No. 89228

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORTH RIVER INSURANCE COMPANY,

Appellant,

v.

JAMES RIVER INSURANCE COMPANY,

Appellee.

Certification from the United States Court of Appeals for the Ninth Circuit – Case No. 23-55757

JOINT APPENDIX [VOL. I]

Sabrina H. Strong
sstrong@omm.com
Zoheb P. Noorani
znoorani@omm.com
Jessica A. Snyder
jsnyder@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

J. Colby Williams (5549)
jcw@cwlawlv.com
CAMPBELL & WILLIAMS
710 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

Attorneys for Appellant The North River Insurance Company

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 12th day of December, 2024, I caused true and correct copies of the foregoing Joint Appendix [Vol. I] to be delivered to the following counsel and parties:

John T. Brooks, Esq.
jbrooks@sheppardmullin.com
Jeffrey Vincent Commisso, Esq.
jcommisso@sheppardmullin.com
Benjamin Brooks, Esq.
bbrooks@sheppardmullin.com
Sheppard Mullin Richter & Hampton, LLP
501 W. Broadway, 18th Floor
San Diego, CA 92101

/s/ J. Colby Williams
An employee of Campbell & Williams

EXHIBIT 1

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
A Professional Corporation
Blaise S. Curet, #124983
bcuret@spcclaw.com
Sharon Lewis, #145340
SLewis@spcclaw.com
2000 Powell Street, Suite 830
Emeryville, California 94608
Tel: (415) 352-6200, Fax: (415) 352-6224

Attorneys for Plaintiff, The North River Insurance Company

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

The North River Insurance Company, a New Jersey Corporation, Plaintiff, vs. James River Insurance Company, an Ohio Corporation, Defendant.	Case No. **COMPLAINT**

Plaintiff, The North River Insurance Company, complains against defendant, James River Insurance Company, and alleges as follows:

THE PARTIES

1. At all times mentioned herein, plaintiff The North River Insurance Company ("NORTH RIVER") was and is a corporation organized under the laws of the State of New Jersey, with its principal place of business in New Jersey, and was and is authorized to transact insurance business in the State of California.

2. NORTH RIVER is informed and believes, and on that basis alleges that defendant, James River Insurance Company ("JAMES RIVER") at all times mentioned herein was and is a corporation organized under the laws of the State of

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

Ohio, with its statutory home office in Ohio and main administrative office in Virginia. It was and is authorized to transact insurance business in the State of California.

JURISDICTION AND VENUE

3. The Court has original jurisdiction over this action pursuant to 28 U.S. Code §1332, because the amount in controversy exceeds $75,000.00 exclusive of interest and costs, and because complete diversity exists between plaintiff and defendant, JAMES RIVER. As set forth above, NORTH RIVER and JAMES RIVER are citizens of different states.

4. Venue is proper in the Central District of California pursuant to 28 U.S. Code §1391(b)(1) and (d) because both parties have offices in and conduct business in the Central District of California, and both parties have contacts sufficient to subject them to personal jurisdiction in the Central District of California.

GENERAL ALLEGATIONS

5. NORTH RIVER is informed and believes, and on that basis alleges that on May 25, 2017, Marcus Collins was fatally shot in unit G-312 of the Shelter Island Apartments located at 3770 Swenson St., Las Vegas, Nevada.

6. On March 7, 2019, a complaint was filed captioned, *Cassandra Rivera and Keesha Davis, as Co-Administrators of the Estate of Marcus Collins, et al. v. Alhambra Place Partnership, LP dba Shelter Island Apartments, et al*., Nevada District Court, Clark County, case no. A-19-790682-C ("the Underlying Lawsuit"), stating four causes of action for (1) negligence, (2) gross negligence, (3) wrongful death, and (4) negligent hiring, supervision and training. Plaintiffs in the Underlying Lawsuit ("Rivera/Davis"), co-administrators of Collins' estate and guardian of his young daughter, alleged that defendants failed to provide adequate security and failed to warn of felonious and dangerous activity at the Shelter Island Apartments. Rivera/Davis sought general damages, medical, funeral and burial costs, damages for pain and suffering, mental anguish, loss of consortium, attorneys'

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

fees and costs, pre-judgment interest, and punitive damages. A true and correct copy of the complaint filed in the Underlying Lawsuit is attached hereto and marked as **Exhibit A**.

7. NORTH RIVER is informed and believes, and on that basis alleges that JAMES RIVER issued Commercial General Liability insurance policy no. 00070531-1 to L.A. Pacific Center Inc., located in Monrovia, CA, which was in effect from March 1, 2017 to March 1, 2018 and provided limits of liability of $1 million each occurrence ("the JAMES RIVER primary policy"), that Alhambra Place Partnership, LP dba Shelter Island Apartments ("Alhambra Place") is an additional named insured on the JAMES RIVER primary policy, and that the Shelter Island Apartments is an insured location.

8. NORTH RIVER is informed and believes, and on that basis alleges that the JAMES RIVER primary policy provides primary insurance coverage to Alhambra Place for "bodily injury" that occurs during the policy period and is caused by an "occurrence."

9. NORTH RIVER is informed and believes, and on that basis alleges that JAMES RIVER had a duty to defend and indemnify Alhambra Place against the claims asserted in the Underlying Lawsuit under the JAMES RIVER primary policy.

10. NORTH RIVER issued Excess Insurance policy no. 5821071075 to L.A. Pacific Center, Inc., which was in effect from March 1, 2017 to March 1, 2018, and provided limits of $10 million each occurrence, excess of the JAMES RIVER policy ("the NORTH RIVER excess policy"). Alhambra Place Partnership dba Shelter Island is an additional named insured on the NORTH RIVER excess Policy

11. The NORTH RIVER excess policy provides the following excess liability insurance coverage:

> WE will pay on YOUR behalf the ULTIMATE NET LOSS (1) in excess of all UNDERLYING INSURANCE, and (2) only after all UNDERLYING INSURANCE has been exhausted by the payment of the limits of such insurance for losses arising out of occurrences insured by all of the policies designated in the Declarations as UNDERLYING INSURANCE….

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

> The Definitions, Terms. Conditions, and Exclusions of the "CONTROLLING UNDERLYING INSURANCE" scheduled in Item 5 of the Declarations, in effect at the inception date of this policy, apply to this coverage unless they are inconsistent with provisions of this policy, or relate to premium, subrogation, any obligation to defend, the payment of expenses, limits of insurance, cancellation or any renewal agreement.

12. NORTH RIVER is informed and believes, and on that basis alleges that JAMES RIVER received timely notice of the May 25, 2017 shooting at the Shelter Island Apartments and the Underlying Lawsuit.

13. NORTH RIVER is informed and believes, and on that basis alleges that JAMES RIVER agreed to defend Alhambra Place against the claims asserted in the Underlying Lawsuit and retained counsel to provide Alhambra Place with a defense.

14. NORTH RIVER is informed and believes, and on that basis alleges that on March 9, 2017, the Las Vegas Metropolitan Police Department issued a Notice and Declaration of Chronic Nuisance to the Shelter Island Apartments based on the number of calls for service to address violence at the property and other disturbance calls from December 2016 through February 2017. NORTH RIVER is informed and believes, and on that basis alleges that on October 18, 2019, the Notice and Declaration of Chronic Nuisance was provided to JAMES RIVER.

15. NORTH RIVER is informed and believes, and on that basis alleges that evidence was developed in the Underlying Lawsuit that security at the Shelter Island Apartments was inadequate based on the volume of crime, and that the subject shooting would not have occurred had security been sufficient in the years prior to the shooting.

16. NORTH RIVER is informed and believes, and on that basis alleges that evidence was developed in the Underlying Lawsuit that Alhambra Place failed to run a complete background check on the tenant who occupied unit G-312 at the time of the shooting in violation of Alhambra Place's own policies and procedures.

17. NORTH RIVER is informed and believes, and on that basis alleges that evidence was developed in the Underlying Lawsuit that Mr. Collins was injured by

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

non-fatal shots and experienced pain and fear before being fatally shot, supporting an award for pain and suffering.

18. NORTH RIVER is informed and believes, and on that basis alleges that on October 10, 2019, JAMES RIVER was informed that the Police Department refused to produce its records of its investigation into the May 25, 2017 shooting, or to identify any witnesses.

19. NORTH RIVER is informed and believes, and on that basis alleges that Rivera/Davis alleged damages in excess of the $1 million per occurrence policy limit in the JAMES RIVER primary policy.

20. NORTH RIVER is informed and believes, and on that basis alleges that JAMES RIVER knew about the evidence as it was developed in the Underlying Lawsuit and it knew that there was a substantial likelihood of an adverse verdict and a judgment in excess of the JAMES RIVER primary policy limit, including an award of punitive damages.

21. NORTH RIVER is informed and believes, and on that basis alleges that on March 28, 2019, Rivera/Davis issued a $1 million settlement demand to Alhambra Place, which was provided to JAMES RIVER on March 29, 2019.

22. NORTH RIVER is informed and believes, and on that basis alleges that in or about May 2021, Rivera/Davis issued an Offer of Judgment to Alhambra Place in the amount of $990,000.

23. NORTH RIVER is informed and believes, and on that basis alleges that on or about May 5, 2021, defense counsel retained by JAMES RIVER to defend Alhambra Place informed JAMES RIVER that the settlement value of the Underlying Lawsuit was $850,000.

24. NORTH RIVER is informed and believes, and on that basis alleges that on or about November 3, 2021, Rivera/Davis reduced their settlement demand to $975,000.

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

25. NORTH RIVER is informed and believes, and on that basis alleges that on or about November 3, 2021, February 8, 2022 and July 1, 2022, defense counsel retained by JAMES RIVER to defend Alhambra Place informed JAMES RIVER that the value of the Underlying Lawsuit was over $1 million.

26. NORTH RIVER alleges that JAMES RIVER knew that there was no reasonable basis not to accept Rivera/Davis' demands within its policy limit, but unreasonably failed to settle the Underlying Lawsuit within its policy limit.

27. NORTH RIVER alleges that JAMES RIVER's unreasonable failure and refusal to effectuate a prompt, fair and equitable settlement of the Underlying Lawsuit on behalf of Alhambra Place after liability became reasonably clear, despite its knowledge that there was a substantial likelihood of a recovery in excess of the per occurrence limit in the JAMES RIVER primary policy and that there was no reasonable basis not to settle within its policy limit, and JAMES RIVER's unreasonable failure to give equal consideration to Alhambra Place's interests as its own interests, constitute breaches of JAMES RIVER's duty to settle under the JAMES RIVER primary policy and the implied covenant of good faith and fair dealing. NORTH RIVER alleges that JAMES RIVER's breaches caused NORTH RIVER's damages as herein alleged.

28. NORTH RIVER is informed and believes, and on that basis alleges that on or about August 30, 2022, Rivera/Davis increased their demand to $5 million.

29. NORTH RIVER is informed and believes, and on that basis alleges that on or about September 9, 2022, JAMES RIVER agreed to contribute its $1 million policy limit to settle the Underlying Lawsuit.

30. NORTH RIVER alleges that on or about November 30, 2022, the Underlying Lawsuit was resolved for $5 million, which reflects the value of the claims asserted in the Underlying Lawsuit.

31. NORTH RIVER alleges that the settlement of the Underlying Lawsuit was not the result of collusion.

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

32. NORTH RIVER alleges that despite JAMES RIVER's unreasonable failure and refusal to settle the Underlying Lawsuit within the per occurrence limit in the JAMES RIVER primary policy when it had the opportunity to do so, JAMES RIVER unreasonably refused to contribute more than its $1 million policy limit to the settlement of the Underlying Lawsuit.

33. NORTH RIVER alleges that in order to protect Alhambra Place and pursuant to a complete reservation of its rights under the NORTH RIVER excess policy and the law, including, but not limited to, its right to reimbursement, NORTH RIVER agreed to fund the balance of the settlement of the Underlying Lawsuit in the amount of $4 million.

34. NORTH RIVER alleges that it was not acting as a volunteer in contributing to the settlement of the Underlying Lawsuit.

FIRST CAUSE OF ACTION

(Equitable Subrogation Against JAMES RIVER)

35. NORTH RIVER incorporates herein by reference the allegations contained in paragraphs 1 through 34, inclusive, as if set forth in full herein.

36. NORTH RIVER alleges that it has paid $4 million on behalf of Alhambra Place to settle the Underlying Lawsuit, for which JAMES RIVER is legally responsible under the terms and conditions of the JAMES RIVER primary policy and by reason of JAMES RIVER's failure to settle the Underlying Lawsuit within the $1 million limit of liability of it primary policy and its breach of the implied covenant of good faith and fair dealing.

37. NORTH RIVER alleges that Alhambra Place has an existing, assignable cause of action against JAMES RIVER for JAMES RIVER's breach of its duty to settle the Underlying Lawsuit, and breach of the implied covenant of good faith and fair dealing, which Alhambra Place could have asserted for its own benefit had it not been compensated by NORTH RIVER's payment on its behalf to settle the Underlying Lawsuit.

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

38. NORTH RIVER alleges that by virtue of its payment to settle the Underlying Lawsuit, it is subrogated to the rights of Alhambra Place against JAMES RIVER.

39. NORTH RIVER alleges that it has suffered damages in the form of the payment it made in indemnifying Alhambra Place against the claims asserted in the Underlying Lawsuit, which was necessitated by JAMES RIVER's failure and refusal to settle the Underlying Lawsuit on behalf of Alhambra Place.

40. Justice requires that the cost of indemnifying Alhambra Place against the claims asserted in the Underlying Lawsuit should be shifted from NORTH RIVER to JAMES RIVER, since JAMES RIVER's equitable position is inferior to that of NORTH RIVER.

41. NORTH RIVER's damages are in a set amount, and NORTH RIVER's payment of $4 million of Alhambra Place's settlement was reasonable and not voluntary.

42. As such, NORTH RIVER stands in Alhambra Place's shoes to recover from JAMES RIVER the $4 million settlement payment on behalf of Alhambra Place to settle the Underlying Lawsuit under the doctrine of equitable subrogation.

PRAYER FOR RELIEF

WHEREFORE, NORTH RIVER prays for judgment against defendant, JAMES RIVER, as follows:

1. For general and special damages in an amount to be proven at trial;

2. For all costs and expenses to the full extent permitted by law;

3. For pre-judgment interest and post-judgment interest to the full extent permitted by law;

4. For attorneys' fees to the full extent permitted by law; and

5. For such other and further relief as this Court may deem just and proper.

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

JURY DEMAND

PLAINTIFF hereby demands a trial by jury pursuant to Federal Rules of Civil Procedure, §38(b) and the Constitution of the United States, on all issues so triable.

DATED: January 4, 2023

SINNOTT, PUEBLA,
CAMPAGNE & CURET, APLC

By: _____

BLAISE S. CURET
SHARON R. LEWIS
Attorneys for The North River Insurance Company

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

EXHIBIT A

COMP
CHRISTOPHER W. CARSON, ESQ.
Nevada Bar No. 9523
TRENT L. RICHARDS, ESQ.
Nevada Bar No. 11448
SAGEBRUSH LAWYERS
2350 W. Charleston Blvd., Suite 100
Las Vegas, Nevada 89102
Telephone: (702) 851-2180
Facsimile: (702) 851-2189
Email: *ccarson@sagebrushlawyers.com*
Attorneys for Plaintiff

CASE NO: A-19-790682-C
Department 16

DISTRICT COURT
CLARK COUNTY, NEVADA
***

CASSANDRA RIVERA and KEESHA DAVIS, as Co-Administrators of the ESTATE OF MARCUS COLLINS; CASSANDRA RIVERA as Guardian of MAR'CAYLA COLLINS, a minor; and the ESTATE OF MARCUS COLLINS; Plaintiff, vs. ALHAMBRA PLACE PARTNERSHIP, LP doing business as SHELTER ISLAND APARTMENTS an Nevada Limited Partnership; DOES I through X; and ROE CORPORATIONS I through X, inclusive Defendants.	Case No.: Dept No.: **COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiffs, CASSANDRA RIVERA and KEESHA DAVIS as the Co-Administrators of the ESTATE OF MARCUS COLLINS, CASSANDRA RIVERA as Guardian of MARCAYLA COLLINS and the ESTATE OF MARCUS COLLINS (hereinafter "Plaintiffs"), by and through their attorneys of record, The Bourassa Law Group, hereby submits this Complaint against Defendants, and each of them, and alleges as follows:

I.
INTRODUCTION

1. This is a wrongful death action arising from Defendants' deliberate indifference and negligence resulting in the wrongful death of MARCUS COLLINS, deceased, who died on May 25, 2017 at the SHELTER ISLAND APARTMENTS at 3700 Swenson Street in the City of Las Vegas, Clark County, Nevada.

II.
PARTIES

2. Plaintiff CASSANDRA RIVERA is a resident of New York and is the mother of MARCAYLA COLLINS, a minor, and all relevant times hereto was the fiancé of the decedent MARCUS COLLINS ("Decedent").

3. Plaintiff KEESHA DAVIS is and, at all times relevant hereto, was a resident of Clark County, Nevada.

4. Plaintiffs CASSANDRA RIVERA and KEESHA DAVIS have been appointed as co-administrators of the Estate of Marcus Collins pursuant to the Letters of Administration (attached hereto as Exhibit "1."), in the court case *In the Matter of the Estate of Marcus Collins*, Clark County Case P-18-096403-E.

5. As Co-Administrators of the Estate of MARCUS COLLINS, CASSANDRA RIVERA and KEESHA DAVIS are authorized to bring this action on behalf of Decedent, MARCUS COLLINS'S ESTATE.

6. Plaintiffs CASSANDRA RIVERA and KEESHA DAVIS are hereinafter collectively referred to as "Plaintiffs."

7. MARCUS COLLINS prior to his death and at all times relevant hereto was a resident of Clark County, Nevada. Hereinafter Mr. COLLINS is referred to as "The Decedent."

8. Defendant ALHAMBRA PLACE PARTNERSHIP, LP, is and, at all times relevant hereto, was a Nevada limited partnership, who is licensed and conducting business as SHELTER ISLAND APARTMENTS (hereinafter "SHELTER ISLAND"), an apartment complex in Clark County, Nevada.

