibition ("Petition").

OBJECTIONS TO ST. PAUL'S STATEMENT OF FACTS

Aspen objects that the Procedural History and Factual Background provided by St. Paul Fire & Marine Insurance Company ("St. Paul" or "Respondent") in its Answer to Petition for Extraordinary Writ Relief ("Answer") improperly presents unproven allegations as affirmative facts. The Order at issue herein was based solely on consideration of the unsubstantiated allegations contained in St. Paul's First Amended Complaint ("FAC") and the insurance policies of the parties. (*See generally* XIII App. 1780-1808; XV App. 2183-94). Accordingly, contrary to the implication of Respondent's statement of facts, the District Court made no findings of fact with respect to the merits of St. Paul's allegations beyond what could be ascertained via the insurance policies of the parties.[1] Further, whether St. Paul believes this case is a "straightforward case of bad faith" or that "Cosmopolitan should not have had to pay a dime," such conclusory opinions and subjective beliefs

[1] Respondent often neglects to provide any citation, or provides inaccurate citations to the record in its statement of facts. For example, for its assertion that, "[a]bsent a conflicted defense, Cosmopolitan would have cross-complained against Marquee for indemnity, and, neither Aspen nor National Union ever sought nor procured a conflict waiver from Cosmopolitan," St. Paul cites 1 AA 53, which is merely a declaration by St. Paul's counsel, asserting Aspen had not produced such documentation in this action as of August 29, 2019. *See id.*

do not constitute facts that are properly before this Court, and therefore do not warrant consideration. *See* Answer, p. 5.

REASONS THE WRIT SHOULD ISSUE

This Court should issue a writ of mandamus or writ of prohibition, directing the District Court to either vacate its inconsistent ruling, whereby it denied Aspen's Renewed Motion for Summary Judgment or to enter an order granting Aspen's Renewed Motion for Summary Judgment. Such relief is necessary here to protect the rights of Aspen to not have to litigate legally incognizable claims that St. Paul has raised against it.

St. Paul professes that the claims it has raised are nothing more than ordinary subrogation claims brought by an excess insurer against a primary insurer. However, such claims have not been recognized in Nevada, nor has any other jurisdiction chosen to extend such liability to insurers residing in separate towers of insurance coverage. St. Paul desires to establish precedent in Nevada, whereby it can shift its entire liability risk onto an insurance provider who never contracted with St. Paul's insured, thereby insulating itself from all losses attendant with claims against its own principle insureds.

Writ relief is appropriate to address the legal issues of statewide importance requiring this Court's clarification that are presented herein. These include whether an excess insurer can bring claims for equitable or contractual subrogation against a

primary insurer residing in a separate tower of insurance coverage, or whether such claims may be maintained where a primary insurer defended and indemnified an additional insured to policy limits. Extensive policy reasons exist for this Court to decline to recognize such claims. As such, Aspen respectfully requests that this Court grant its Petition.

I. EXTRAORDINARY RELIEF IS PROPER, AS LEGAL ISSUES OF STATEWIDE IMPORTANCE NEED CLARIFICATION.

A. The Petition Presents Legal Issues of Statewide Importance Needing Clarification.

Respondent has failed to present any cogent argument in opposition to Aspen's contention that writ relief is proper in that St. Paul does not address the proper relevant alternative grounds for mandamus relief.[2] As explicitly delineated

[2] Respondent has not raised any arguments with respect to Petitioner's request for a writ of prohibition. "When the district court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extrajurisdictional act" and it is appropriate where "an important issue of law needs clarification" and intervention "serves public policy" (citations omitted). *See Canarelli v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 247, 250, 464 P.3d 114, 119 (2020) (citations omitted); *see also NuVeda, LLC v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 137 Nev. Adv. Op. 54, 495 P.3d 500, 503 (2021) ("A writ of prohibition…may be issued to compel a person or body exercising judicial functions to case performing beyond its legal authority") (citation omitted).

The District Court acted in excess of its jurisdiction or legal authority when it allowed St. Paul's claims to proceed against Aspen, thereby recognizing new law that no known jurisdiction has adopted. Respondent's claims are not warranted under existing Nevada law. As such, the District Court should have granted summary judgment in favor of Aspen, just as it did with Real Party in Interest, National Union Fire Insurance Company of Pittsburgh, PA's ("National Union") similar motion for summary judgment, so that such issues of first impression could have been presented

by this Court, mandamus relief is proper where – as here – a petitioner presents "legal issues of statewide importance requiring clarification," the determination of which will "promote[] judicial economy and administration by assisting other jurists, parties, and lawyers." *Walker v. Second Jud. Dist. Ct.*, 476 P.3d 1194, 1198-99 (2020) (citations omitted); *MDC Restaurants, LLC v. The Eighth Jud. Dist. Ct. of the State of Nevada in & for Cnty. of Clark*, 134 Nev. 315, 318, 419 P.3d 148, 151 (2018) (mandamus relief is appropriate when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition") (citation omitted).