9. At all times relevant, DOES 1 through 10 and/or ROE CORPORATIONS 1 through 10,

inclusive, and each of them, were legal entities or individuals doing business in the State of Nevada. That the true names and capacities, whether individual, corporate, agents, association or otherwise of the Defendants, DOES 1 through 10 and/or ROE CORPORATIONS 1 through 10, inclusive, are unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe, and thereon allege, that each of the Defendants designated herein as DOES and/or ROE CORPORATIONS are responsible in some manner for the events and happenings herein referred to, and in some manner proximately caused the injuries and damages thereby to Plaintiffs, as herein alleged. Plaintiffs allege that each named DOE and/or ROE Defendants acted negligently, willfully, intentionally, recklessly, vicariously or otherwise caused, directed, allowed or set in motion the injurious events set forth herein. Each named DOE and ROE defendant is legally responsible for the events and happenings stated in this Complaint and, thus, proximately caused injury and damages to Plaintiffs. That at least one of the DOE/ROE Defendants is believed to be the employee responsible for security/supervision of the areas at issue. Upon information and belief, DOES/ROES I through III were in charge of maintaining the safety of their guests, tenants and members of the general public within the Shelter Island Apartments. DOES/ROES IV through VII own, lease or otherwise have control of the area where the death occurred. DOES/ROES VIII thorough X are the employees and/or independent contractors attending to the deceased and/or the supervisions of the employees and/or independent contractors charged with security and supervision of the premises. Plaintiffs will ask leave of Court to amend the Complaint to insert the true names and capacities of DOES and/or ROE CORPORATIONS I through X and state appropriate charging allegations when that information has been ascertained.

10. At all times hereinafter, SHELTER ISLAND, DOES I through X and ROE CORPORATIONS I through X will be collectively referred to as Defendants.

11. At all times relevant herein, Defendants, and each of them, and/or their employees, agents, servants, or other representatives were the owners, maintainers, managers, inspectors, supervisors, controllers, and/or were responsible for SHELTER ISLAND APARTMENTS located at 3770 Swenson St. Las Vegas, NV 89119. Plaintiffs allege that at all times mentioned herein, each of the Defendants was the agent of some or all of the others, and all acts alleged herein to have been committed by any one of them was committed on behalf of some or every other Defendant. Accordingly, Plaintiffs allege that each Defendant is liable for its/his/her own actions and that of its/his/her employees, agents

and servants, and each Defendant is also vicariously liable for the injuries and damages suffered by Plaintiffs as set forth herein below.

III.
JURISDICTION AND VENUE

12. This Court has jurisdiction in this matter, and venue is proper, in that all the facts and circumstances that give rise to the subject lawsuit occurred in Clark County, Nevada and Plaintiff KEESHA DAVIS and Defendant ALHAMBRA PLACE PARTNERSHIP, LP are Nevada residents/entities.

IV.
GENERAL ALLEGATIONS

13. On or about May 25, 2017, the Decedent and a friend arrived at the premises of the Shelter Island Apartments at 3700 Swenson Street in Las Vegas, Nevada.

14. Plaintiffs allege that the Decedent and his friend went to Shelter Island to meet with resident Mr. Anthony Fletcher in his unit, during that meeting Mr. Fletcher and several of Mr. Fletcher's associates ambushed, shot and killed The Decedent inside Mr. Fletcher's unit.

15. Defendants, while in the course and scope of their employment and agency with other Defendants, negligently failed to control, supervise and maintain the premises and further failed to warn the Decedent about the unsavory character of Mr. Fletcher and/or other residents and/or guests of Shelter Island all of which contributed to the Decedent's death and Plaintiffs' damages.

16. Defendants negligent failure to control, supervise and/or maintain the premises of Shelter Island included, but is not limited to, having new security cameras on property that did not work and/or did not record the premises on or about the date of the incident and having little, no and/or ineffective security patrols at Shelter Island.

17. As a direct and proximate cause of Defendants' negligence, the Decedent's fiancé, Plaintiff CASSANDRA RIVERA, has assume all of the extensive child care duties, as well as substantial additional expenses for the care, feeding and raising of the Decedent's daughter Plaintiff MAR'CAYLA COLLINS in an amount in excess of Fifteen Thousand Dollars ($15,000).

18. Plaintiff MAR'CAYLA COLLINS, a minor, has been deprived of the care, comfort and companionship of her father which will continue throughout her life to her damage in an amount in excess of Fifteen Thousand Dollars ($15,000).

19. As a direct and proximate cause of Defendants' negligence, Plaintiffs CASSANDRA RIVERA and KEESHA DAVIS as the Co-Administrators of the Estate of MARCUS COLLINS, have incurred medical, funeral and burial costs in an amount in excess of Fifteen Thousand Dollars ($15,000).

20. As a direct and proximate result of Defendants' negligence, Plaintiffs have had to retain counsel to prosecute this action and are entitled to attorneys' fees and costs.

V.

FIRST CAUSE OF ACTION

(Negligence against All Defendants)

21. Plaintiff incorporates by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

22. Plaintiff is informed, believes and thereon alleges that Defendants, and each of them, owed a duty to Mr. Collins to exercise care in providing a safe environment for Shelter Island residents and guests.

23. In complete disregard of this duty, Defendants failed to prevent Mr. Fletcher or his associates from conducting felonious and dangerous activity on the Shelter Island premises.

24. Plaintiff is informed, believes and thereon alleges that Defendants' conscious disregard for the criminal activity taking place on their premises created such circumstances to allow Mr. Fletcher and his associates to continue their criminal activity and ultimately murder Mr. Collins.

25. As a direct and proximate result of the Defendants' failure to properly supervise the Shelter Island Apartments, provide adequate security and neglecting the operation of its security camera system which would likely have documented the numerous individuals that entered Mr. Fletcher's studio apartment prior to the incident, Mr. Collins was shot and murdered on Shelter Island premises.

26. As a direct and proximate result of the Defendants' negligence, Plaintiff has incurred, and will continue to incur damages and other costs and expenses in an amount in excess of $15,000.00.

27. As a further direct and proximate result of Defendants' conduct as set forth herein, Plaintiff has been required to retain the services of an attorney, and as a direct, natural and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

VI.

SECOND CAUSE OF ACTION
(Gross Negligence against All Defendants)

28. Plaintiff incorporates by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

29. Plaintiff is informed, believes and thereon alleges that Defendants, by and through their security officers, administrators, agents and employees, engaged in extreme, outrageous, unconscionable, and reckless behavior and thereby acted with malice or gross negligence when they allowed a known drug dealer to operate out of his studio apartment at Shelter Island and/or when they failed and/or refused to use the security camera system for its intended function to secure the Shelter Island Apartments for its tenants and their guests.

30. As a direct and proximate result of Defendants' gross negligence, Plaintiff has incurred, and will continue to incur damages and other costs and expenses in an amount in excess of $15,000.00.

31. Plaintiff is informed and believes and thereon allege that Defendants' conduct, and each of them, was extreme, outrageous, unconscionable, and reckless in disregard of Mr. Collins' safety, and that under these circumstances, punitive damages should be assessed by way of an example so that such conduct is not allowed to persist. Therefore, Plaintiff requests for an assessment of punitive damages pursuant to NRS 42.005 in an amount commensurate with the Defendants' wealth.

32. As a further direct and proximate result of Defendants' conduct as set forth herein, Plaintiff has been required to retain the services of an attorney, and as a direct, natural and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

VI.
THIRD CAUSE OF ACTION
(Wrongful Death Claim against All Defendants)

33. Plaintiff incorporates by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

34. As a direct and proximate result of the foregoing, the Decedent suffered fatal injuries and died, for which his Estate, through its representatives are entitled to the recovery permitted by NRS 41.085, inclusive of all other applicable statutes.

35. Plaintiff brings this wrongful death action against Defendants for the death of Mr. Collins, for their own damages and for the damages to the other statutory beneficiaries arising from the injuries which caused Mr. Collins' death.

36. Defendants are liable as the injuries were caused by their wrongful acts, neglect, carelessness, and by the wrongful act, neglect, and carelessness of their agents and employees as set forth above.

37. Plaintiff requests damages for the grief and mental anguish, bereavement and mental trauma, and emotional damages they suffered as a result of Mr. Collins' death.

38. As a direct and proximate result of Defendants' conduct, Plaintiff CASSANDRA RIVERA, has assumed extensive child care duties, as well as incurred additional expenses for the care and feeding of Plaintiff MAR'CAYLA COLLINS, a minor and Plaintiff CASSANDRA RIVERA's daughter, in an amount in excess of $15,000.00.

39. As a direct and proximate result of Defendants' conduct, Plaintiff MAR'CAYLA COLLINS, a minor, has been deprived of the care, comfort and companionship of her father which will continue throughout her entire life to their damage in an amount in excess of $15,000.00.

40. As a further direct and proximate result of Defendants' conduct as set forth herein, Plaintiff has been required to retain the services of an attorney, and as a direct, natural and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

VII.
FOURTH CAUSE OF ACTION
(Negligent Hiring, Supervision and Training against All Defendants)

41. Plaintiff incorporates by reference each and every allegation previously made in this Complaint, as if fully set forth herein.

42. Plaintiff is informed, believes and thereon alleges that Defendants owed Mr. Collins a duty to use reasonable care in the training and/or supervision of its employees to ensure that they are fit for their positions in the scope of their employment for Defendants.

43. Plaintiff is informed, believes and thereon alleges that Defendants breached this duty in failing to train and supervise its employees in a manner to keep Mr. Collins safe from risks that a reasonable person would have foreseen.

44. Plaintiff is informed, believes and thereon alleges that Mr. Collins' injuries were foreseeable to a reasonable person acting as an employee of the Defendant.

45. As a direct and proximate result of Defendants' negligence, Plaintiff has incurred, and will continue to incur, damages and other costs and expenses in an amount in excess of $15,000.00.

46. As a further direct and proximate result of Defendants' conduct as set forth herein, Plaintiff retained the services of Sagebrush Lawyers to bring this action. Plaintiff is therefore entitled to recover her attorney's fees, expert fees and costs incurred herein pursuant to Nevada law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, CASSANDRA RIVERA as the Administrator of the ESTATE OF MARCUS COLLINS and as Guardian of MAR'CAYLA COLLINS, a minor, and the ESTATE OF MARCUS COLLINS, reserving the right to amend this Complaint at the time of trial to include all items of damages not yet ascertained, prays judgment against Defendants, and each of them, as follows:

1. For general damages in an amount in excess of Fifteen Thousand Dollars ($15,000.00);
2. Medical, funeral and burial costs incurred;
3. Damages for past and future pain, suffering, mental anguish, and loss of enjoyment of life including but not limited to MAR'CAYLA COLLINS loss of the love, support of her father;
4. For costs of suit, reasonable attorney's fees,
5. Punitive damages pursuant to NRS 42.005;
6. For such other further relief as the Court may deem just and proper; and
7. Prejudgment interest.

DATED this 7th day of March, 2019.

SAGEBRUSH LAWYERS

By: _____

CHRISTOPHER W. CARSON, ESQ.
Nevada Bar No. 9523
2350 W. Charleston Blvd., 2nd Floor
Las Vegas, NV 89102
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff, by and through her attorneys of record, Sagebrush Lawyers, hereby demands a jury trial of all of the issues in the above matter.

DATED this 7th day of March, 2019.

SAGEBRUSH LAWYERS

By: _____

CHRISTOPHER CARSON, ESQ.
Nevada Bar No. 9523
2350 W. Charleston Blvd., 2nd Floor
Las Vegas, Nevada 89102

EXHIBIT 1

LTA
MARK J. BOURASSA, ESQ.
Nevada Bar No. 7999
THE BOURASSA LAW GROUP
2350 W. Charleston Blvd. #100
Las Vegas, Nevada 89102
Tel: (702) 851-2180
Fax: (702) 851-2189
Email: mbourassa@blgwins.com

Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Estate of MARCUS COLLINS, deceased.	CASE NO.: P-18-096403-E DEPT. NO.: M **LETTERS OF ADMINISTRATION**

On the 1st day of October, the Court entered an Order appointing CASSANDRA RIVERA and KEESHA DAVIS, as Co-Admistratrix of the Estate of Marcus Collins. *See* attached Order. Therefore, the Co-Administratrix having duly qualified may act and have the authority and duties of Co-Administratrix of the Estate of Marcus Collins.

In testimony of which, I have this date signed these Letters and affixed the Seal of the Court.

CLERK OF THE COURT

By: _____ 1/31/2019
Deputy Clerk Date
Shimaya Ladson

I, CASSANDRA RIVERA, whose mailing address is 79 South 9th Street, Apartment 4B, Brooklyn, New York 11249, solemnly affirm that I will faithfully perform according to law the duties of Co-Administratrix and that all matters stated in any petition or paper filed with Court by me are true of my own knowledge or, if any matters are stated on information and belief, I believe them to be true.

Cassandra Rivera

CASSANDRA RIVERA, CO-ADMINISTRATRIX

SUBSCRIBED AND AFFIRMED before me this 19 day of October, 2018.

Shaunta R Garcia

Notary Public in and for the County of Dutchess, State of New York

SHAUNTA R GARCIA
NOTARY PUBLIC STATE OF NEW YORK
DUTCHESS COUNTY
LIC. #01GA6233628
COMM. EXP. 1/3/23

I, KEESHA DAVIS, whose mailing address is 6916 Cedar Basin Avenue, Las Vegas, Nevada 89142, solemnly affirm that I will faithfully perform according to law the duties of Co-Administratrix and that all matters stated in any petition or paper filed with Court by me are true of my own knowledge or, if any matters are stated on information and belief, I believe them to be true.

KEESHA DAVIS, CO-ADMINISTRATRIX

SUBSCRIBED AND AFFIRMED before me this 31 day of ~~October, 2018.~~ January, 2019

Notary Public in and for the County of Clark, State of Nevada

KYLE S COMPTON
Notary Public, State of Nevada
Appointment No. 11-5568-1
My Appt. Expires April 13, 2019

EXHIBIT 2

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
BLAISE S. CURET, ESQ. #124983 | SHARON LEWIS, ESQ. #145340
SINNOT PUEBLA CAMPAGNE & CURET, APLC
2000 Powell Street, Suite 830, Emeryville, CA 94608
TELEPHONE NO.: (213) 996-4200 | FAX NO. | E-MAIL ADDRESS *(Optional)*: bcuret@spcclaw.com
ATTORNEY FOR *(Name)*: Plaintiff: The North River Insurance Company

FOR COURT USE ONLY

UNITED STATES DISTRICT COURT

STREET ADDRESS: 350 W. 1ST STREET
MAILING ADDRESS:
CITY AND ZIP CODE: LOS ANGELES, CA 90012
BRANCH NAME: FOR THE CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF: THE NORTH RIVER INSURANCE COMPANY
DEFENDANT: JAMES RIVER INSURANCE COMPANY

CASE NUMBER:
2:23-cv-00027 RSWL (Ex)

PROOF OF SERVICE OF SUMMONS

Ref. No. or File No.:
THE NORTH v JAMES RIVER INSURANCE

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of:
   a. ☐ Summons
   b. ☐ Complaint
   c. ☐ Alternative Dispute Resolution (ADR) package
   d. ☐ Civil Case Cover Sheet
   e. ☐ Cross-complaint
   f. ☑ other *(specify documents)*: **See attached Document List**
3. a. Party served *(specify name of party as shown on documents served)*:
   JAMES RIVER INSURANCE COMPANY, an Ohio Corporation

   b. ☑ Person (other than the party in item 3a) served on behalf of an entity or as an authorized agent (and not a person under item 5b on whom substituted service was made) *(specify name and relationship to the party named in item 3a)*:
   KOY SAECHAO, CUSTOMER SERVICE LIAISON, AUTHORIZED TO ACCEPT - CSC-LAWYERS INC. SERVICE, INC., AGENT FOR SERVICE OF PROCESS
4. Address where the party was served: **2710 Gateway Oaks Dr Ste 150N**
   Sacramento, CA 95833-3502
5. I served the party *(check proper box)*
   a. ☑ **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on *(date)*: **1/5/2023** (2) at *(time)*: **2:20 PM**
   b. ☐ **by substituted service.** On *(date)*: at *(time)*: I left the documents listed in item 2 with or in the presence of *(name and title or relationship to person indicated in item 3b)*:
      (1) ☐ **(business)** a person at least 18 years of age apparently in charge at the office or usual place of business of the person to be served. I informed him of her of the general nature of the papers.
      (2) ☐ **(home)** a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party. I informed him or her of the general nature of the papers.
      (3) ☐ **(physical address unknown)** a person at least 18 years of age apparently in charge at the usual mailing address of the person to be served, other than a United States Postal Service post office box. I informed him of her of the general nature of the papers.
      (4) ☐ I thereafter mailed (by first-class, postage prepaid) copies of the documents to the person to be served at the place where the copies were left (Code Civ. Proc., §415.20). I mailed the documents on *(date)*: from *(city)*: **or** ☐ a declaration of mailing is attached.
      (5) ☐ I attach a **declaration of diligence** stating actions taken first to attempt personal service.

1607 James M. Wood
Los Angeles, CA 90015
Phone: (213) 252-2000 Fax:

Continued from Proof of Service

CLIENT: SINNOT PUEBLA CAMPAGNE & CURET

CLIENT FILE #: THE NORTH v JAMES RIVER INSURANCE **DATE:** January 9, 2023

SUBJECT: JAMES RIVER INSURANCE COMPANY, an Ohio Corporation

SUMMONS IN A CIVIL ACTION; COMPLAINT; CIVIL COVER SHEET; THE NORTH RIVER INSURANCE COMPANY'S NOTICE OF INTERESTED PARTIES; NOTICE OF ASSIGNMENT TO UNITED STATES JUDGES; NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM; NOTICE TO PARTIES: COURT POLICY ON SETTLEMENT AND USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) Counsel are required to furnish and discuss this Notice with their clients; Notice to Counsel Re Consent to Proceed Before a United States Magistrate Judge

PETITIONER: THE NORTH RIVER INSURANCE COMPANY	CASE NUMBER:
RESPONDENT: JAMES RIVER INSURANCE COMPANY	2:23-cv-00027 RSWL (Ex)

c. ☐ **by mail and acknowledgment of receipt of service.** I mailed the documents listed in item 2 to the party, to the address shown in item 4, by first-class mail, postage prepaid,

(1) on *(date):* (2) from *(city):*

(3) ☐ with two copies of the *Notice and Acknowledgment of Receipt* and a postage-paid return envelope addressed to me. *(Attach completed* Notice and Acknowledgement of Receipt.) (Code Civ. Proc., § 415.30.)

(4) ☐ to an address outside California with return receipt requested. (Code Civ. Proc., § 415.40.)

d. ☐ **by other means** *(specify means of service and authorizing code section):*

☐ Additional page describing service is attached.

6. The "Notice to the Person Served" (on the summons) was completed as follows:

a. ☐ as an individual defendant.
b. ☐ as the person sued under the fictitious name of *(specify):*
c. ☐ as occupant.
d. ☑ On behalf of *(specify):* **JAMES RIVER INSURANCE COMPANY, an Ohio Corporation** under the following Code of Civil Procedure section:

☑ 416.10 (corporation)	☐ 415.95 (business organization, form unknown)
☐ 416.20 (defunct corporation)	☐ 416.60 (minor)
☐ 416.30 (joint stock company/association)	☐ 416.70 (ward or conservatee)
☐ 416.40 (association or partnership)	☐ 416.90 (authorized person)
☐ 416.50 (public entity)	☐ 415.46 (occupant)
	☐ other:

7. **Person who served papers**
   a. Name: **D'Angelo Emiliano - ASAP Legal**
   b. Address: **1607 James M. Wood Los Angeles, CA 90015**
   c. Telephone number: **(213) 252-2000**
   d. **The fee** for service was: **$ 133.75**
   e. I am:
      (1) ☐ not a registered California process server.
      (2) ☐ exempt from registration under Business and Professions Code section 22350(b).
      (3) ☑ registered California process server:
         (i) ☐ owner ☐ employee ☑ independent contractor.
         (ii) Registration No.: **2022-030**
         (iii) County: **Sacramento**

8. ☑ **I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

or

9. ☐ **I am a California sheriff or marshal and** I certify that the foregoing is true and correct.

Date: **1/9/2023**

ASAP Legal
1607 James M. Wood
Los Angeles, CA 90015
(213) 252-2000
www.asaplegal.com

D'Angelo Emiliano
(NAME OF PERSON WHO SERVED PAPERS/SHERIFF OR MARSHAL)

EXHIBIT 3

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
JOHN T. BROOKS, Cal. Bar No. 167793
JEFFREY V. COMMISSO, Cal. Bar No. 191267
BENJAMIN D. BROOKS, Cal. Bar No. 314373
501 West Broadway, 19th Floor
San Diego, California 92101-3598
Telephone: 619.338.6500
Facsimile: 619.234.3815
E mail jbrooks@sheppardmullin.com
jcommisso@sheppardmullin.com
bbrooks@sheppardmullin.com

Attorneys for Defendant JAMES RIVER INSURANCE COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NORTH RIVER INSURANCE COMPANY,

Plaintiff,

v.

JAMES RIVER INSURANCE COMPANY,

Defendant.

Case No. 2:23-CV-00027-PSG-E

JAMES RIVER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

Date: July 28, 2023
Time: 1:30pm
Crtrm: 6A

Complaint Filed: January 4, 2023

I. Introduction

Around 11:00 a.m. on May 25, 2017, between five and ten men tortured, then executed, Marcus Collins inside an apartment in the Shelter Island complex in Las Vegas. After stripping him naked and forcing him onto a couch, at least three of the men shot Collins more than 20 times in a known torture pattern: They first shot him in the extremities — wrists, arms, legs, penis — to maximize his suffering before shooting him in the chest to kill him. Law enforcement caught and prosecuted one of Collins' killers.

In the meantime, Collins' minor daughter and her mother sued Shelter Island for negligent security. James River insured Shelter Island under a $1 million primary policy; North River provided a $10 million excess policy. James River hired defense counsel, and for years everyone assessed the case to be one of no-liability because a property owner cannot foresee, and is not responsible to prevent, intentional killings inside a tenant's private premises. Nevertheless, the parties ultimately agreed to settle the case before trial for $5 million: James River contributed the $1 million primary policy limit, and North River contributed $4 million from its $10 million excess policy.

Now North River is suing James River as Shelter Island's equitable subrogee, hoping to use hindsight criticisms to make James River its de facto reinsurer. But subrogation claims are derivative, and within the past six months, the Nevada Supreme Court has twice held that an excess insurer does not have a claim for equitable subrogation if the underlying case settled within the combined policy limits. Under those circumstances — which are the precise circumstances here — the insured suffered no damages, and there is thus no derivative right for the excess insurer to be subrogated to.

Accordingly, based on North River's allegations, it cannot state a claim, and the Court should dismiss North River's complaint with prejudice.

II. The Back Story

A. Marcus Collins was tortured and executed by firing squad, inside an apartment, in broad daylight, by up to ten individuals.

In early 2017, Marcus Collins' son, Devante, stole a gun, some televisions, and a pair of designer sunglasses from Anthony "Tone" Fletcher. Fletcher knew Collins and went to him about the theft. Collins and Fletcher agreed that Devante would return Fletcher's property or Collins would pay Fletcher for it. This apparently settled the matter, and Collins and Fletcher subsequently did drug deals with each other. But Devante did not return what he stole or Collins didn't pay what Fletcher wanted. Either way, at some point Collins was seen wearing the stolen sunglasses, which prompted Fletcher to action.

On May 25, 2017, D'Angelo Johnson picked up Collins to give him a ride to buy some weed. But first, they made three stops. They stopped at an ATM so Collins could get some money. Next, they picked up a woman at a 7-11 store. Finally, they picked up another man, who directed them to the Shelter Island apartment complex to buy marijuana and pills.

Around 11:00 am, Collins and his companions arrived at the Shelter Island complex and went to an apartment rented to Stephen Thornton. They went inside and approximately ten men, including Fletcher, were waiting for them. Collins pulled out his money; the men pulled out guns. Collins and Johnson were ordered to strip. When Johnson resisted, he was pistol whipped until he collapsed unconscious to the floor. Collins stripped. The men then forced Collins onto the couch, naked. They tortured him by gunshot: they shot Collins more than 20 times in the wrists, arms, legs, penis, and torso. The coroner found five different bullet types in Collins' body. The coroner also recognized his wounds as part of a known pattern where shots to the extremities are intentionally and accurately placed for maximum suffering before killing the victim.

Days later, an FBI informant told detectives that Fletcher killed Collins because of Devante's theft. Collins' ex-girlfriend Cassandra Rivera, with whom Collins had a daughter, confirmed as much, and she added that Collins had been seen wearing Fletcher's

sunglasses on the street, leaving Fletcher incensed. Fletcher is serving a life sentence for murdering Collins. It is unclear whether the other murderers have been caught.

The coroner's report concluded that Collins was the victim of intentional torture and homicide. A police sergeant familiar with Shelter Island's security (who had in fact sent a nuisance letter to the complex) said that no amount of security would have stopped this murder. In short, Collins was the victim of a pre-planned torture and execution inside a private apartment, perpetrated by up to ten individuals (and no fewer than three shooters) in broad daylight.

B. Collins' heirs sued Shelter Island, but given the facts of Collins' execution, the case was always one of no liability and suspect damages.

Five or six months after Collins' murder, counsel for Collins' daughter and her mother submitted a negligent security claim to Shelter Island. Shelter Island tendered the claim to James River in November 2017, and James River immediately hired defense counsel. (*See* Compl. ¶ 12–13.) Throughout the underlying litigation, defense counsel opined that this was a case of no liability: premeditated murder is not foreseeable, Shelter Island did not have control of the inside of a resident's apartment, the alleged deficiencies in Shelter Island's security could not have caused the murder, nor could better security have stopped it. For years in the underlying litigation, North River received and agreed with defense counsel's assessments that this was a no-liability case that was worth far less than the $1 million primary limits.

In March 2019, Collins' heirs filed their complaint and shortly thereafter demanded $1 million "or the available limits of Defendant's applicable insurance, whichever is greater" — effectively an $11 million demand. Because James River had not yet received any evidence supporting their claimed damages or liability, it did not offer to settle the case. The insured and North River agreed with that decision.

Over the next three years, discovery continued and Collins's heirs made progressively lower demands. But by August 2022, defense counsel concluded that it would probably not be possible to obtain all the targeted-killing evidence they wanted.

James River also learned that, two years after Collins' murder, there was a murder at in a common area at Shelter Island (as opposed inside an apartment); that Shelter Island's owner testified poorly in her deposition about the common-area murder; and that the common-area murder case settled for the combined $11 million policy limits.[1]

Based on all of the foregoing, James River reevaluated the case and planned to make a $1 million offer to settle. But North River, hoping for a better deal, demanded that James River not make such an offer because North River didn't want such an offer to "set a floor" in settlement negotiations.

Nevertheless, in September 2022, James River offered the $1 million primary limits, but the case did not settle. (*See* Compl. ¶ 29.) Two months later, the parties agreed to settle the case for $5 million. (*See* Compl. ¶ 30.) James River contributed the $1 million primary limits, and North River contributed the $4 million balance out of its $10 million excess limits. (*See* Compl. ¶¶ 29–30.)

III. North River's Complaint and Equitable Claim

In January 2023, North River filed this complaint against James River asserting a single cause of action for equitable subrogation. North River wants the Court to shift North River's $4 million payment to James River on the theory that James River unreasonably failed to settle the underlying case for less than $1 million when it had the chance. In particular, and as is relevant here, North River alleges:

- Collins was murdered inside a Shelter Island apartment in May 2017. (Compl. ¶ 5.)
- Collins' heirs sued Shelter Island related to Collins' murder. (Compl. ¶ 6 & Ex. A.)

[1] Shelter Island did not have a James River policy applicable to the 2019 incident.

- James River covered Shelter Island under a primary policy with liability limits of $1 million. (Compl. ¶¶ 7–8; *see also* Ex. 1 (James River Policy No. 00070531-1).)[2]
- North River covered Shelter Island under an excess policy with a $10 million limit. (Compl. ¶¶ 10–11.)
- Collins' heirs' suit against Shelter Island settled for $5 million, of which James River paid $1 million and North River paid $4 million. (Compl. ¶¶ 29–30.)
- The settlement with Collins' heirs was well within the $11 million combined policy limits. (*See* Compl. ¶¶ 7–8, 10–11, 29–30.)

Based on these allegations, North River cannot state a claim for equitable subrogation: North River's only potential right to recover from James River is derivative of Shelter Island's, but Shelter Island did not suffer any damages because the underlying case settled within the combined policy limits. As a result, North River's surplus allegations that James River might have settled the heirs' claims for less than $1 million are irrelevant and cannot support an equitable subrogation claim.

IV. Nevada law applies to this dispute because the James River insurance policy was to be performed in Nevada.

Nevada law applies to this dispute. Federal district courts apply the choice of law rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941). The California Code of Civil Procedure provides that "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed[.]" Cal. Civ. Code § 1646. An insurance policy is a contract, and California Courts apply Section 1646 to disputes arising from insurance policies. Cal. Ins. Code § 22; *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App. 4th 1436, 1443 (2007). Under Section 1646, the place of performance of an insurance policy is the location of the insured risk, which in this case was Las Vegas, Nevada. *See id.*; (*see also* Compl. ¶¶ 5–7; Ex. 1.)

[2] The Court may consider the James River Policy at the pleading stage because North River incorporated it by reference into the complaint. *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 763 (9th Cir. 2023); (*see* Compl. ¶¶ 7–9.)

V. North River correctly alleges that the underlying claim settled within the policy limits, so the insured did not suffer any damages, and therefore there is no claim for North River to be subrogated to.

North River cannot state a claim for equitable subrogation because there is no underlying claim for North River to be subrogated to. Equitable "subrogation applies when one party, the subrogee, involuntarily pays the obligation or loss of another, the subrogor, for which a third party is found to bear responsibility." *St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 521 P.3d 418, 2022 WL 17543613, at *2 (Nev. Dec. 8, 2022) (citing *AT & T Techs., Inc. v. Reid*, 855 P.2d 533, 535 (Nev. 1993)).[3] "Subrogation creates *derivative* rights and requires an underlying independent basis upon which the subrogor could have recovered the payment as if the subrogee had never stepped in to assume the loss." *Id*. (emphasis added).

In other words, if Shelter Island does not have a claim for bad faith failure to settle, North River does not have a claim for equitable subrogation. Shelter Island's alleged underlying claim is for bad faith failure to settle within the $1 million James River policy limits. (*See* Compl. ¶ 26.) And Shelter Island only has such a claim if it suffered damages as a result of the alleged unreasonable failure to settle. *E.g.*, *St. Paul*, 521 P.3d 418, 2022 WL 17543613, at *2. As explained in *St. Paul*, Shelter Island did not suffer damages because the underlying case settled within the combined policy limits, and therefore there is no underlying claim for bad faith failure to settle.

In *St. Paul*, the insureds operated a night club. *St. Paul*, 521 P.3d 418, 2022 WL 17543613, at *1. Night club security personnel hurt a patron when they attempted to oust him from the club, and the patron sued the insureds. *Id.* The insureds tendered the claim to their primary carrier Aspen Specialty and one of their excess carriers National Union. *Id.* They later notified St. Paul, another excess carrier, of the claim. *Id.* The carriers each contributed to settle the claim, and St. Paul thereafter sued National Union for equitable

[3] The Nevada Supreme Court's unpublished decisions are not binding, but they may be cited for their persuasive value. *See* Nevada Rule of App. Proc. 36 (Nevada Supreme Court decisions citable for persuasive value).

subrogation to recover the amount that it had contributed to the settlement on the theory that National Union failed to settle the case within its own limits. *Id.* The trial court granted summary judgment to National Union and dismissed the equitable subrogation claim, and the Nevada Supreme Court affirmed. *Id.* at *1–2.

The Nevada Supreme Court explained that the insurers "guaranteed [the insured's] financial 'security, protection, and peace of mind' when they settled [the insured's] liability before excess-judgment exposure" within their combined limits. *Id.* at *2. "Therefore, [the insured] did not suffer damages which would give rise to either a bad-faith claim or a breach-of-contract claim," and "St. Paul thus lack[ed] any claim to assert on behalf of [the insured] against National Union." *Id.*; *see also Aspen Specialty Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 528 P.3d 287, 2023 WL 3185274, at *2 (Nev. Apr. 28, 2023) (same result in case between excess carrier and primary carrier).

The same is true here. North River's claim, if any, is derivative of Shelter Island's claim. Even if North River's allegations that there were earlier opportunities to settle the underlying case for less than $1 million are deemed true, Shelter Island doesn't have a claim for bad faith failure to settle because the underlying case settled within the combined policy limits. North River correctly alleges that the James River policy limit was $1 million, the North River excess policy limit was $10 million, so the combined limit was $11 million, and the underlying case settled within the combined limit for $5 million. (Compl. ¶¶ 7, 10, 29–30.) Under these circumstances, James River and North River guaranteed Shelter Island's financial security, protection, and peace of mind by settling the case before any excess-judgment exposure. *St. Paul*, 521 P.3d 418, 2022 WL 17543613, at *2; *Aspen Specialty*, 258 P.3d 287, 2023 WL 3185274, at *2. Therefore, Shelter Island did not suffer any damages, and Shelter Island does not have a claim for bad faith failure to settle. *Id.* And because Shelter Island does not have a claim, North River cannot be subrogated to any right to recover from James River. *See id.*

North River cannot plead around this defect. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 297 (9th Cir. 1990) (amendment cannot contradict allegations in the original complaint to state a claim). The Court should dismiss North River's claim with prejudice.[4]

VI. Conclusion

To protect their mutual insured Shelter Island from potential excess liability, James River and North River settled the underlying claim within their combined policy limits. Shelter Island thus suffered no damages, and it does not have a claim for bad faith failure to settle against James River. Because Shelter Island does not have a claim, there is nothing for North River to be subrogated to. Therefore, the Court should dismiss North River's complaint with prejudice.

Dated: June 26, 2023

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Jeffrey V. Commisso
JEFFREY V. COMMISSO

Attorneys for Defendant JAMES RIVER INSURANCE COMPANY

[4] North River's complaint also fails to state a claim for the independent reason that North River does not allege facts showing that its equitable position is superior to James River's. *See, e.g.*, *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (1998) (to establish claim for equitable subrogation, plaintiff must show that "justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the [plaintiff]"), *cited in St. Paul*, 521 P.3d 418, 2022 WL 17543613, at *3; (*see* Compl. ¶ 40 (conclusorily alleging that justice requires shifting the loss to James River without any supporting facts).

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant James River Insurance Company, certifies that this brief contains 2679 words, which complies with the word limit of L.R. 11-6.1.

Dated: June 26, 2023

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Jeffrey V. Commisso
JEFFREY V. COMMISSO

Attorneys for Defendant JAMES RIVER INSURANCE COMPANY

EXHIBIT 4

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
JOHN T. BROOKS, Cal. Bar No. 167793
JEFFREY V. COMMISSO, Cal. Bar No. 191267
BENJAMIN D. BROOKS, Cal. Bar No. 314373
501 West Broadway, 19th Floor
San Diego, California 92101-3598
Telephone: 619.338.6500
Facsimile: 619.234.3815
E mail jbrooks@sheppardmullin.com
jcommisso@sheppardmullin.com
bbrooks@sheppardmullin.com

Attorneys for Defendant JAMES RIVER INSURANCE COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NORTH RIVER INSURANCE COMPANY,

Plaintiff,

v.

JAMES RIVER INSURANCE COMPANY,

Defendant.

Case No. 2:23-CV-00027-PSG-E

DECLARATION OF JUSTIN ZAHARRIS IN SUPPORT OF JAMES RIVER'S MOTION TO DISMISS

Date: July 28, 2023
Time: 1:30pm
Crtrm: 6A

Complaint Filed: January 4, 2023

I, Justin Zaharris, declare as follows:

1. I am an employee at James River Insurance Company, and I am authorized to make this declaration on James River's behalf. I have personal knowledge of the following.

2. **Exhibit 1** to this declaration is a true and correct copy of James River insurance policy number 00070531-1, in which Alhambra Place Partnership DBA Shelter Island is listed as an additional named insured, with effective dates of March 1, 2017 through March 1, 2018.

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

Dated: 6/26/2023

DocuSigned by:
Justin Zaharris
CB47166230094FD...