While such "advisory" mandamus relief is subject to strict limits, it is granted "when the issue presented is novel, of great public importance, and likely to recur." *MDC Restaurants, LLC*, 134 Nev. at 318-19 (citation omitted). Writ review in the summary judgment context is appropriate where cases ***either***: (1) present "serious issues of substantial public policy"; or (2) involve "important precedential questions of statewide interest." *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). Mandamus relief is appropriate here because the Petition meets both grounds for consideration.

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to this Court for its consideration concurrently via an appeal by St. Paul. Petitioner therefore requests that this Court direct the District Court to not permit St. Paul's claims to proceed and to direct it to grant Aspen's Renewed Motion for Summary Judgment.

Serious issues of substantial public policy are implicated by the issues being presented to this Court. Throughout the Petition, Aspen delineated extensive public policies that militate against the application of equitable or contractual subrogation to claims between insurers, particularly those involving insurers residing in separate towers of insurance coverage. *See, e.g.* Petition, pp. 21-24, 26 (claims for equitable subrogation between insurers for failure to settle violate public policies); *id.* pp. 27-33 (public policies militate against application of equitable subrogation to claims between insurers in separate towers of insurance coverage); *id.* pp. 38-40 (claims for contractual subrogation violate public policies). In light of the considerable public policy considerations implicated herein, mandamus relief is appropriate.

The Petition also presents important legal issues of first impression that are of statewide importance, requiring such relief. This Court's determination as to whether an excess insurer can bring claims for equitable or contractual subrogation against a primary insurer in the two tower context does not merely affect Petitioner. Rather, this Court's determination of such questions will have considerable impact on insurance carriers throughout Nevada, including, but not limited to, the formation of and/or revisions to insurance policies and rates; the valuation, payment, or settlement of claims brought against policy holders; and the potential filing and resolution of untold subrogation complaints that may be brought by excess carriers or carriers for

additional insureds whenever their policies are triggered, including those that are currently being litigated or those that may be subject to future litigation.

Whether this Court choses to recognize equitable or contractual subrogation claims between insurers is an important novel precedential question of statewide interest that will affect the entire insurance industry in Nevada, and questions regarding the viability of such claims under Nevada law are highly likely to recur; indeed, *they have already recurred*.[3] In light of the same, mandamus relief is appropriate.

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[3] Respondent falsely asserts "the only parties currently interested in the outcome of the legal questions here and in the Appeal are Aspen, St. Paul, National Union, and Marquee." Answer at p. 15. St. Paul is well aware that Aspen is currently involved in *another* two-tower insurance subrogation case in Nevada, which is pending in the federal district court: *Zurich American Ins. Co. v. Aspen Specialty Ins. Co.*, U.S. District Court for the District of Nevada, Case No.: 2:20-cv-01374-APG-DJA (the "Zurich Case"); *see also* Answer, p. 20 (citing the Zurich Case); St. Paul's Reply Brief in Nevada Supreme Court Case No. 81344, filed November 30, 2021 (repeatedly citing to the Zurich Case in its appeal).

In the Zurich Case, Cosmopolitan's primary insurer – Zurich American Insurance Company – has asserted analogous insurance subrogation claims against Aspen, as primary insurer for Marquee (under whose policy Cosmopolitan is an additional insured) based on purported bad faith failure to settle an underlying claim brought against Cosmopolitan and Marquee. Grappling with the same legal issues presented in this Petition, the U.S. District Court aptly recognized the presence of "numerous novel issues of Nevada law" and recommended the parties consider presenting such legal issues to this Court via a certification pursuant to NRAP Rule 5. *See* Order Granting in Part Motion to Dismiss, ECF. No 29, p. 15:6-8 (XX App. AA 2609-23). Given the inherently similar legal issues and the likelihood that this Court's determination on such questions will "provide valuable guidance on Nevada law governing the claims" in the Zurich Case, the federal district court ordered that the Zurich Case be stayed pending this Court's determination as to the legal viability of such claims via Aspen's petition and St. Paul's related appeal. *See* Order Staying

B. Judicial Economy and Administration Favor Granting the Petition.

Granting Petitioner's request for extraordinary writ relief would promote sound judicial economy and administration. This case is inherently complicated, involving review of hundreds of thousands of pages of discovery, extensive discovery disputes regarding production of purportedly privileged documentation with respect to the consideration of various counsel for the underlying litigation, and effectively relitigating the entire underlying claim, which proceeded through the trial phase.