Justin Zaharris

EXHIBIT 1

LIQUOR LIABILITY DECLARATIONS

POLICY NUMBER
00070531-1

JAMES RIVER INSURANCE COMPANY
6641 WEST BROAD STREET, SUITE 300
RICHMOND, VA 23230

1. NAMED INSURED AND MAILING ADDRESS:

LA Pacific Center Inc
710 S Myrtle Avenue Suite 285
Monrovia, CA 91016

PRODUCER: 21291

Burns & Wilcox Brokerage (Scottsdale)
14631 North Scottsdale Road Suite #150
Scottsdale, AZ 85254

2. POLICY PERIOD: From 03/01/2017 to 03/01/2018 12:01 A.M. Standard Time at your Mailing Address above.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, IN RELIANCE UPON THE STATEMENTS IN THE APPLICATION(S) AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE		
EACH COMMON CAUSE LIMIT	$	1,000,000
AGGREGATE LIMIT	$	2,000,000

DESCRIPTION OF BUSINESS
FORM OF BUSINESS: Corporation
BUSINESS DESCRIPTION: Hotels, Apartments

CLASSIFICATION AND PREMIUM

LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE $	ADVANCE PREMIUM $
1	Restaurants - with sales of alcoholic beverages that are less than 30% of the total annual receipts of the restaurants - with table service	16910	207,941 Gross Sales	4.00	1,500.00

	TOTAL PREMIUM (SUBJECT TO AUDIT)	$ 1,500.00
If checked, premium shown is flat and not subject to audit ☐	AT INCEPTION	$ 1,500.00
TOTAL SHOWN IS PAYABLE:		
	FREQUENCY: Annual	
AUDIT PERIOD (IF APPLICABLE)		

ENDORSEMENTS
ENDORSEMENTS ATTACHED TO THIS POLICY:

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

COMMERCIAL GENERAL LIABILITY DECLARATIONS

POLICY NUMBER
00070531-1

JAMES RIVER INSURANCE COMPANY
6641 WEST BROAD STREET, SUITE 300
RICHMOND, VA 23230

1. NAMED INSURED AND MAILING ADDRESS:

LA Pacific Center Inc
710 S Myrtle Avenue Suite 285
Monrovia, CA 91016

PRODUCER: 21291

Burns & Wilcox Brokerage (Scottsdale)
14631 North Scottsdale Road Suite #150
Scottsdale, AZ 85254

2. POLICY PERIOD: From 03/01/2017 to 03/01/2018 12:01 A.M. Standard Time at your Mailing Address above.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, IN RELIANCE UPON THE STATEMENTS IN THE APPLICATION(S) AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE			
EACH OCCURRENCE LIMIT	$	1,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	$	50,000	Any one premises
MEDICAL EXPENSE LIMIT		Excluded	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	$	1,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	$	2,000,000	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	$	2,000,000	

RETROACTIVE DATE (CG 00 02 ONLY)
THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW. RETROACTIVE DATE: **NONE; THIS IS NOT A CLAIMS MADE POLICY** (ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)

DESCRIPTION OF BUSINESS
FORM OF BUSINESS: Corporation
BUSINESS DESCRIPTION: Hotels, Apartments

ALL PREMISES YOU OWN, RENT OR OCCUPY

LOCATION NUMBER	ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY
1)	375 E. Harmon Avenue, Las Vegas, NV 89109
2)	4625 Boulder Highway, Las Vegas, NV 89121
3)	4855 Boulder Highway, Las Vegas, NV 89121
4)	3770 S Swenson St, Las Vegas, NV 89119
5)	Parcel 162-21-702-006, Las Vegas, NV 89109
6)	Parcel 162-21-702-007, Las Vegas, NV 89109
7)	158 Sawpit Lane, Bradbury, CA 91010

CLASSIFICATION AND PREMIUM

LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE $	ADVANCE PREMIUM $
1	Restaurants - with sales of alcoholic beverages that are less than 30% of the total annual receipts of the restaurants - with table service	16910	1,710,593 Gross Sales	5.64	9,651.00
1	Hotels and Motels-with pools or beaches-less than four stories	45190	7,227,749 Gross Sales	9.90	71,551.00
2	Swimming Pools	48925	1 Per Pool	669.19	669.00
2	Apartment Buildings	60010	280 Units	60.40	16,913.00
3	Swimming Pools	48925	2 Per Pool	668.72	1,337.00
3	Apartments	60010	839 Units	60.40	50,679.00
4	Swimming Pools	48925	1 Per Pool	669.19	669.00
4	Apartments	60010	445 Units	60.40	26,880.00
5	Vacant Land - Other than Not-For-Profit	49451	2 Acres	.95	2.00
6	Vacant Land - Other than Not-For-Profit	49451	2 Acres	.95	2.00
7	Dwellings - one - family (lessor's risk only)	63010	1 Dwelling	146.92	147.00
	Employee Benefit Liability				Included

	TOTAL PREMIUM (SUBJECT TO AUDIT)	$180,000.00
If checked, premium shown is flat and not subject to audit ☐	Company Fee	$ 250.00
TOTAL SHOWN IS PAYABLE:	AT INCEPTION	$180,250.00

AUDIT PERIOD (IF APPLICABLE)	FREQUENCY: Annual

ENDORSEMENTS
ENDORSEMENTS ATTACHED TO THIS POLICY:
See attached schedule A – Schedule of Forms

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

SCHEDULE A

FORMS AND ENDORSEMENTS THAT APPLY TO THIS POLICY:

POLICY NO. 00070531-1

FORM NUMBER	DESCRIPTION
GC0010US-1006	Liquor Liability Declarations
MC0001US-0416	Commercial General Liability Declarations
GC0001US-0304	Schedule A
CG0001-1207	Commercial General Liability Coverage Form
CG0033-1207	Liquor Liability Coverage Form
CG0435-1207	Employee Benefits Liability Coverage
AP2103US-0607	Minimum Policy Premium
AP5011US-1203	Policy Limitation - Amended Aggregate Limits of Insurance per Location
GC2719US-1016	Deductible Endorsement - Damages and Expenses - Liquor
MC2105US-1016	Deductible Endorsement - Damages and Expenses
MC2126US-0913	Premium Base Endorsement
CG2407-0196	Products/Completed Operations Hazard Redefined
CG2029-1185	Additional Insured - Grantor of Franchise
AP1005US-0705	Additional Named Insured Endorsement
AP1005US-0705	Additional Named Insured Endorsement
AP2003US-0403	Additional Insured - Lessors of Leased Equipment
CG2018-1185	Additional Insured - Mortgagee, Assignee, Receiver
AP1013US-0516	Premium Audit Conditions Amended
AP2104US-1012	Common Policy Conditions
AP2107US-0403	Binding Arbitration
AP2048US-0906	Limitation of Coverage to Designated Premises or Project
CG0068-0509	Recording and Distribution of Material or Information in Violation of the Law Exclusion
CG2136-0305	Exclusion - New Entities
CG2147-1207	Employment-Related Practices Exclusion
CG2167-1204	Fungi or Bacteria Exclusion
IL0021-0908	Nuclear Energy Liability Exclusion
AP2029US-1210	Combined Policy Exclusions
AP2031US-0411	Exclusion - Cross Suits
AP2061US-0408	Absolute Pollution and Pollution Related Liability Exclusion - with Hostile Fire/HVAC Exceptions
GC2128US-1012	Exclusion - Liquor Liability
GC2131US-0403	Fiduciary Exclusion
GC2141US-0107	Exclusion - Construction Activities
MC2139US-0403	Exclusion - Coverage C - Medical Payments
AP5027R-0115	Rejection of Coverage for Certified Acts of Terrorism Coverage
CG2175-0115	Exclusion of Certified Acts of Terrorism and Exclusion of Other Acts of Terrorism Committed Outside the United States
AP5048US-0410	California - Service of Suit
AP0100US-0403	Privacy Policy

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

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. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

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.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or

(b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs **(1), (3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3), (4), (5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

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

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

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

o. Personal And Advertising Injury

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

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Distribution Of Material In Violation Of Statutes

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** – Limits Of Insurance.

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. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

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".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods – Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of websites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b.** and **c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-Related

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Distribution Of Material In Violation Of Statutes

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

COVERAGE C MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage **A.**

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs **(1)(a)** or **(b)** above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by,

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

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

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage **C;**

b. Damages under Coverage **A,** except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages under Coverage **B.**

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

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

5. Subject to Paragraph **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

a. Damages under Coverage **A;** and

b. Medical expenses under Coverage **C**

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to Paragraph **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

7. Subject to Paragraph **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or

c. All other parts of the world if the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph **a.** above;

(2) The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph **f.** does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

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

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a., b., c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a., b., c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

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".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

LIQUOR LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

SECTION I – LIQUOR LIABILITY COVERAGE

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "injury" to which this insurance applies if liability for such "injury" is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage. 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 "injury" to which this insurance does not apply. We may, at our discretion, investigate any "injury" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

b. This insurance applies to "injury" only if:

(1) The "injury" occurs during the policy period in the "coverage territory"; and

(2) Prior to the policy period**,** no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "injury" or claim, knew that the "injury" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "injury" occurred, then any continuation, change or resumption of such "injury" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Injury" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "injury" or claim, includes any continuation, change or resumption of that "injury" after the end of the policy period.

d. "Injury" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "injury" or claim:

(1) Reports all, or any part, of the "injury" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "injury"; or

(3) Becomes aware by any other means that "injury" has occurred or has begun to occur.

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Injury" 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.

b. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

c. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the "injury".

d. Liquor License Not In Effect

"Injury" arising out of any alcoholic beverage sold, served or furnished while any required license is not in effect.

e. Your Product

"Injury" arising out of "your product". This exclusion does not apply to "injury" for which the insured or the insured's indemnitees may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

f. Other Insurance

Any "injury" with respect to which other insurance is afforded, or would be afforded but for the exhaustion of the limits of insurance.

This exclusion does not apply if the other insurance responds to liability for "injury" imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage.

g. War

"Injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

SUPPLEMENTARY PAYMENTS

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1. All expenses we incur.

2. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

3. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

4. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

7. Expenses incurred by the insured for first aid administered to others at the time of an event to which this insurance applies.

These payments will not reduce the limits of insurance.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

2. Each of the following is also an insured:

a. Your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" is an insured for:

(1) "Injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while that co-"employee" is either in the course of his or her employment or performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" as a consequence of Paragraph **(a)** above; or

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs **(a)** or **(b)** above.

(2) "Property damage" to property:

(a) Owned or occupied by, or

(b) Rented or loaned

to that "employee", any of your other "employees", by any of your partners or members (if you are a partnership or joint venture), or by any of your members (if you are a limited liability company).

b. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

c. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier; and

b. Coverage does not apply to "injury" that occurred before you acquired or formed the organization.

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

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The Aggregate Limit is the most we will pay for all "injury" as the result of the selling, serving or furnishing of alcoholic beverages.

3. Subject to the Aggregate Limit, the Each Common Cause Limit is the most we will pay for all "injury" sustained by one or more persons or organizations as the result of the selling, serving or furnishing of any alcoholic beverage to any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – LIQUOR LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Injury, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "injury" which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "injury" took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any "injury".

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of "injury" to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary. Our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **b.** below.

b. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

2. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the "injury" occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or

c. All other parts of the world if the "injury" arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph **a.** above; or

(2) The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

3. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

4. "Executive Officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

5. "Injury" means damages because of "bodily injury" and "property damage", including damages for care, loss of services or loss of support.

6. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

7. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.

8. "Suit" means a civil proceeding in which damages because of "injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

9. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

10. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product", and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

POLICY NUMBER: 00070531-1

COMMERCIAL GENERAL LIABILITY
CG 04 35 12 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYEE BENEFITS LIABILITY COVERAGE

THIS ENDORSEMENT PROVIDES CLAIMS-MADE COVERAGE.
PLEASE READ THE ENTIRE ENDORSEMENT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Coverage	Limit Of Insurance	Each Employee Deductible	Premium
Employee Benefits Programs	**$ 1,000,000 each employee** **$ 1,000,000 aggregate**	**$ 2,500**	**Included**
Retroactive Date:	**03/01/2016**		
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

A. The following is added to **Section I – Coverages:**

COVERAGE – EMPLOYEE BENEFITS LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of any act, error or omission, of the insured, or of any other person for whose acts the insured is legally liable, 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 to which this insurance does not apply. We may, at our discretion, investigate any report of an act, error or omission and settle any "claim" or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Paragraph **D.** (Section **III** – Limits Of Insurance); and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

b. This insurance applies to damages only if:

(1) The act, error or omission, is negligently committed in the "administration" of your "employee benefit program";

(2) The act, error or omission, did not take place before the Retroactive Date, if any, shown in the Schedule nor after the end of the policy period; and

(3) A "claim" for damages, because of an act, error or omission, is first made against any insured, in accordance with Paragraph **c.** below, during the policy period or an Extended Reporting Period we provide under Paragraph **F.** of this endorsement.

c. A "claim" seeking damages will be deemed to have been made at the earlier of the following times:

(1) When notice of such "claim" is received and recorded by any insured or by us, whichever comes first; or

(2) When we make settlement in accordance with Paragraph **a.** above.

A "claim" received and recorded by the insured within 60 days after the end of the policy period will be considered to have been received within the policy period, if no subsequent policy is available to cover the claim.

d. All "claims" for damages made by an "employee" because of any act, error or omission, or a series of related acts, errors or omissions, including damages claimed by such "employee's" dependents and beneficiaries, will be deemed to have been made at the time the first of those "claims" is made against any insured.

2. Exclusions

This insurance does not apply to:

a. Dishonest, Fraudulent, Criminal Or Malicious Act

Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.

b. Bodily Injury, Property Damage, Or Personal And Advertising Injury

"Bodily injury", "property damage" or "personal and advertising injury".

c. Failure To Perform A Contract

Damages arising out of failure of performance of contract by any insurer.

d. Insufficiency Of Funds

Damages arising out of an insufficiency of funds to meet any obligations under any plan included in the "employee benefit program".

e. Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation

Any "claim" based upon:

(1) Failure of any investment to perform;

(2) Errors in providing information on past performance of investment vehicles; or

(3) Advice given to any person with respect to that person's decision to participate or not to participate in any plan included in the "employee benefit program".

f. Workers' Compensation And Similar Laws

Any "claim" arising out of your failure to comply with the mandatory provisions of any workers' compensation, unemployment compensation insurance, social security or disability benefits law or any similar law.

g. ERISA

Damages for which any insured is liable because of liability imposed on a fiduciary by the Employee Retirement Income Security Act of 1974, as now or hereafter amended, or by any similar federal, state or local laws.

h. Available Benefits

Any "claim" for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds accrued or other collectible insurance.

i. Taxes, Fines Or Penalties

Taxes, fines or penalties, including those imposed under the Internal Revenue Code or any similar state or local law.

j. Employment-Related Practices

Damages arising out of wrongful termination of employment, discrimination, or other employment-related practices.

B. For the purposes of the coverage provided by this endorsement:

1. All references to Supplementary Payments – Coverages **A** and **B** are replaced by Supplementary Payments – Coverages **A, B** and **Employee Benefits Liability.**

2. Paragraphs **1.b.** and **2.** of the Supplementary Payments provision do not apply.

C. For the purposes of the coverage provided by this endorsement, Paragraphs **2.** and **3.** of **Section II – Who Is An Insured** are replaced by the following:

2. Each of the following is also an insured:

a. Each of your "employees" who is or was authorized to administer your "employee benefit program".

b. Any persons, organizations or "employees" having proper temporary authorization to administer your "employee benefit program" if you die, but only until your legal representative is appointed.

c. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Endorsement.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if no other similar insurance applies to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier.

b. Coverage under this provision does not apply to any act, error or omission that was committed before you acquired or formed the organization.

D. For the purposes of the coverage provided by this endorsement, **Section III – Limits Of Insurance** is replaced by the following:

1. Limits Of Insurance

a. The Limits of Insurance shown in the Schedule and the rules below fix the most we will pay regardless of the number of:

(1) Insureds;

(2) "Claims" made or "suits" brought;

(3) Persons or organizations making "claims" or bringing "suits";

(4) Acts, errors or omissions; or

(5) Benefits included in your "employee benefit program".

b. The Aggregate Limit is the most we will pay for all damages because of acts, errors or omissions negligently committed in the "administration" of your "employee benefit program".

c. Subject to the Aggregate Limit, the Each Employee Limit is the most we will pay for all damages sustained by any one "employee", including damages sustained by such "employee's" dependents and beneficiaries, as a result of:

(1) An act, error or omission; or

(2) A series of related acts, errors or omissions

negligently committed in the "administration" of your "employee benefit program".

However, the amount paid under this endorsement shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the "employee benefit program".

The Limits of Insurance of this endorsement apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations of the policy to which this endorsement is attached, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits Of Insurance.

2. Deductible

a. Our obligation to pay damages on behalf of the insured applies only to the amount of damages in excess of the deductible amount stated in the Schedule as applicable to Each Employee. The limits of insurance shall not be reduced by the amount of this deductible.

b. The deductible amount stated in the Schedule applies to all damages sustained by any one "employee", including such "employee's" dependents and beneficiaries, because of all acts, errors or omissions to which this insurance applies.

c. The terms of this insurance, including those with respect to:

(1) Our right and duty to defend any "suits" seeking those damages; and

(2) Your duties, and the duties of any other involved insured, in the event of an act, error or omission, or "claim"

apply irrespective of the application of the deductible amount.

d. We may pay any part or all of the deductible amount to effect settlement of any "claim" or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as we have paid.

E. For the purposes of the coverage provided by this endorsement, Conditions **2.** and **4.** of **Section IV – Commercial General Liability Conditions** are replaced by the following:

2. Duties In The Event Of An Act, Error Or Omission, Or "Claim" Or "Suit"

a. You must see to it that we are notified as soon as practicable of an act, error or omission which may result in a "claim". To the extent possible, notice should include:

(1) What the act, error or omission was and when it occurred; and

(2) The names and addresses of anyone who may suffer damages as a result of the act, error or omission.

b. If a "claim" is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the "claim" or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the "claim" or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "claim" or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the "claim" or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of an act, error or omission to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation or incur any expense without our consent.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this endorsement, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis that is effective prior to the beginning of the policy period shown in the Schedule of this insurance and that applies to an act, error or omission on other than a claims-made basis, if:

(a) No Retroactive Date is shown in the Schedule of this insurance; or

(b) The other insurance has a policy period which continues after the Retroactive Date shown in the Schedule of this insurance.

(2) When this insurance is excess, we will have no duty to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of the total amount that all such other insurance would pay for the loss in absence of this insurance; and the total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Schedule of this endorsement.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limits of insurance to the total applicable limits of insurance of all insurers.

F. For the purposes of the coverage provided by this endorsement, the following Extended Reporting Period provisions are added, or, if this endorsement is attached to a claims-made Coverage Part, replaces any similar Section in that Coverage Part:

EXTENDED REPORTING PERIOD

1. You will have the right to purchase an Extended Reporting Period, as described below, if:

a. This endorsement is canceled or not renewed; or

b. We renew or replace this endorsement with insurance that:

(1) Has a Retroactive Date later than the date shown in the Schedule of this endorsement; or

(2) Does not apply to an act, error or omission on a claims-made basis.

2. The Extended Reporting Period does not extend the policy period or change the scope of coverage provided. It applies only to "claims" for acts, errors or omissions that were first committed before the end of the policy period but not before the Retroactive Date, if any, shown in the Schedule. Once in effect, the Extended Reporting Period may not be canceled.

3. An Extended Reporting Period of five years is available, but only by an endorsement and for an extra charge.

You must give us a written request for the endorsement within 60 days after the end of the policy period. The Extended Reporting Period will not go into effect unless you pay the additional premium promptly when due.

We will determine the additional premium in accordance with our rules and rates. In doing so, we may take into account the following:

a. The "employee benefit programs" insured;

b. Previous types and amounts of insurance;

c. Limits of insurance available under this endorsement for future payment of damages; and

d. Other related factors.

The additional premium will not exceed 100% of the annual premium for this endorsement.

The Extended Reporting Period endorsement applicable to this coverage shall set forth the terms, not inconsistent with this Section, applicable to the Extended Reporting Period, including a provision to the effect that the insurance afforded for "claims" first received during such period is excess over any other valid and collectible insurance available under policies in force after the Extended Reporting Period starts.

4. If the Extended Reporting Period is in effect, we will provide an extended reporting period aggregate limit of insurance described below, but only for claims first received and recorded during the Extended Reporting Period.

The extended reporting period aggregate limit of insurance will be equal to the dollar amount shown in the Schedule of this endorsement under Limits of Insurance.

Paragraph **D.1.b.** of this endorsement will be amended accordingly. The Each Employee Limit shown in the Schedule will then continue to apply as set forth in Paragraph **D.1.c.**

G. For the purposes of the coverage provided by this endorsement, the following definitions are added to the **Definitions** Section:

1. "Administration" means:

a. Providing information to "employees", including their dependents and beneficiaries, with respect to eligibility for or scope of "employee benefit programs";

b. Handling records in connection with the "employee benefit program"; or

c. Effecting, continuing or terminating any "employee's" participation in any benefit included in the "employee benefit program".

However, "administration" does not include handling payroll deductions.

2. "Cafeteria plans" means plans authorized by applicable law to allow employees to elect to pay for certain benefits with pre-tax dollars.

3. "Claim" means any demand, or "suit", made by an "employee" or an "employee's" dependents and beneficiaries, for damages as the result of an act, error or omission.

4. "Employee benefit program" means a program providing some or all of the following benefits to "employees", whether provided through a "cafeteria plan" or otherwise:

a. Group life insurance, group accident or health insurance, dental, vision and hearing plans, and flexible spending accounts, provided that no one other than an "employee" may subscribe to such benefits and such benefits are made generally available to those "employees" who satisfy the plan's eligibility requirements;

b. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an "employee" may subscribe to such benefits and such benefits are made generally available to all "employees" who are eligible under the plan for such benefits;

c. Unemployment insurance, social security benefits, workers' compensation and disability benefits;

d. Vacation plans, including buy and sell programs; leave of absence programs, including military, maternity, family, and civil leave; tuition assistance plans; transportation and health club subsidies; and

e. Any other similar benefits designated in the Schedule or added thereto by endorsement.

H. For the purposes of the coverage provided by this endorsement, Definitions **5.** and **18.** in the **Definitions** Section are replaced by the following:

5. "Employee" means a person actively employed, formerly employed, on leave of absence or disabled, or retired. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

18. "Suit" means a civil proceeding in which damages because of an act, error or omission to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

MINIMUM POLICY PREMIUM

This endorsement modifies and amends insurance provided under the following:

ALL COVERAGE PARTS

This endorsement sets forth the minimum earned premium for the policy. The minimum earned premium for this policy is calculated in accordance with the following:

1. The minimum premium for the policy period is 100% of the total policy premium as shown on the policy declarations page plus any premium adjustment by endorsements and any additional premium developed by audit.

2. Audits that indicate a return premium will not reduce the minimum as stated in paragraph 1.

3. If the insured cancels this policy and the policy is not subject to audit, the return premium will be 90% of the unearned policy premium; however in no event will the Company retain less than **25**% of the minimum premium shown in paragraph 1. above.

4. If the insured cancels this policy and the policy is subject to audit, the earned premium will be determined by final audit, however in no event will it be less than **25**% of the minimum premium as described in paragraph 1. above.

5. If the Company cancels the policy for any reason, other than for non-payment of premium, then the insured will be returned the full amount of the unearned premium without any minimum premium restrictions.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

POLICY LIMITATION – AMENDED AGGREGATE LIMITS OF INSURANCE PER LOCATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SECTION III – LIMITS OF INSURANCE - The General Aggregate Limit applies separately to each “Location” of the Named Insured.

Notwithstanding the application of the General Aggregate Limit to each “Location” of the Named Insured, under no circumstances will we pay more than **$10,000,000** for all claims under this policy that are subject to the General Aggregate limit.

For the purpose of this endorsement, the following definition is added:

“Location” means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DEDUCTIBLE ENDORSEMENT – DAMAGES AND EXPENSES – LIQUOR

This endorsement modifies insurance provided under the following:

LIQUOR LIABILITY COVERAGE PART

SCHEDULE

Location		
Coverage	**Amount and Basis of Deductible**	
	PER CLAIM or PER COMMON CAUSE	
Liquor Liability	$	$ 5,000

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

APPLICATION OF ENDORSEMENT (Enter below any limitations on the application of this endorsement. If no limitation is entered, the deductibles apply to “claims expense” and damages for "injury", however caused):

A. Our obligation under the Liquor Liability Coverage to pay “claims expense” and damages on your behalf applies only to the amount of “claims expense” and damages in excess of any deductible amount stated in the Schedule above.

B. We may select a deductible amount on either a per claim or a per common cause basis. Our selected deductible applies to the Liquor Liability Coverage and to the basis of the deductible indicated by the placement of the deductible amount in the Schedule above. The deductible amount stated in the Schedule above applies as follows:

1. PER CLAIM BASIS. If the deductible amount indicated in the Schedule above is on a per claim basis, that deductible applies under Liquor Liability Coverage, to all "injuries" sustained by any one person or organization.

2. PER COMMON CAUSE BASIS. If the deductible amount indicated in the Schedule above is on a per common cause basis, that deductible amount applies under Liquor Liability Coverage to all “claims expense” and damages because of "injury" as the result of the selling, serving or furnishing of any alcoholic beverage to any one person, regardless of the number of persons or organizations who sustain damages.

C. The terms of this insurance, including those with respect to:

1. Our right and duty to defend the insured against any "suit" seeking those damages; and

2. Your duties in the event of an "injury", claim or "suit"

apply irrespective of the application of the deductible amount.

D. We may pay any part or all of the deductible amount on your behalf to effect settlement of any claim or “suit”. This advance payment on your behalf will be invoiced to you and shall be promptly reimbursed to us within 30 days of the invoice date. Failure to reimburse us for deductible amounts paid on your behalf may result in policy cancellation as stated in common policy conditions.

E. “Claims expense” shall include investigations, adjustment and legal expenses, interests and fees, including court costs and premiums on bonds incurred by us. “Claims expense” does not include salary charges of regular employees of the Company.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DEDUCTIBLE ENDORSEMENT – DAMAGES AND EXPENSES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Coverage	**Amount and Basis of Deductible**		
	PER CLAIM	**or**	**PER OCCURRENCE**
Bodily Injury Liability	$		$
OR			
Property Damage Liability	$		$
OR			
Personal & Advertising Injury Liability	$		$
OR			
Damage To Premises Rented To You	$		$
OR			
Medical Payments	$		$
OR			
Bodily Injury Liability and/or Property Damage Liability and/or Personal & Advertising Injury Liability, and/or Damage To Premises Rented To You and/or Medical Payments Combined	$		$ 5,000

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

APPLICATION OF ENDORSEMENT (Enter below any limitations on the application of this endorsement. If no limitation is entered, the deductibles apply to “claims expense” and damages for all "bodily injury", "property damage" or “personal and advertising injury” or medical expenses however caused):

A. Our obligation under the Bodily Injury Liability, Property Damage Liability, Personal and/or Advertising Injury Liability, Damage to Premises Rented to You, Medical Payments or any other coverages provided by this policy to pay “claims expense” and damages on your behalf applies only to the amount of “claims expense” and damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages.

B. We may select a deductible amount on either a per claim or a per "occurrence" basis. Our selected deductible applies to the coverage option and to the basis of the deductible indicated by the placement of the deductible amount in the Schedule above. The deductible amount stated in the Schedule above applies as follows:

1. **PER CLAIM BASIS.** If the deductible amount indicated in the Schedule above is on a per claim basis, that deductible applies as follows:

   a) Under Bodily Injury Liability Coverage, to all damages sustained by any one person because of "bodily injury" including “claims expense”;

   b) Under Property Damage Liability Coverage, to all damages sustained by any one person because of "property damage" including “claims expense”;

   c) Under Personal & Advertising Injury Liability Coverage, to all damages sustained by any one person or organization because of “personal and advertising injury” including “claims expense”;

   d) Under Damage To Premises Rented To You Coverage, all damages to any one premises while rented to you, because of “property damage” including “claims expense”;

   e) Under Medical Payments Coverage, to all medical expenses sustained by any one person including “claims expense”; or

   f) Under Bodily Injury Liability and/or Property Damage Liability and/or Personal & Advertising Injury Liability, and/or Damage To Premises Rented To You, and/or Medical Payments Coverages Combined, to all injury, damage and medical expenses sustained by any one person or organization including “claims expense”

   as the result of any one "occurrence", offense or accident.

   If damages are claimed for care, loss of services or death resulting at any time from "bodily injury", a separate deductible amount will be applied to each person making a claim for such damages.

   With respect to "property damage", “person” includes an organization.

2. **PER OCCURRENCE BASIS.** If the deductible amount indicated in the Schedule above is on a "per occurrence" basis, that deductible amount applies as follows:

   a) Under Bodily Injury Liability Coverage, to all damages because of "bodily injury" including “claims expense”;

   b) Under Property Damage Liability Coverage, to all damages because of "property damage" including “claims expense”;

   c) Under Personal & Advertising Injury Liability Coverage, to all damages because of “personal and advertising injury” including “claims expense”;

   d) Under Damage To Premises Rented To You Coverage, all damages to any one premises while rented to you, because of “property damage” including “claims expense”;

   e) Under Medical Payments Coverage, to all medical expenses because of an accident including “claims expense”; or

   f) Under Bodily Injury Liability and/or Property Damage Liability and/or Personal & Advertising Injury Liability, and/or Damage To Premises Rented To You, and/or Medical Payments Coverages Combined, to all injury, damage and medical expenses including “claims expense”

   as the result of any one "occurrence", offense or accident, regardless of the number of persons or organizations who sustain damages because of that "occurrence", offense or accident.

C. The terms of this insurance, including those with respect to:

1. Our right and duty to defend any "suits" seeking those damages; and
2. Your duties in the event of an "occurrence", offense, claim, or “suit”

apply irrespective of the application of the deductible amount.

D. We may pay any part or all of the deductible amount on your behalf to effect settlement of any claim or "suit". This advance payment on your behalf will be invoiced to you and shall be promptly reimbursed to us within 30 days of the invoice date. Failure to reimburse us for deductible amounts paid on your behalf may result in policy cancellation as stated in common policy conditions.

E. "Claims expense" shall include investigations, adjustment and legal expenses, interests and fees, including court costs and premiums on bonds incurred by us. "Claims expense" does not include salary charges of regular employees of the Company.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PREMIUM BASE ENDORSEMENT

One or more of the following symbols may be entered under the Premium Base column of the Declarations. These symbols designate the base used for determining your premium. The following is a definition of these symbols when used as a premium base.

Symbol Definition

"Area" means: The total number of square feet of floor space at the insured premises, computed as follows:

For entire buildings, by multiplying the product of the horizontal dimensions of the outside of the outer building walls by the number of floors, including basements but do not use the area of the following:

1. Courts and mezzanine types of floor openings.

2. Portions of basements or floors where 50% or more of the area is used for shop or storage for building maintenance, dwelling by building maintenance employees, heating units, power plants or air-conditioning equipment.

3. For tenants, determine the area they occupy in the same manner as for the entire buildings.

The rates apply per 1,000 square feet of area.

"Total Cost" means:

The total cost of all work let or sublet in connection with each specific project including:

1. The cost of all labor, materials and equipment furnished, used or delivered for use in the execution of the work.
2. All fees, bonuses or commissions made, paid or due.

The rates apply per $1,000 of total cost.

"Admissions" means:

The total number of persons, other than employees or the named insured, admitted to the event insured or to events conducted on the premises whether on paid admissions, tickets, complimentary tickets or passes.

The rates apply per admission.

"Payroll" means:

1. Remuneration which includes money or substitutes for money.
2. Payroll includes:

   a. Commissions, bonuses, pay for holidays, vacations or periods of illness;
   b. Extra pay for overtime.
   c. Payments by an employer or amounts otherwise required by law to be paid by employees to statutory insurance or pension plans, such as Federal Social Security Act;

d. Payment to employees on any basis other than time worked, such as piece work, profit sharing or incentive plans;
e. Payment or allowance for hand tools or power tools used by hand provided by employees and used in their work or operations for the insured;
f. The rental value of an apartment or a house provided for an employee based on comparable accommodations;
g. Value of meals and lodging other than an apartment or house received by employees as part of their pay;
h. The value of store certificates, merchandise, credits or any other substitute for money received by employees as part of their pay;
i. The payroll of mobile equipment operators and their helpers, whether or not the operators are designated or licensed to operate automobiles. If the operators and their helpers are provided to the insured along with equipment hired under contract and their actual payroll is not known, use 1/3 of the total amount paid out by the insured for the hire of the equipment;
j. The payroll of executive officers and individual insureds and co-partners;
k. Fees paid to employment agencies for temporary personnel provided to the insured;

3. Payroll does not include:

a. Tips and other gratuities received by employees;
b. Payments by an employer to group insurance or group pension plans for employees in accordance with the manuals in use by us;
c. The value of special rewards for individual invention or discovery;
d. Dismissal or severance payments except for time worked or accrued vacation;

The rates apply per $1,000 of payroll.

"Gross Sales" or "Receipts" means:

1. The gross amount charged by the named insured, concessionaires of the named insured or by others trading under the insured's name for:
   a. All goods or products, sold or distributed;
   b. Operations performed during the policy period;
   c. Rentals; and
   d. Dues or fees.
2. Inclusions
   The following items shall not be deducted from gross sales:
   a. Foreign exchange discounts;
   b. Freight allowance to customers;
   c. Total sales of consigned goods and warehouse receipts;
   d. Trade or cash discounts;
   e. Bad debts; and
   f. Repossession of items sold on installments (amount actually collected.)
3. Exclusions
   The following items shall be deducted from gross sales:
   a. Sales or excise taxes which are collected and submitted to a governmental division;
   b. Credits for repossessed merchandise and products returned.
   c. Allowances for damaged and spoiled goods;
   d. Finance charges for items sold on installments;
   e. Freight charges on sales if freight is charged as a separate item on customers invoice; and
   f. Royalty income from patent rights or copyrights which are not product sales.

The rates apply per $1,000 of gross sales.

"Each" means:

The basis of premium involves units of exposure, and the quantity comprising each unit of exposure is indicated in the Declarations such as "per acre."

The rates apply per unit of exposure.

"Unit" means:

A single room or group of rooms intended for occupancy as separate living quarters by a family, by a group of unrelated persons living together, or by a person living alone.

The rates apply per each unit.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRODUCTS/COMPLETED OPERATIONS HAZARD REDEFINED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Description of Premises and Operations:

Restaurant Operations

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to "bodily injury" or "property damage" arising out of "your products" manufactured, sold, handled or distributed:

1. On, from or in connection with the use of any premises described in the Schedule, or

2. In connection with the conduct of any operation described in the Schedule, when conducted by you or on your behalf,

Paragraph **a.** of the definition of "Products-completed operations hazard" in the DEFINITIONS Section is replaced by the following:

"Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" that arises out of "your products" if the "bodily injury" or "property damage" occurs after you have relinquished possession of those products.

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – GRANTOR OF FRANCHISE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

Where required by written contract or written agreement.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to their liability as grantor of a franchise to you.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL NAMED INSURED ENDORSEMENT

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS

The persons or entities listed in the Schedule below are included as Named Insured(s) under this policy:

SCHEDULE

Name:	**Retroactive Date:** If no date is shown below, the Retroactive date shown in the Declarations Page of this Policy shall apply:
LA Wilshire Corporation DBA The Suites (Indio & Flamingo)	
Alhamba Place Partnership DBA Shelter Island	
KP Oasis Management Inc	
KP Asset Management Inc	

This endorsement in no way increases the Limits of Insurance shown in the Declarations Page of this Policy.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL NAMED INSURED ENDORSEMENT

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS

The persons or entities listed in the Schedule below are included as Named Insured(s) under this policy:

SCHEDULE

Name:	**Retroactive Date:** If no date is shown below, the Retroactive date shown in the Declarations Page of this Policy shall apply:
LA Wilshire Corporation DBA The Suites (Indio & Flamingo)	
Alhamba Place Partnership DBA Shelter Island	
KP Oasis Management Inc	
KP Asset Management Inc	

This endorsement in no way increases the Limits of Insurance shown in the Declarations Page of this Policy.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – LESSORS OF LEASED EQUIPMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITYCOVERAGE

SCHEDULE

Where required by written contract or written agreement.

Who is an "Insured" is amended to include as an Insured any person or organization from whom you lease equipment when you and such person or organization have an agreement in writing that such person or organization be added as an Additional Insured to your policy. The coverage afforded to the Additional Insured is solely limited to liability directly caused by the maintenance, operation or use by you of equipment leased to you by such person or organization.

Where no coverage shall apply herein for the Named Insured, no coverage or defense shall be afforded to the Additional Insured.

With respect to the coverage afforded to the Additional Insured, the following exclusions apply:

This coverage does not apply to:

1. Any occurrence which takes place after the equipment lease expires;
2. "Bodily injury" or "property damage" arising out of the sole negligence of the person or organization shown in the Schedule;
3. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the claimed negligence of the Additional Insured other than that directly caused by the maintenance, operation or use by you of equipment leased to you by the Additional Insured which shall be imputed to the Additional Insured; or
4. "Bodily injury", "property damage" or "personal and advertising injury" to any employee of the Named Insured or to any obligation of the Additional Insured to indemnify another because of damage arising out of such injury.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – MORTGAGEE, ASSIGNEE, OR RECEIVER

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

Where required by written contract or written agreement.