Clarification of the law by this Court would either alter the District Court's denial of Aspen's Renewed Motion for Summary Judgment (thereby dismissing this case), or, alternatively, it would limit or alter the scope of discovery to tailor it to the remaining claims and their related elements and defenses, which currently remain undefined under Nevada law. In either situation, judicial economy strongly favors consideration of the Petition.

Respondent provides nonsensical arguments in support of its assertion that judicial economy favors denial, claiming granting writ relief would "indefinitely stop" its current appeal, necessitate the initiation of a "new appeal," and result in two conflicting appeals that would need to be "combined, reconciled, and decided,"

Case, ECF No. 43, p. 2:3-6 (XX App. AA 2624-25). Although these orders are a matter of public record, Petitioner has attached them to this Reply for the convenience of the Court.

thereby complicating matters. Answer pp. 15-18. Aspen is not aware of any procedural mechanism whereby Respondent could appeal this Court's grant of writ relief or its determination with respect to the viability of St. Paul's subrogation claims under Nevada law. Further, Respondent's mischaracterizations of the arguments raised by National Union in St. Paul's appeal and by Aspen herein do not have any bearing on the question of judicial economy.

Maintenance of an action not warranted by existing law does not constitute a "plain, speedy, and adequate remedy in the ordinary course of law." NRS 34.170, 34.330. Respondent's claims are not recognized under Nevada law, and continued litigation of the same through trial merely for the purpose of eventually filing an appeal to determine whether the claims should have been dismissed from the outset is neither plain, speedy, or adequate.

Forcing the parties to continue litigating such complicated claims through the entire discovery process and a jury trial before a resolution of fundamental questions as to whether such claims are even cognizable under law is directly contrary to and incompatible with judicial economy. Nevada has not recognized insurance subrogation claims in the two tower context, and the resolution of the legal issues presented herein could dispose of this entire controversy. Further, such a determination will promote judicial economy and administration by assisting other jurists, parties, and lawyers in the resolution of similar claims, including one that is

already pending in Nevada's federal court. *See* FN 3. As such, judicial economy favors granting writ relief.

C. Laches Does Not Apply.

The doctrine of laches does not preclude granting writ relief in the Petition. "Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) (*quoting Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610–11, 836 P.2d 633, 636–37 (1992)). To determine whether laches applies, this Court considers: (1) whether the party inexcusably delayed bringing the challenge; (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging; and (3) whether the inexcusable delay was prejudicial to the respondent. *Building & Constr. Trades*, 108 Nev. at 611, 836 P.2d at 637.

None of the requisite factors for the application of the doctrine of laches are present here. The legal issues of first impression presented in the Petition are the subject of a contemporaneous appeal pending before this Court: Nevada Supreme Court Case No. 81344 (the "Appeal"), which involves the same conflicting District Court orders that are at issue herein. Pursuant to this Court's order, Aspen filed an Answering Brief in St. Paul's Appeal on May 13, 2021. *See docket*, Nevada Supreme

Court Case No. 81344. However, on June 4, 2021, Aspen was removed as a respondent from St. Paul's Appeal and its answering brief was stricken. *Id.* On August 2, 2021, National Union filed its Answering Brief. *Id.* St. Paul's Reply Brief was filed on November 30, 2021, and oral arguments were held on April 5, 2022. *Id.*

Although the same fundamental legal issues were being presented to this Court via the Appeal, National Union's Answering Brief did not address certain aspects of the District Court's orders that are relevant to St. Paul's claims against Aspen or extend its legal analysis to include arguments that are relevant to all parties herein, including, for instance, a thorough analysis of the public policies precluding adoption of equitable or contractual subrogation claims against an insurer residing in a separate tower of insurance coverage. For the purpose of addressing such matters, Aspen filed its Petition on November 17, 2021.