Designation of Premises:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule but only with respect to their liability as mortgagee, assignee, or receiver and arising out of the ownership, maintenance, or use of the premises by you and shown in the Schedule.
2. This insurance does not apply to structural alterations, new construction and demolition operations performed by or for that person or organization.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PREMIUM AUDIT CONDITIONS AMENDED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE
PRODUCTS/COMPLETED OPERATIONS COVERAGE

SECTION IV--COMMERCIAL GENERAL LIABILITY CONDITIONS, Item 5. Premium Audit, is deleted and replaced with the following:

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request. We have the right, but not the obligation, to conduct a physical audit of records needed for premium computation after the expiration of this policy.

d. Your refusal to maintain or provide needed records, or to allow us to conduct a physical audit of needed records, will result in our developing and calculating a final audit premium based on information available to us without your cooperation. If a final Premium Audit calculated without your cooperation results in additional premium due to us, you are obligated to pay such additional premium.

e. Failure to pay any additional premium due resulting from a Premium Audit when due may result in the cancellation of any additional or subsequent policy in effect with the Company, at our sole discretion.

f. Any additional or subsequent policy in effect after the term of this policy with the Company shall be subject to adjustment of its rating base based on the Premium Audit, at our sole discretion.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COMMON POLICY CONDITIONS

All Coverage Parts in this policy are subject to the following Conditions.

1. CANCELLATION AND NON-RENEWAL

A. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.

B. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

(1) 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or

(2) 30 days before the effective date of cancellation if we cancel for any other reason.

C. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

D. Notice of cancellation will state the effective date of cancellation. The policy will end on that date.

E. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata unless cancellation is due to non payment of premium, in which case the refund may be less than pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

F. If notice is mailed, proof of mailing will be sufficient proof of notice.

If we elect not to renew this policy, we shall mail written notice to the First Named Insured at the address shown in the Declarations. Such written notice of non-renewal shall be mailed at least 30 days prior to the end of the policy term.

2. CHANGES

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

3. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring suit or transfer those rights to us and help us enforce them.

4. REPRESENTATIONS

By accepting this policy, you agree:

A. The statements in the Declarations are accurate and complete;

B. Those statements are based upon representations you made to us; and

C. We have issued this policy in reliance upon your representations.

5. SERVICE OF SUIT

It is agreed that in the event of the failure of this Company to pay any amount claimed to be due hereunder, this Company will submit to the jurisdiction of any court of competent jurisdiction within the United States of America and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon the Company's President, or his nominee, at the address shown on the Declarations page of this policy, and that in any suit instituted against any one of them upon this policy, this Company will abide by the final decision of

such Court or of any Appellate Court in the event of an appeal.

The above-named is authorized and directed to accept service of process on behalf of this Company in any such suit and/or upon the request of the insured to give a written undertaking to the insured that it or they will enter a general appearance upon this Company's behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States of America, which makes provision therefore, this Company hereby designates the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designates the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

6. TERMS, CONDITIONS AND PREMIUM

On each renewal, continuation, anniversary of the effective date of the policy or on an annual basis, the Company will determine the rate and premium and/or amend the terms and conditions in accordance with the rates and rules then in effect.

7. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless signed by duly authorized representatives of this Company.

VICE PRESIDENT ***PRESIDENT***

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BINDING ARBITRATION

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS

Should we and the insured disagree as to the rights and obligations owed by us under this policy, including the effect of any applicable statutes or common law upon the contractual obligations otherwise owed, either party may make a written demand that the dispute be subjected to binding arbitration.

When such a request is made, The American Arbitration Association shall be used, with each party selecting an arbitrator from the list of qualified arbitrators for insurance coverage disputes provided by that Association. The two chosen arbitrators shall select a third arbitrator from the same list; if they cannot agree to a selection, The American Arbitration Association shall make the selection for them. Each party shall bear the costs of its arbitrator and shall share equally the costs of the third arbitrator and of the arbitration process. A decision agreed to by two of the arbitrators will be binding.

In the event you prevail in the arbitration and we promptly offer to you arbitration costs and reasonable attorney fees incurred in connection therewith, in addition to the disputed contract benefit, you shall have no right to sue us for breach of implied covenants or unreasonable withholding of contract benefits.

To the extent that we prevail in the arbitration, the arbitrators may award us any expenses and/or damages incurred or paid under reservation of rights in excess of our contract obligations as determined by the arbitrators.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITATION OF COVERAGE TO DESIGNATED PREMISES OR PROJECT

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS

SCHEDULE

Premises:
Project:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

This insurance applies only to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or
2. The project shown in the Schedule.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

RECORDING AND DISTRIBUTION OF MATERIAL OR INFORMATION IN VIOLATION OF LAW EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Exclusion **q.** of Paragraph **2. Exclusions** of Section **I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

B. Exclusion **p.** of Paragraph **2. Exclusions** of Section **I – Coverage B – Personal And Advertising Injury Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – NEW ENTITIES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph **3.** of **Section II – Who Is An Insured** does not apply.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph **2., Exclusions** of Section **I – Coverage A – Bodily Injury And Property Damage Liability:**

This insurance does not apply to:

"Bodily injury" to:

(1) A person arising out of any:

(a) Refusal to employ that person;

(b) Termination of that person's employment; or

(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or

(2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs **(a), (b),** or **(c)** above is directed.

This exclusion applies:

(1) Whether the injury-causing event described in Paragraphs **(a), (b)** or **(c)** above occurs before employment, during employment or after employment of that person;

(2) Whether the insured may be liable as an employer or in any other capacity; and

(3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

B. The following exclusion is added to Paragraph **2., Exclusions** of Section **I – Coverage B – Personal And Advertising Injury Liability:**

This insurance does not apply to:

"Personal and advertising injury" to:

(1) A person arising out of any:

(a) Refusal to employ that person;

(b) Termination of that person's employment; or

(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or

(2) The spouse, child, parent, brother or sister of that person as a consequence of "personal and advertising injury" to that person at whom any of the employment-related practices described in Paragraphs **(a), (b),** or **(c)** above is directed.

This exclusion applies:

(1) Whether the injury-causing event described in Paragraphs **(a), (b)** or **(c)** above occurs before employment, during employment or after employment of that person;

(2) Whether the insured may be liable as an employer or in any other capacity; and

(3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

Fungi Or Bacteria

a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

B. The following exclusion is added to Paragraph **2. Exclusions** of **Section I – Coverage B – Personal And Advertising Injury Liability:**

2. Exclusions

This insurance does not apply to:

Fungi Or Bacteria

a. "Personal and advertising injury" which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.

b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

C. The following definition is added to the **Definitions** Section:

"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT

(Broad Form)

This endorsement modifies insurance provided under the following:

COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
PROFESSIONAL LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

1. The insurance does not apply:

A. Under any Liability Coverage, to "bodily injury" or "property damage":

(1) With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(2) Resulting from the "hazardous properties" of "nuclear material" and with respect to which **(a)** any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or **(b)** the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.

C. Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:

(1) The "nuclear material" **(a)** is at any "nuclear facility" owned by, or operated by or on behalf of, an "insured" or **(b)** has been discharged or dispersed therefrom;

(2) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an "insured"; or

(3) The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion **(3)** applies only to "property damage" to such "nuclear facility" and any property thereat.

2. As used in this endorsement:

"Hazardous properties" includes radioactive, toxic or explosive properties.

"Nuclear material" means "source material", "special nuclear material" or "by-product material".

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

"Waste" means any waste material **(a)** containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and **(b)** resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

"Nuclear facility" means:

(a) Any "nuclear reactor";

(b) Any equipment or device designed or used for **(1)** separating the isotopes of uranium or plutonium, **(2)** processing or utilizing "spent fuel", or **(3)** handling, processing or packaging "waste";

(c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

(d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"Property damage" includes all forms of radioactive contamination of property.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COMBINED POLICY EXCLUSIONS

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS

The following exclusions are added to this policy:

ABSOLUTE ASBESTOS, LEAD OR SILICA EXCLUSION

Injury or damages, including any claim or suit, arising out of, resulting from, caused or contributed to by Asbestos, Lead or Silica is not covered under this policy, nor are any expenses nor any obligation to share damages with or repay anyone else who must pay damages from same in conjunction with occurrences arising or alleged to have arisen out of same, including but not limited to any:

a. “Bodily injury”, “personal and advertising injury”, “property damage" or damages of any type, arising out of the inhalation, ingestion, physical exposure to, absorption of, or toxic substances of or from Asbestos, Lead or Silica in any form, or from any goods, products or structures containing same, or “property damage" or devaluation of property arising from any form of same; or

b. Existence of Asbestos, Lead, or Silica, in any form, in occupancy or construction, or the manufacture, sale, transportation, handling, storage, disposal, or removal of same, or goods or products containing same; or

c. Loss, cost, expense, fines and/or penalties arising out of any (1) request, demand, order, governmental authority or directive or that of any private party or citizen action that any insured, or others, test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to or assess the effects of Asbestos, Lead, or Silica, or (2) any litigation or administrative procedure in which any insured or others may be involved as a party in response to the effects or alleged effects of Asbestos, Lead, or Silica; or

d. Supervision, instructions, recommendations, requests, warnings or advice given or which should have been given, as well as any costs, including but not limited to abatement, mitigation, removal, containment, treatment, detoxification, neutralization, or disposal of same or in any way responding to or assessing the effects of same; or

e. Actual or alleged Asbestosis, Lead poisoning, Silicosis or any other similar condition.

This exclusion applies regardless of whether:

a. Injury or damage claimed is included within the “products/completed operations hazard” of the policy; or

b. An alleged cause for the injury or damage is the insured’s negligent hiring, placement, training, supervision, retention, act, error or omission.

CLAIM(S) IN PROGRESS EXCLUSION

a. This policy does not apply to “bodily injury", “personal and advertising injury” or “property damage” which begins or takes place before the inception date of coverage, whether such “bodily injury", “personal and advertising injury” or “property damage” is known to an insured, even though the nature and extent of such damage or injury may change and even though the damage may be continuous, progressive, cumulative, changing or evolving, and even though the “occurrence” causing such “bodily injury", “personal and advertising injury” or “property damage” may be or may involve a continuous or repeated exposure to substantially the same general harm.

b. All “property damage” to units of or within a single project or development, and arising from the same general type of harm, shall be deemed to occur at the time of damage to the first such unit, even though the existence, nature and extent of such damage or injury may change and even though the “occurrence” causing such “property damage” may be or involve a continuous or repeated exposure to substantially the same general harm which also continues or takes place (in the case of repeated exposure to substantially the same general harm) during the policy term.

DISCRIMINATION EXCLUSION

Discrimination charges, of any kind, actual and alleged, are not covered under this policy, nor are any expenses or obligation to share damages with or repay another who must pay damages from same.

DAMAGES LIMITATION

Damages mean a monetary judgment, award, or settlement. Damages do not include:

a. Civil or criminal fines, sanctions or penalties, whether imposed pursuant to statute or otherwise; or
b. Judgments or awards arising from acts or omissions deemed uninsurable by law; or
c. The restitution of consideration or expense paid to you for professional services rendered or which should have been rendered; or
d. Disputed fees or any actual or alleged personal profit or advantage to which you are not legally entitled; or
e. Equitable or non-pecuniary relief.

DUTY TO DEFEND EXCLUSION

Where there is no coverage under this policy, there is no duty to defend.

PROFESSIONAL LIABILITY EXCLUSION

Professional liability, malpractice, errors, omissions, or acts of any type including rendering or failure to render any type of professional service is not covered under this policy nor are any expenses nor any obligation to share damages with or repay anyone else who must pay damages from same, unless such coverage is specifically endorsed onto this policy.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CROSS SUITS

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” or any other claim for damages brought by any insured covered by this policy, against any other insured that has an ownership interest in, is operated, controlled, or managed by or is a parent, subsidiary or affiliate of any such insured.

This exclusion does not apply to any additional insured added to this policy by endorsement if such additional insured is:

1. specifically named in the Schedule of such endorsement, or

2. an indemnitee in a written contract or written agreement between any Named Insured and any additional insured signed before the date of the first “occurrence” or first offense and requiring the Named Insured to add such indemnitee as an additional insured;

Provided such additional insured:

a. is not a parent, subsidiary or affiliate of the Named insured;

b. does not have any ownership interest in the Named insured;

c. is not owned, operated, controlled or managed by the Named insured.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ABSOLUTE POLLUTION AND POLLUTION RELATED LIABILITY EXCLUSION—WITH HOSTILE FIRE/HVAC EXCEPTIONS

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS

The following exclusion is added to this policy. If the policy already includes a pollution exclusion or a pollution-related exclusion, such exclusion(s) is(are) deleted and replaced with the following:

Pollution/environmental impairment/contamination is not covered under this policy, nor are any expenses nor any obligation to share damages with or repay anyone else who must pay damages from same in conjunction with occurrences arising out of or alleged to have arisen out of same. All liability and expense arising out of or related to any form of pollution, whether intentional or otherwise and whether or not any resulting injury, damage, devaluation, cost or expense is expected by any insured or any other person or entity is excluded throughout this policy.

This insurance does not apply to any damages, claim, or suit arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" including but not limited to any:

a. "Bodily injury", "personal and advertising injury", "property damage", or damages for the devaluation of property, or for taking, use or acquisition or interference with the rights of others in or on property or air space, or any other type injury or expense; or

b. Any loss, cost, expense, fines and/or penalties arising out of any (1) request, demand, order, governmental authority or directive or that of any private party or citizen action that any insured, or others, test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to, or assess same, the effects of "pollutants", environmental impairments, contaminants or (2) any litigation or administrative procedure in which any insured or others may be involved as a party as a result of actual, alleged or threatened discharge, dispersal, seepage, migration, release, escape or placement of "pollutants", environmental impairments, or contaminants into or upon land, premises, buildings, the atmosphere, any water course, body of water, aquifer or ground water, whether sudden, accidental or gradual in nature or not, and regardless of when.

This exclusion applies regardless of whether:

a. Injury or damage claimed is included within the "products-completed operations hazard" of the policy; or

b. An alleged cause for the injury or damage is the insured's negligent hiring, placement, training, supervision, retention, act, error or omission.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This exclusion does not apply to:

a. "bodily injury", if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests; or

b. "bodily injury", "personal and advertising injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire" unless that "hostile fire" originated:

   i. At any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste; or

   ii. At any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to, or assess the effects of "pollutants".

The following definition is added to the policy. If the policy already includes a definition of "pollutants" such definition is deleted and replaced with the following:

"Pollutants" mean any solid, liquid, gaseous, fuel, lubricant, thermal, acoustic, electrical, or magnetic irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, fibers, radiation, acid, alkalis, petroleums, chemicals or "waste". "Waste" includes medical waste, biological infectants, and all other materials to be disposed of, recycled, stored, reconditioned or reclaimed.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - LIQUOR LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

2. Exclusions c. Liquor Liability is deleted and replaced with the following:

The coverage under this policy does not apply to “bodily injury”, “property damage”, or “personal and advertising injury” arising out of:

1. Causing or contributing to the intoxication of any person;
2. The furnishing of alcoholic beverages to anyone under the legal drinking age or the influence of alcohol;
3. Any statute, ordinance or regulation relating to sales, gift, distribution or use of alcoholic beverages;
4. Any act or omission by any insured, any “employee” of any insured, patrons, members, associates, volunteers or any other person providing or failing to provide transportation, detaining or failing to detain any person, or any act of assuming or not assuming responsibility for the well being, supervision or care of any person allegedly under or suspected to be under the influence of alcohol; or
5. The negligent hiring, employment, training, placement or supervision of any person doing work for or otherwise acting on behalf of any Insured.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FIDUCIARY EXCLUSION

This endorsement modifies insurance provided under the following:

ALL COVERAGE PARTS

This policy does not apply to any claim arising out of the:

1. Coercion, conversion or misappropriation of others' funds or property;
2. Any dishonest, fraudulent, criminal, malicious acts or omissions of the insured, partner or employee or any person for whom you are legally responsible; or
3. Any activities or operations performed in the capacity of a fiduciary.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION –CONSTRUCTION ACTIVITIES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of or related to any construction, demolition, reconstruction, building, rebuilding, or development of any kind on the insured premises.

However, this exclusion shall not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of routine and regular maintenance activities performed by the insured’s employees on the insured premises.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – COVERAGE C – MEDICAL PAYMENTS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

ALL PREMISES AND CLASSIFICATIONS

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to any premises or classification shown in the Schedule:

1. Section **I** – Coverage **C** – Medical Payments does not apply and none of the references to it in the Coverage Part apply.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT IS ATTACHED TO AND MADE PART OF YOUR POLICY IN RESPONSE TO THE DISCLOSURE REQUIREMENTS OF THE TERRORISM RISK INSURANCE ACT. THIS ENDORSEMENT DOES NOT GRANT ANY COVERAGE OR CHANGE THE TERMS AND CONDITIONS OF ANY COVERAGE UNDER THE POLICY.

REJECTION OF COVERAGE FOR CERTIFIED ACTS OF TERRORISM COVERAGE (PURSUANT TO TERRORISM RISK INSURANCE ACT)

SCHEDULE

THE INSURED WAS OFFERED AND

HAS DECLINED TERRORISM COVERAGE ON THIS POLICY

In accordance with the federal Terrorism Risk Insurance Act, this notice confirms that you were offered and have rejected coverage for terrorist acts certified under that Act.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF CERTIFIED ACTS OF TERRORISM AND EXCLUSION OF OTHER ACTS OF TERRORISM COMMITTED OUTSIDE THE UNITED STATES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

A. The following exclusion is added:

This insurance does not apply to:

TERRORISM

"Any injury or damage" arising, directly or indirectly, out of a "certified act of terrorism", or out of an "other act of terrorism" that is committed outside of the United States (including its territories and possessions and Puerto Rico), but within the "coverage territory". However, with respect to an "other act of terrorism", this exclusion applies only when one or more of the following are attributed to such act:

1. The total of insured damage to all types of property exceeds $25 million (valued in US dollars). In determining whether the $25 million threshold is exceeded, we will include all insured damage sustained by property of all persons and entities affected by the terrorism and business interruption losses sustained by owners or occupants of the damaged property. For the purpose of this provision, insured damage means damage that is covered by any insurance plus damage that would be covered by any insurance but for the application of any terrorism exclusions; or

2. Fifty or more persons sustain death or serious physical injury. For the purposes of this provision, serious physical injury means:

a. Physical injury that involves a substantial risk of death; or

b. Protracted and obvious physical disfigurement; or

c. Protracted loss of or impairment of the function of a bodily member or organ; or

3. The terrorism involves the use, release or escape of nuclear materials, or directly or indirectly results in nuclear reaction or radiation or radioactive contamination; or

4. The terrorism is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or

5. Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such materials.

With respect to this exclusion, Paragraphs **1.** and **2.** describe the thresholds used to measure the magnitude of an incident of an "other act of terrorism" and the circumstances in which the threshold will apply for the purpose of determining whether this exclusion will apply to that incident.

B. The following definitions are added:

1. For the purposes of this endorsement, "any injury or damage" means any injury or damage covered under any Coverage Part to which this endorsement is applicable, and includes but is not limited to "bodily injury", "property damage", "personal and advertising injury", "injury" or "environmental damage" as may be defined in any applicable Coverage Part.

2. "Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in accordance with the provisions of the federal Terrorism Risk Insurance Act, to be an act of terrorism pursuant to such Act. The criteria contained in the Terrorism Risk Insurance Act for a "certified act of terrorism" include the following:

a. The act resulted in insured losses in excess of $5 million in the aggregate, attributable to all types of insurance subject to the Terrorism Risk Insurance Act;

b. The act resulted in damage:

(1) Within the United States (including its territories and possessions and Puerto Rico); or

(2) Outside of the United States in the case of:

(a) An air carrier (as defined in Section 40102 of title 49, United States Code) or United States flag vessel (or a vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), regardless of where the loss occurs; or

(b) The premises of any United States mission; and

c. The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

3. "Other act of terrorism" means a violent act or an act that is dangerous to human life, property or infrastructure that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion, and the act is not a "certified act of terrorism".

Multiple incidents of an "other act of terrorism" which occur within a seventy-two hour period and appear to be carried out in concert or to have a related purpose or common leadership shall be considered to be one incident.

C. The terms and limitations of any terrorism exclusion, or the inapplicability or omission of a terrorism exclusion, do not serve to create coverage for injury or damage that is otherwise excluded under this Coverage Part.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CALIFORNIA - SERVICE OF SUIT

This endorsement modifies and amends insurance provided under the following:

ALL COVERAGE PARTS

Pursuant to California statutes, this Company designates the following as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insured or any beneficiary hereunder arising out of this contract of insurance:

CSC – Corporation Service Company
Karen Harris
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

Phone # 800-927-9800
Fax # 916-641-5151

The above-named is authorized and directed to accept service of process on behalf of the Company.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

JAMES RIVER INSURANCE COMPANY

Privacy Policy

We do not sell customer information to nonaffiliated third parties, and we do not share customer information with nonaffiliated third parties except those parties who perform contractual services for us, and parties to which we are authorized to provide information by law. In addition, when we provide information to affiliates or non-affiliates, we limit those disclosures to information about your transactions and experiences with us and to disclosures otherwise permitted by law. You do not need to take any action to prevent us from selling or sharing information we obtain about you.

We use security measures and training in our effort to protect the customer information we collect. We protect the information we obtain about you by maintaining physical, electronic and procedural safeguards.

We collect the following types of information about you when you purchase or use our products and services. Most of the information that we obtain about you comes directly from you, such as through the insurance applications you submit when requesting insurance products. These applications and other inquiries we make of you allow us to learn information that we may use to contact you in the future, such as your name, address, telephone number and e-mail address. In addition, insurance applications and other information you provide enables us to determine the type and value of your insured property, the types of insurance coverages you have or in which you might be interested, and similar information.

If you visit an Internet site that we maintain, we might request or obtain information that will enable us to identify you as a registered user, such as your name, a user identification name, a password, password reminders, and your Internet service provider. We might use a “cookie” to retain some of this information. We also might obtain information about your operating system, web browser and similar information to enable us to improve the operation of our site.

When we consider products and services in which you may be interested, we often review information that we have about your past transactions with us or our affiliates, such as your existing or former policy coverages, premiums and payment history. In addition, we may learn information about your transactions with nonaffiliated third parties, including the types of products or services you obtained from them and your experiences with them. Finally, we may obtain other information from third parties that has a bearing upon your eligibility for the products or services you seek from us. This information may include your credit report or information about your creditworthiness, or other information maintained by consumer reporting agencies.

We provide customer information only to our affiliates and to nonaffiliates that must protect your customer information.

We also may provide information as mentioned in this notice to nonaffiliated third parties that perform services for us or perform functions on our behalf, such as marketing and research, or to other financial institutions with which we have joint agreements for activities such as marketing. By law, our contracts with these parties must prevent them from using the information they receive about you except as described in this notice.

Finally, we may share customer information as permitted by applicable law. This means that we will share information with parties as necessary to affect, administer, or enforce transactions that you request. For example, we might provide information to a company that processes, prints and mails our insurance policies to you, or to a company that adjusts claims under your policies. We also might disclose customer information to other entities specified by law, such as insurance advisory organizations, our attorneys and accountants, consumer reporting agencies, or civil and regulatory authorities. Federal law sets the limitations on these types of disclosures.

We strive to keep our records as accurate as possible. We attempt to maintain accurate records about you and we will gladly make appropriate corrections when you notify us. Of course, we do not control the accuracy of information gathered and provided by third parties, and you may need to notify third parties directly if you believe that any information we received from them is inaccurate. You may request the name and address of any consumer-reporting agency from which we obtain a report on you. You then may contact that consumer-reporting agency to request a copy of the report it makes or to advise of any changes to the information they maintain and report.

We will provide one copy of this Privacy Policy to joint contract holders. Please share this information with everyone covered under your policy or contract.

EXHIBIT 5

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
A Professional Corporation
Blaise S. Curet, #124983
bcuret@spcclaw.com
Sharon R. Lewis, #145340
SLewis@spcclaw.com
2000 Powell Street, Suite 830
Emeryville, California 94608
Tel: (415) 352-6200, Fax: (415) 352-6224

Attorneys for Plaintiff, The North River Insurance Company

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

The North River Insurance Company, a New Jersey Corporation,

Plaintiff,

vs.

James River Insurance Company, an Ohio Corporation,

Defendant.

Case No. 2:23-cv-00027-PSG-Ex. (sn)

THE NORTH RIVER INSURANCE COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

Date: July 28, 2023
Time: 1:30 p.m.
Ctrm.: 6A

Complaint Filed: January 4, 2023

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

TABLE OF CONTENTS

Page

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

TABLE OF AUTHORITIES

Page

STATE CASES

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

FEDERAL STATUTES

STATE STATUTES

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

I. INTRODUCTION

On January 4, 2023, The North River Insurance Company filed a complaint against James River Insurance Company stating one cause of action for equitable subrogation based on James River's failure to settle an underlying lawsuit against the parties' common insured, Shelter Island, within the James River primary policy limits. James River initially demanded that the parties submit this dispute to binding arbitration. When the parties had nearly reached agreement concerning the conduct of the arbitration proceedings, James River changed its mind about arbitration and filed this motion.[1]

James River presumably brought the pending motion pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), claiming that North River has failed to state a claim upon which relief can be granted. Specifically, James River contends that North River's subrogation claim fails because the insured did not suffer a loss and, therefore, had no claim against James River.

After reciting some salacious facts, taking liberty with their accuracy and failing to offer supporting evidence which this Court may judicially notice[2], James River cherry-picked a subset of the facts alleged by North River and asserts that *those* facts do not state a claim for equitable subrogation under Nevada law. But James River ignores paragraphs 14-16, and 18-27 of North River's complaint that contain the factual allegations showing North River's claim for equitable subrogation is proper.

[1] The North River Insurance Company reserves its right to petition this Court for an order compelling the parties to submit this dispute to binding arbitration pursuant to the James River policy (Dkt. 25-3, Zaharris Decl., p. 57).

[2] In ruling on a motion to dismiss, the Court may only consider facts not alleged in the complaint if they are properly the subject of judicial notice. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990).

While James River's choice of law analysis is flawed, whether California or Nevada law applies, the allegations in the complaint state a claim for equitable subrogation against James River based on James River's failure to settle the underlying lawsuit in breach of its duty of good faith and fair dealing. Therefore, the pending motion should be denied.

II. CHOICE OF LAW ANALYSIS

The first step in a choice-of-law analysis is to demonstrate that there is a conflict among the laws of two or more States that may apply. James River has not demonstrated which States' laws could apply, or that the applicable laws of Nevada and California are in conflict. Absent this threshold showing, this Court will apply California law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

If James River had demonstrated a conflict of laws, it would be appropriate to engage in a complete choice of law analysis to determine which State's law applies. Choice of law rules in diversity cases are "substantive" under *Erie Railroad v. Tompkins, supra,* at 78. Therefore, a Federal Court in a diversity case will apply the same choice of law rules that the local State Court would apply. *Klaxon Co. v. Stentor Elec. Manufacturing Co., Inc.,* 313 U.S. 487, 496 (1941); *Patton v. Cox,* 276 F.3d 493, 495 (9th Cir. 2002). Thus, in analyzing which State's law governs, this Court applies California's choice of law rules.

A. California Civil Code §1646

James River asserts that pursuant to California Civil Code, §1646, Nevada law applies. This statute determines which State's law appropriately governs contract interpretation. *Frontier Oil Corp. v. RLI Ins. Co*., 153 Cal.App.4th 1436, 1459-1460 (2007). Section 1646 states:

> A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

The purpose of this statute is to ensure that contracts are interpreted pursuant to the law that the contracting parties presumably, if not expressly, intended. *Frontier Oil, supra*, at 1449-1450. If this statute governs the choice of law analysis in this matter, because the James River policy does not specify where it is to be performed, the court would then examine the James River policy to determine whether it "indicates" a place of performance. "Where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance." *Ibid*. The parties' intended place of performance, if not expressly identified, may be gleaned from the nature of the contract. *Id.* at 1450.

Here, the intended place of performance is not stated in The James River policy. The James River policy was issued to a California insured (Dkt. 25-3, Zaharris Decl., p. 4). The insured's premises are in both Nevada and California (Dkt. 25-3, Zaharris Decl., p. 7), but the liability coverage applies to losses in the "coverage territory" which is defined as all parts of the world (Dkt. 25-3, Zaharris Decl., p. 10 and 22). James River's claim handling conduct took place in Virginia.

If the Court is unable to determine the intended place of performance of the James River policy, under the second clause of §1646, the Court looks to the place where the insurance contract was made. Under §1646, an insurance contract is "made" in the state where it is accepted and delivered. *Costco Wholesale Corp. v. Liberty Mutual Ins. Co.*, 472 F.Supp.2d 1183, 1197 (S.D. Cal. 2007) (policy was "made" in Connecticut under §1646 because policy was accepted by and delivered to policyholder in Connecticut); *Ameron International Corp. v. American Home Assur. Co.*, 2011 WL 2261195, *5 (C.D. Cal. June 6, 2011) (insurance policy was "made" in California under §1646 because it was accepted and delivered there); *ABF Capital Corp. v. Grove Properties Co.*, 126 Cal.App.4th 204, 222 (2005) (contract was made in California because the "last act" -- acceptance -- was

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

performed there.) *See*, California Civil Code, §1626 ("A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.").

The James River policy was "made" in either California or Arizona. The James River policy was issued to L.A. Pacific Center, Inc, a California citizen. It was delivered to L.A. Pacific Center, Inc. or its insurance agent, Burns & Wilcox Brokerage, which is an Arizona citizen (Dkt. 25-3, Zaharris Decl., p. 4).

B. The Governmental Interest Test

To the extent California's governmental interest test is relevant to the choice of law analysis, it requires a showing that (1) there is a material conflict between the laws of California and another interested state; (2) the other state has a legitimate interest in having its law apply to this dispute; and (3) the other state's interests will be more significantly impaired than California's. *Washington Mut. Bank, FA v. Superior Court*, 24 Cal.4th 906, 919-920 (2001).

James River has not shown a material conflict between California and Nevada law. It has not shown that Nevada has a legitimate interest in having its law apply to this dispute. California has a legitimate interest in whether claims covered under insurance policies issued California insureds are properly handled and settled by their primary insurers.

This case involves James River's duty to act reasonably when it takes control of the litigation and settlement of a claim against its insured. James River's failure to settle the underlying lawsuit against its insured within its policy limits when it had a sufficient opportunity to do so exposed the insured to an excess judgment in breach of the implied covenant of good faith and fair dealing, resulting in damages of $4 million. Under both California and Nevada law, James River was liable for the entire amount of the $5 million settlement. When it refused to pay more than $1 million, North River, having the same obligation to consider the interests of the insured, paid the balance of the settlement, the damages, on the insured's behalf to get the insured out of harm's way (Dkt. 1, complaint, ¶33).

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

As there is no conflict between the applicable law of California and Nevada, it does not matter which State's law is applied. North River has stated a claim for equitable subrogation based on James River's failure to settle the underlying litigation within its policy limits and is entitled to recover the $4 million that James River owed and refused to pay.

III. JAMES RIVER BREACHED ITS DUTY TO SETTLE

Under California and Nevada law, every contract imposes on each party a duty of good faith and fair dealing that neither party will injure the right of the other to receive the benefits of the agreement. *Comunale v. Traders and Gen. Ins. Co.*, 50 Cal.2d 654, 658 (1958); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308 (2009). Because a defending insurer controls settlement negotiations, California and Nevada recognize that the duty of good faith and fair dealing requires the insurer to accept reasonable settlement demands within its policy limits. *Hamilton v. Md. Cas. Co.*, 27 Cal.4th 718, 724 (2002); *Allstate v. Miller*, *supra*, at 309 (2009).

In assessing the reasonableness of a settlement demand, the defending insurer must give equal consideration to its interests and the interests of its insured and act as a prudent insurer without policy limits. *Commercial Union Assur. Cos. v. Safeway Stores, Inc.*, 26 Cal.3d 912, 917 (1980); *Allstate v. Miller*, *supra,* at 309-312. The only permissible consideration in evaluating the reasonableness of a settlement offer is whether, in light of the victim's injuries and the probable liability of the insured, judgment is likely to exceed the amount of the offer. *Johansen v. Ca. State Auto. Ass'n. Inter-Ins. Bureau,* 15 Cal.3d 9, 16 (1975); *Allstate v. Miller, supra,* at 312.

Where there is a substantial likelihood of a recovery in excess of the policy limits so that the most reasonable manner of disposing of the claim is a settlement within those limits, the duty of good faith requires the insurer to settle the claim. *Hamilton v. Maryland Cas. Co.*, 27 Cal.4th 718, 724-725 (2002). The insurer's refusal to do so is a breach of its duty of good faith and fair dealing. *Johansen,*

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

supra, at 14-15; *Mosten Management Co., Inc. v. Zurich-American Ins. Grp.*, 62 Fed.Appx. 175, 177 (9th Cir. 2003). An insurer that breaches its duty to settle is liable for all of the insured's damages caused by the breach, regardless of policy limits. *Hamilton, supra,* at 725; *Allstate v. Miller, supra,* at 313-314.

The complaint filed by Collins' Estate against Shelter Island alleged inadequate security at the Shelter Island Apartments and sought damages in excess of $1 million (Dkt. 1, complaint, ¶6 and 19). NRS 651.015 establishes civil liability for a property owner if someone dies on the property, the wrongful act that caused the death was foreseeable, and the property owner failed to exercise due care for the decedent's safety. *Humphries v. N.Y.-N.Y. Hotel & Casino*, 403 P.3d 358 (2017).[3] The statute specifies that a wrongful act is foreseeable if the property owner knew of prior, similar wrongful acts on the property. Two months prior to Collins' death, the Las Vegas Metropolitan Police Department issued a Notice and Declaration of Chronic Nuisance to the Shelter Island Apartments due to the frequency of violent crime on the property (Dkt. 1, complaint, ¶14). Given the insured's knowledge of prior violent, criminal acts on the property, Collins' death was foreseeable. Evidence showed that security at Shelter Island was inadequate (Dkt. 1, complaint, ¶15-16). Thus, there was a substantial likelihood of an adverse verdict in excess of $1 million, as well as an award of punitive damages (Dkt. 1, complaint, ¶20).

James River agreed to and retained counsel to defend the insured, taking control of the litigation and settlement of the Estate's claims against the common insured (Dkt. 1, complaint, ¶13). James River was aware of the substantial likelihood that the insured would be found liable and faced significant exposure that could exceed the James River policy limit of $1 million (Dkt. 1, complaint, ¶20).

The Estate made demands to resolve the lawsuit within the James River policy limits of $1 million (Dkt. 1, complaint, ¶21-24) and then on August 30, 2022,

[3] Nevada law governed the insured's liability in the underlying litigation.

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

the Estate's demand increased to $5 million (Dkt. 1, complaint, ¶28). James River's refusal to settle within its policy limits when it had the opportunity to do so was unreasonable and in breach of the implied covenant of good faith and fair dealing. *Johansen, supra*, at 15-16; *Guaranty Nat'l. Ins. Co. v. Potter*, 112 Nev. 199, 206 (1996). As a result, the eventual settlement exceeded the James River policy limits, and James River was liable for the entire amount.

On September 9, 2022, James River offered $1 million to settle the lawsuit against its insured and refused to pay any more (Dkt. 1, complaint, ¶29). In compliance with the implied covenant, North River agreed to fund the balance (Dkt. 1, complaint, ¶33). This $4 million payment was a direct result of James River's failure to accept the Estate's reasonable, within primary limits settlement demands. *Ace American Ins. Co. v. Fireman's Fund Ins. Co*., 2 Cal.App.5th 159, 179 (2016); *Allstate v. Miller, supra,* at 313-314. But for North River's funding of the $4 million balance of the settlement, the insured would have had to fund that amount itself or risk a worse result at trial.