Respondent cannot meet the first two factors for the application of laches. Until June 4, 2021, Aspen was considered by this Court to be a respondent in the Appeal with respect to the District Court's conflicting orders, and Aspen pursued legal action with this Court via its Answering Brief, directly disputing the same District Court's orders that are at issue herein. Further, Aspen could not have known whether National Union would fully address the issues that are relevant to all parties in the underlying action in its own Answering Brief until such brief was filed on August 2, 2021. Upon discovering that additional arguments remained to be

addressed by this Court, Aspen filed its Petition three (3) months later, prior to the filing of the Reply Brief in the Appeal and almost five (5) months before oral arguments were held therein. Under these circumstances, any purported delay in filing the Petition is excusable and does not constitute acquiescence by Aspen with respect to the legal viability of St. Paul's claims under Nevada law.

Further, Respondent has not demonstrated that it experienced any change of circumstances, let alone one that has resulted in prejudice or inequities. "Laches is more than a mere delay in seeking to enforce ones' rights; it is a delay that works to the disadvantage of another." *Carson City*, 113 Nev. at 412 (*citing Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85-6 (1989)). "The condition of the party asserting laches must become so changed that the party cannot be restored to its former state." *Id.* (*quoting Home Savings*, 779 P.2d at 86).

No prejudicial change of circumstances has occurred here. The legal questions presented in the Appeal continue to be pending before this Court, and the District Court case it is still pending trial. St. Paul's contention that the Petition "will disrupt and confuse both matters" is insupportable: the Petition expands and colors the issues that remain pending for this Court's consideration in St. Paul's Appeal, raising additional but related arguments not specifically addressed in National Union's Answering Brief. This Court's proper resolution of these legal issues of first

impression cannot be prejudicial to St. Paul. As such, the doctrine of laches does not apply here.

III. ASPEN'S PETITION SUCCEEDS ON THE MERITS BECAUSE NEITHER EQUITABLE, NOR CONTRACTUAL SUBROGATION EXIST BETWEEN INSURERS IN SEPARATE TOWERS OF COVERAGE.

A. Respondent Fails to Address the Absence of Contractual Subrogation Rights.

St. Paul's subrogation claims are improper, as subrogation is simply not the appropriate vehicle by which a party should bring bad faith claims relating to an insurance claim handling matter. Contractual subrogation could only apply if there was another tortfeasor from the Underlying Action from whom to target recovery. It is not intended to cover a dispute where the alleged harm is caused at the end of an underlying litigation.

Respondent makes only one conclusory statement with respect to St. Paul's contractual subrogation rights, citing *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647 (Tex. 2007). *See* Answer at p. 19. Respondent failed to address the arguments raised in the Petition with respect to contractual subrogation, instead simply concluding (without support) that it had an ability to subrogate the claims of its contracted insured, Cosmopolitan.

Respondent's reliance on *Fortis* is misplaced. *Fortis* involved a tortfeasor driver being found liable for the subject accident with the injured driver, which

allowed for potential contractual subrogation of the insurance provider for the injured driver as against the tortfeasor. By contrast, St. Paul's only contract was with its insured, Cosmopolitan, who was found to be a joint tortfeasor with Marquee in the Underlying Action. Thus, St. Paul cannot step into Cosmopolitan's shoes for purposes of contractual subrogation because Cosmopolitan itself was determined to be a tortfeasor.

In an effort to avoid what this case really is – a impermissible contribution claim between insurers – St. Paul improperly attempts to maintain contractual subrogation as a theory of liability. Contribution cannot apply to the facts of this case.[4] In the Underlying Action, St. Paul's named insured, Cosmopolitan, was found to be a tortfeasor along with Marquee. Parties found to be jointly and severally liable as tortfeasors for an underlying claim, particularly one that have mutually agreed to settle, cannot be permitted to start pointing fingers at each other in a subrogation context. Parties who settle after a judgment has been found against them cannot then legally argue they have no responsibility because under Nevada law, every tortfeasor

[4] Under a contribution theory, St. Paul would only be able to recover if the insured joint tortfeasor, Cosmopolitan, was found to have paid more than its equitable share of the common liability. Here, tortfeasors Marquee and Cosmopolitan each paid 50% of the total amount to Moradi in the Underlying Action. Under NRS 17.225 and 17.275, St. Paul as an insurer would only have a potential right to contribution if Cosmopolitan was forced to pay more than an equitable share, which did not happen because each party split the judgment costs paid to Moradi. Therefore, St. Paul should not be found to have any contribution claim.

has responsibility. Therefore, St. Paul thus cannot maintain an action under a theory that it is contractually subrogated to Cosmopolitan's claims, because Cosmopolitan itself does not have a claim for subrogation against Marquee.

In responding to Aspen's analysis of caselaw showing insureds who are fully indemnified (and by extension, they excess insurers) have no right to recover an additional pro rata portion of a settlement from an insurer, Respondent asserts that one of many cases cited by Aspen – *i.e. Mid-Continent* – has been subsequently limited. *See* Answer, pp. 30-31. However, St. Paul's truncated citation to *Continental* is intentionally misleading. *See id.*, citing *Cont'l Cas. Co. v. N. Am. Capacity Ins. Co.*, 683 F.3d 79 (5th Cir. 2012). Analyzing limitations to *Mid-Continent*, the *Continental* Court stated, in relevant part: "…that the shoes of the insured are purportedly "empty" of rights against the primary carrier does not necessarily bar an excess insurer from recovering under a theory of subrogation from the primary carrier ***who should have paid its share of indemnity or defense costs***." *Cont'l Cas. Co.*, 683 F.3d at 86. It is undisputed here that Aspen did defend and indemnify Cosmopolitan in the Underlying Action, even to its full policy limits. St. Paul's attempts to assert contractual subrogation claims where its own insured has no damages is insupportable.

Respondent's claim for contractual subrogation should be dismissed. This Court has not previously acknowledged the existence of contractual subrogation

claims as between separate insurers in the insurance coverage context, nor should it do so now. This matter is distinguishable from the general tortfeasor fact-patterns relied upon by Respondent. As such, St. Paul's claim for contractual subrogation must fail, as there are no contractual damages for which St. Paul could subrogate on behalf of Cosmopolitan.

B. Liability Should Not Be Perfunctorily Imposed on Primary Insurers Solely as a Result of Excess Verdicts.

Respondent ignores the bulk of the extensive public policy arguments raised within the Petition, choosing to focus on just one: new litigation that will inherently arise against primary insurers any time a settlement demand is denied and a subsequent excess verdict or settlement is reached. Overlooking the substance of Petitioner's argument – *i.e.* that excess insurers will, *regardless of the merits of the claims and without limitation*, seek to impose liability on primary insurers any time their excess polices are triggered - St. Paul asserts that strict liability does not exist in the bad faith liability context in the case of an excess verdict. *See* Answer at p. 22.

Not only does Respondent's argument fail to address the substance of the policy issue presented, but its cited case does not support the proposition with respect to strict liability; indeed, *Allstate v. Miller* does not even address strict tort liability. In *Allstate v. Miller*, the Nevada Supreme Court held that a "failure-to-inform theory" was a viable basis for a bad faith claim by an insured against its own insurance company. *Allstate v. Miller*, 125 Nev. 300, 322-23, 212 P.3d 318, 333-34

(2009). The Court further found that Allstate had no duty to accept a stipulated judgment in excess of the insurance policy in the underlying action. *Id.* at 318, 212 P.3d at 330-31.

Whether it acknowledges it or not, St. Paul is advocating for a rule that would indeed create a form of liability for primary insurance carriers that would exist *whenever* an excess verdict or settlement is obtained, thereby imposing potential liability above primary insurer policy limits by any other carrier that was exposed to such an excess verdict or settlement. Such liability would arise merely by the triggering of the excess policy, which liability the excess carrier contractually agreed to assume. The issue is not whether a final judgment is eventually reached against primary insurers – the issue is that excess insurers (particularly those with large policy limits) will have no limitation against *filing* such claims as a matter of course, regardless of whether the underlying facts support bad faith failure to settle, in hopes of a payout to cover – in part or in whole – their own assumed risks and damages associated with providing coverage to their insureds. The imposition of such liability in every event where an excess policy is triggered violates public policy and should be denied.

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C. Public Policy Militates Against Adoption of Equitable Subrogation Claims Between Insurers in Separate Towers of Insurance Coverage.

Acknowledging that the Petition raises extensive policy arguments against the adoption of equitable subrogation claims between insurers, Respondent seeks to dismiss all such arguments by mischaracterizing Respondent's position and relying on the argument that other states allow such subrogation. *See* Answer at pp. 24-28. Respondent repeatedly attempts to fit the present factual scenario into the traditional case of an excess v. primary insurer within the same tower of insurance coverage for a mutual insured, improperly ignoring the two-tower distinction present here. St. Paul's caselaw is readily distinguishable, being limited to claims involving a single tower of insurance coverage. Such caselaw is further distinguishable, as Aspen defended and indemnified Cosmopolitan to policy limits as an additional insured.[5]

Respondent grossly mischaracterizes Petitioner's policy arguments, falsely asserting Aspen somehow admitted that it treated Cosmopolitan as a second-class

[5] For instance, St. Paul cites to a Sixth Circuit case for its position that subrogation between insurers is the "overwhelming" majority rule. In *National Sur. Corp. v. Hartford Cas. Ins. Co.,* the Sixth Circuit applied Kentucky law where insurers resided in the same tower of insurance coverage mutually insured the same entity. *See National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 753 (6th Cir. 2007). Therein, the excess carrier sought to step into the insureds shoes to assert a bad faith failure to settle claim against the primary insurer, who could have settled within its policy limits. *See id.* By contrast, no allegations exists here that Aspen was ever presented with the opportunity to settle within its $1,000,000 policy limits.

citizen, inferior to Marquee. *See* Answer, pp. 25-26. Nowhere in the Petition does Aspen take the position that it did not owe any duty to Cosmopolitan or admit that it favored Cosmopolitan in any way; indeed, *it is undisputed that Aspen covered the Underlying Claim on behalf of both Marquee and Cosmopolitan, defending and indemnifying Cosmopolitan to its policy limits*. St. Paul's attempt to circumvent its own separate duties to its named insured does not warrant the imposition of liability onto Aspen. As outlined in the Petition, equitable principles prohibit the application of the subrogation claims asserted herein.

D. Equitable Principles Negate Respondent's Subrogation Claims.

Without providing any analysis of the arguments raised in the Petition with respect to equitable superiority, Respondent asserts in a conclusory way that all such arguments are somehow "wrong" and that unidentified additional discovery is needed. *See* Answer, pp. 28-29. St. Paul's theory of the existence of superior equity rests solely on its allegation that its losses "occurred because of Aspen's failure to settle the case prior to verdict." *Id.* at p. 29. However, as stated in the Petition, the presence of a loss does not warrant recovery under a theory of equitable subrogation absent superior equities, which are not present here. Even under the undisputed facts

of this case, St. Paul cannot have superior equity or seek recovery against Aspen for its purported damages.[6]

As set forth in Aspen's petition, in equity, it cannot be said that St. Paul's satisfaction of its own contractual obligations to its insured via payment of its portion of the settlement of the Underlying Action should entitle it to recover against Aspen, who had a different relationship as to Cosmopolitan, its additional insured. Through its claims, St. Paul is impermissibly attempting to shift its assumed burdens and liabilities as Cosmopolitan's contracted excess insurer to Aspen, who did not contract with Cosmopolitan or St. Paul. St. Paul accepted premiums in exchange for its assumption of certain risks, and it should bear such losses when that risk becomes a reality. As such, St. Paul cannot be found to have superior equity and cannot seek recovery against Aspen related to its own failure to act under a theory of equitable subrogation.

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[6] Aspen further denies Respondent's contention that *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal. App. 4th 1098, 49 Cal. Rptr. 3d 785 (2006) mandates that discovery and a decision by a trier of fact are necessary to establish equitable superiority. Rather, the Court reversed the trial court's grant of summary judgment. Based on the trial court's improper application of a factually dissimilar case, it determined the doctrine of superior equities favored the tortfeasors who permitted a fire to be started and spread and granted summary judgment in their favor against an innocent insurance carrier. By contrast, Aspen's analysis of this doctrine is limited to the undisputed facts in this case, which can be properly determined via summary judgment, and indeed, was done so by the District Court herein in its Order granting summary judgment in favor of National Union.

CONCLUSION

This Court should grant the requested writ relief. Equitable and contractual subrogation claims do not exist between insurance carriers in Nevada for bad faith failure to settle, and Nevada should not recognize such claims, particularly, where, as here, the insurers reside in separate towers of insurance coverage. Writ relief will maintain consistency with Nevada law and public policy in insurance matters, and will ensure consistency with the District Court's rulings as to the viability of such claims.

Respectfully submitted this 19th day of May, 2022.

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/s/ Michael M. Edwards

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared on 8 ½ by 11-inch paper, double spaced, with 1-inch margins on all side, in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) and 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains approximately **4,992** words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of May 2022.

MESSNER REEVES LLP

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Messner Reeves LLP, that in accordance therewith, I caused a copy of **REPLY IN SUPPORT OF PETITION UNDER NRAP 21 FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF PROHIBITION** to be served on the Real Parties in Interest via the Supreme Court's e-filing system on this 19th day of May, 2022, and via U.S. Mail on the 20th day of May, 2022 upon:

The Honorable GLORIA STURMAN
Eighth Judicial District Court, Dept. 26
Clark County, Nevada
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