IV. THE NORTH RIVER'S RIGHT TO EQUITABLE SUBROGATION

The elements of North River's equitable subrogation claim are: (1) the insured suffered a loss for which James River was liable; (2) North River compensated the insured for that loss; (3) the insured has an existing, assignable cause of action against James River and could have asserted that action if it had not been compensated by North River; (4) North River suffered damages caused by James River's breach of its duty to settle; (5) justice requires that the loss be entirely shifted from North River to James River; and (6) North River's payment was reasonable and not voluntary. *Fireman's Fund Ins. Co. v. Md. Cas. Co*., 21 Cal.App.4th 1586, 1596 (1994); *Colony Ins. Co. v. Colorado Cas. Ins. Co*., 2018 WL 3312965, *6 (D. Nev. 2018). Equitable subrogation is appropriate where (1) the subrogee made a payment to protect its interest, (2) not as a volunteer, (3) the subrogee was not primarily liable for the payment, (4) the subrogee paid the entire

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

amount, and (5) subrogation would not work any injustice. *Mort v. U.S.*, 86 F.3d 890, 894 (9th Cir. 1996) (applying Nevada law and relying on California law).

Equitable subrogation is a broad equitable remedy that applies when one insurer pays a debt for which another insurer is primarily liable and which in equity and good conscience the other insurer should have paid. *Ace v. Fireman's Fund, supra*, at 167; *Mort, supra*, at 894. An excess insurer that incurs liability because of a primary insurer's wrongful refusal to settle stands in the shoes of the common insured and may assert all claims against the primary insurer that the insured could assert. *Commercial Union v. Safeway, supra*, at 917-918; *Mort, supra*, at 894.

By equitable subrogation, an excess insurer, as a subrogee of the insured, may recover the amount of the settlement in excess of the primary policy limits from a primary insurer that wrongfully refused to settle within its limits and thereby caused the loss to the excess insurer. *Commercial Union v. Safeway, supra*, at 917; *Colony v. Colorado, supra*, at *6. If the excess insurer can show actual damages a result of the primary insurer's unreasonable failure to settle within the primary policy limits, an excess judgment is not required to establish damages in an equitable subrogation case. *Ace v. Fireman's Fund, supra*, at 170; *Colony v. Colorado, supra*, at *6.

James River has moved to dismiss North River's complaint on grounds that the insured did not suffer a loss and, therefore, has no claim against James River. James River's legal support is two unpublished decisions issued by the Nevada Supreme Court in a personal injury lawsuit against a nightclub (Cosmopolitan) and its management company (Marquee). Following a jury verdict in excess of $160 million and before the punitive damages stage commenced, Cosmopolitan's and Marquee's primary and excess insurers entered into a settlement agreement with the plaintiff, paying their collective policy limits. *Aspen Specialty Ins. Co. v. District Court*, 528 P.3d 287, *2 (2023). The subsequent lawsuit included equitable and contractual subrogation claims among equal-level excess insurers. In discussing one excess insurer's subrogation claim against the other excess insurer, the Court stated

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

that no subrogation claim existed because when the opportunity to settle arose the insurers settled within their policy limits, "before excess judgment exposure." *St. Paul Fire & Marine Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 521 P.3d 418, *2 (2022). In other words, the insurers did not breach their duty to settle. There is nothing in either decision indicating that there was any prior opportunity to settle for less than the ultimate settlement. Absent an opportunity to settle within policy limits and an unreasonable refusal to settle, there is no breach of the implied covenant of good faith and fair dealing, and no basis to hold an insurer liable for any amount in excess of its policy limits. *Ibid.* Because the insurers paid their policy limits in settlement and the insured suffered no damages, there was no basis to hold any insurer liable in excess of its policy limits.

In this case, and as is alleged in the complaint, when the opportunity to settle within its policy limits arose, James River did not act reasonably. *Hamilton, supra,* at 724-725; *Allstate v. Miller, supra,* at 309. It did not protect the insured from probable exposure to a judgment in excess of its policy limits. Because James River breached the implied covenant of good faith and fair dealing, *it became liable for the entire amount of the settlement, including the $4 million in excess of its policy limits. Hamilton, supra,* at 725; *Allstate v. Miller, supra,* at 313-314.

Although its unreasonable failure to resolve the underlying lawsuit within its policy limits rendered it liable for the entire amount of any settlement or judgment, James River refused to contribute any more than $1 million to the settlement of the underlying lawsuit. At the time, the demand was $5 million. James River left its insured to fund the balance or risk a worse outcome at trial.

North River contributed $4 million to the settlement to protect its insured from that worse outcome and itself from liability to the insured. Under California law, it is not necessary that the insured actually incur a loss. It is sufficient that the insured would have incurred the loss had the excess insurer not paid it. *Northwestern Mut. Ins. Co. v. Farmers' Ins. Group*, 76 Cal.App.3d 1031, 1044

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

(1978). Under Nevada law, the Court is "guided by equity and not a rigid prescribed legal inquiry." *Colony v. Colorado, supra*, at *6. Finding that the insured suffered a loss for which its primary insurer was liable, that the primary insurer failed to settle in bad faith, that the ultimate settlement was higher than it would have been if the primary insurer settled when liability was clear, that the insured would be liable for the amount of the settlement in excess of the $1 million primary policy limits if it did not have excess insurance, and that the excess insurer funded the settlement in excess of the $1 million primary policy limits to avoid liability to the insured, the Court ruled in the excess insurer's favor on its claim for equitable subrogation and awarded the excess insurer the amount it paid to settle the claim against the insured. *Colony v. Colorado, supra*, at *6-7.

Here, the insured has a claim against James River for breach of the implied covenant and could have asserted that claim if it had not been protected by North River. North River's damages of $4 million were caused by James River's failure to settle the underlying lawsuit within its policy limits when it had the opportunity and the obligation to do so. Justice requires that the loss be entirely shifted from North River to James River.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

V. CONCLUSION

For the foregoing reasons, The North River Insurance Company respectfully requests that this Court deny James River Insurance Company's Motion to Dismiss on the grounds that The North River Insurance Company has stated a claim upon which relief can be granted. Should the Court be inclined to grant the Motion to Dismiss, The North River Insurance Company respectfully requests leave to file an amended complaint.

DATED: July 7, 2023

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC

By: _____

BLAISE S. CURET
SHARON R. LEWIS
Attorneys for Plaintiff, The North River Insurance Company

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

The undersigned, counsel of record for plaintiff, The North River Insurance Company, certifies that this brief contains 3,498 words, which complies with the word limit of L.R. 11-6.1.

DATED: July 7, 2023

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC

By: _____

BLAISE S. CURET
SHARON R. LEWIS
Attorneys for Plaintiff, The North River Insurance Company

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
2000 POWELL STREET, SUITE 830
EMERYVILLE, CALIFORNIA 94608
TEL (415) 352-6200 • FAX (415) 352-6224

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 2000 Powell Street, Suite 830, Emeryville, CA 94608.

On July 7, 2023, I served true copies of the following document(s) described as **THE NORTH RIVER INSURANCE MEMORANDUM OF POINTS IN AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS** on the interested parties in this action as follows:

Jeffrey V. Commisso
John T. Brooks
Benjamin D. Brooks
Sheppard Mullin Richter Hampton LLP
501 W. Broadway, 19th Floor
San Diego, CA 92101
Tel.: 619-338-6500
jcommisso@sheppardmullin.com
jbrooks@sheppardmullin.com
bbrooks@sheppardmullin.com

Attorneys for James River Insurance Company

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

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

Executed on July 7, 2023, at Emeryville, California.

M. Mejia
Michelle Mejia

EXHIBIT 6

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
JOHN T. BROOKS, Cal. Bar No. 167793
JEFFREY V. COMMISSO, Cal. Bar No. 191267
BENJAMIN D. BROOKS, Cal. Bar No. 314373
501 West Broadway, 19th Floor
San Diego, California 92101-3598
Telephone: 619.338.6500
Facsimile: 619.234.3815
E mail jbrooks@sheppardmullin.com
jcommisso@sheppardmullin.com
bbrooks@sheppardmullin.com

Attorneys for Defendant JAMES RIVER INSURANCE COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NORTH RIVER INSURANCE COMPANY,

Plaintiff,

v.

JAMES RIVER INSURANCE COMPANY,

Defendant.

Case No. 2:23-CV-00027-PSG-E

JAMES RIVER'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Date: July 28, 2023
Time: 1:30pm
Crtrm: 6A

Complaint Filed: January 4, 2023

I. Introduction

This insurer-versus-insurer case arises out of a Nevada murder, in which Nevada residents assassinated a Nevada victim inside a Nevada apartment owned by a Nevada company, Shelter Island. The victim's heirs sued Shelter Island in Nevada state court for wrongful death under Nevada law. Shelter Island submitted an insurance claim to its primary insurer James River to defend it in the Nevada case. The James River insurance policy provided $1 million in liability coverage, and Shelter Island also had a $10 million excess insurance policy with North River, for a combined total of $11 million of insurance.

North River's complaint alleges that James River could have settled the Nevada case within the $1 million primary limit but unreasonably failed to do so. Instead, the case settled for $5 million: James River paid $1 million, North River paid $4 million, Shelter Island paid nothing.

Now North River wants James River to pay for the entire settlement on the theory that it is equitably subrogated to Shelter Island's cause of action against James River for breach of the implied covenant of good faith and fair dealing. North River's problem is that over the past seven months, the Nevada Supreme Court has ruled twice that under circumstances just like the ones here, there is no such claim: If the underlying case settles within the combined policy limits, the insured does not suffer any damages, so there is no underlying cause of action for breach of the implied covenant. And without an underlying cause of action, there is no right for the excess carrier to be subrogated to. *St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 521 P.3d 418, 2022 WL 17543613, at *2 (Nev. Dec. 8, 2022); *Aspen Specialty Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 528 P.3d 287, 2023 WL 3185274, at *2 (Nev. Apr. 28, 2023).

North River tries to dodge this result by arguing that California law should apply (which does not have a per se bar against equitable subrogation claims when the underlying case settles within limits). But by California statute, Nevada law applies because Nevada was the place of James River's policy performance. Besides, California has nothing to do with the case, and applying California law would significantly impair

Nevada's interest in controlling the insurers' conduct of premises liability claims by Nevada insureds related to Nevada properties. Further, even under California law, North River can't state a claim because it can't allege that its equitable position is superior to James River's (an essential element of its equitable subrogation claim). The Court should dismiss North River's complaint with prejudice.

II. Nevada law applies to this dispute because the James River insurance policy was to be performed in Nevada, Nevada law materially conflicts with California's, and Nevada has a significantly stronger governmental interest.

A. The analysis should begin and end with Section 1646.

North River admits that Section 1646 determines what state's law applies to contract interpretation. (Opp. at 2.) And it doesn't dispute that the James River insurance policy is a contract. Nor does it dispute that California Courts apply Section 1646 to disputes arising from insurance policies. Nor does it dispute that the place of performance related to *this* case was Nevada. As explained in James River's opening brief, under these circumstances, Section 1646 dictates that Nevada law applies.

Nevertheless, North River argues that the policy was drafted to potentially cover additional places of performance. (Opp. at 3.) That the policy covered other companies for potential losses in other potential locations has nothing to do with this actual Nevada loss. And it is silly to suggest that Shelter Island (a Nevada company) would not expect Nevada law to apply to a Nevada premises claim brought by the Nevada victim's heirs.

North River also argues that if the Court can't determine the intended place of performance, the Court should look to the place where the policy was made, accepted, and delivered. (Opp. at 3.) But North River's arguments that the James River policy was made in California or Arizona aren't supported by the complaint: the complaint doesn't allege, and the James River policy doesn't show, that the "last act" of acceptance happened in California (where one of the named insureds had its mailing address) or Arizona (where the insureds' broker was located), as opposed to Nevada (where all four additional insureds

reside), or Virginia (James River's location).[1] In any event, this isn't an issue because based on the facts North River alleged, the Court can determine the place of performance: Nevada. *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App. 4th 1436, 1443 (2007) ("the location of the risk insured" is the place of performance, and the place of performance dictates the law governing policy interpretation).

The inquiry thus can and should end with Section 1646.

B. <u>There are at least two material conflicts between Nevada's equitable subrogation law and California's.</u>

The Court need not address the conflicts between Nevada and California law or the states' relative interest in having their laws apply, but that inquiry likewise shows that Nevada applies to this case. North River argues that there is no material conflict between California and Nevada law, but it doesn't explain what each state's equitable subrogation law is. As James River's opening brief showed, there is at least one major conflict: under Nevada law, if the underlying claim settled within the combined policy limits, there is no claim for the excess carrier to be subrogated to because the insured suffered no damages; California law is different:

[1] The cases North River cites don't resolve this issue. (*See* Opp. at 3–4 (citing *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1197 (S.D. Cal. 2007) (place of acceptance was undisputed at summary judgment); *Ameron Int'l Corp. v. Am. Home Assur. Co.*, No. 11-cv-1601, 2011 WL 2261195, at *5 (C.D. Cal. June 6, 2011) (relying on testimony from defendant insurer's summary judgment witness declaration to determine place of acceptance); *ABF Cap. Corp. v. Grove Properties Co.*, 126 Cal. App. 4th 204, 222 (2005) (non-insurance case where Court determined place of contracting was location where defendants signed the agreement and mailed their acceptance of the agreement)).)

Nevada	California
An excess insurer *cannot* establish an equitable subrogation claim against primary insurer where the underlying case settled within combined policy limits. *Aspen Specialty Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 528 P.3d 287, 2023 WL 3185274, at *2 (Nev. 2023); *see also St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 521 P.3d 418, 2022 WL 17543613, at *2 (Nev. Dec. 8, 2022)	An excess insurer *can* pursue an equitable subrogation claim against primary insurer even if underlying case settled within combined policy limits. *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal. App. 5th 159, 170 (2016).

North River also argues that under Nevada law, the equitable subrogation inquiry is "guided by equity and not a rigid prescribed legal inquiry." (Opp. at 10.) But at least in California, if not also Nevada, the excess carrier must establish that its equitable position is superior to the primary carrier's, such that justice requires shifting the entire loss to the primary carrier. To the extent Nevada law is more flexible, this is another material conflict:

Nevada	California
Non-insurance cases addressing subrogation claims have held that subrogation allows the court to "accomplish what is just and fair as between the parties," and courts have "full discretion to fashion and grant equitable remedies." *AT & T Techs., Inc. v. Reid*, 109 Nev. 592, 595 (1993); *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428 (2010).	The excess carrier must show that its equitable position is superior; establishing the underlying breach of the implied covenant is insufficient, and a "[p]laintiff cannot establish a superior equitable position by simply asserting that it has done nothing wrong." *Capitol Specialty Ins. Corp. v. GEICO Gen. Ins. Co.*, 562 F. Supp. 3d 563, 573 (C.D. Cal. 2021).

That said, it's not a given that Nevada law allows more flexibility than California in addressing excess insurers' claims for equitable subrogation. The Nevada Supreme Court's *St. Paul* decision favorably cited *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, which held that "[t]he *essential* elements of an insurer's cause of action for equitable subrogation" include that "justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer[.]" 65 Cal. App. 4th 1279, 1292 (1998) (emphasis added).

C. Applying California law would more significantly impair Nevada's legitimate interests than vice versa.

Because there is a material conflict between Nevada and California equitable subrogation law, the next question is which state's interests would be more significantly impaired by applying the other's law. North River asserts that California has a "legitimate interest in whether claims covered under insurance policies issued California [*sic*] insureds are properly handled and settled by their primary insurers." (Opp. at 4.) Of course. But Shelter Island (the defendant in the underlying case) is not a California insured. It is a Nevada company. And Nevada has the same interest in ensuring that Nevada insureds' claims are handled and settled properly. North River stops its analysis there, but there is more to it. (*See* Opp at 4 (admitting that the final step is to determine which "state's interests will be more significantly impaired").)

Nevada's interest in having its law apply will clearly be more significantly impaired if California law applies than vice versa. This case involves a Nevada murder inside a Nevada apartment involving Nevada assailants and a Nevada victim, leading to a Nevada wrongful death lawsuit under Nevada law against the Nevada apartment complex owner, that Nevada entity's insurance claim to James River, and James River's handling of that Nevada claim. (*See, e.g.*, Compl. ¶ 9 (alleging that James River "had a duty to defend and indemnify Alhambra Place [dba Shelter Island]," one of the Nevada insureds); Opp. at 6 n.3 ("Nevada law governed the insured's liability in the underlying litigation.").) On the

other hand, only one of five insureds under the James River policy has a California mailing address, and just one of seven covered premises is in California, but neither that insured nor that premises were involved in the underlying case. California's interest in applying its law to this case, if any, pales in comparison to Nevada's.

Accordingly, even the more roundabout inquiry yields the same result as simply applying Section 1646: Nevada law applies.

III. North River cannot state a claim for equitable subrogation under either Nevada or California law.

After spending a third of its brief on choice-of-law arguments, North River attempts to simultaneously avail itself of the best (for it) of each state's conflicting laws. (Opp. at 9–10 ("Under California law, it is not necessary that the insured actually incur a loss. . . . Under Nevada law, the Court is guided by equity and not a rigid prescribed legal inquiry.") (internal marks omitted).) The problem for North River is that it can't state a claim under either state's law.

A. Under Nevada law, there is no claim for North River to be subrogated to because the insured suffered no damages.

Under Nevada law, there is no claim for North River to be subrogated to because Shelter Island suffered no damages. North River alleges that that between Shelter Island's James River and North River policies, Shelter Island had $11 million in coverage. North River alleges that the underlying case settled for $5 million, composed of a $1 million contribution from James River and a $4 million contribution from North River. Shelter Island didn't contribute to the settlement, nor was there ever an excess judgment against Shelter Island.

There is no binding Nevada Supreme Court decision addressing whether under these circumstances, an excess insurer like North River can recover its settlement contribution from the primary insurer. *See, e.g.*, *Scottsdale Ins. Co. v. Liberty Mut. Ins. Co.*, 130 Nev. 1241, 2014 WL 7188790, at *1 (Nev. 2014) (declining certified question

asking whether Nevada recognizes a claim for equitable subrogation by an excess carrier against a primary carrier). Consequently, the Court will have to predict how the Nevada Supreme Court would decide the issue. *Murray v. BEJ Mins., LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019). This will not be hard: Within the past seven months, the Nevada Supreme Court issued two unpublished, reasoned opinions addressing equitable subrogation claims by excess carriers based on alleged underlying claims for bad faith failure to settle within the primary limits. Both cases held that where the underlying case settled within the combined policy limits, the excess carrier has no claim for equitable subrogation because the insured did not suffer any damages, and there is thus no underlying claim for the excess carrier to be subrogated to. *St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 521 P.3d 418, 2022 WL 17543613, at *2 (Nev. Dec. 8, 2022); *Aspen Specialty Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 528 P.3d 287, 2023 WL 3185274, at *2 (Nev. Apr. 28, 2023). Contrary to North River's assertion, *Aspen Specialty* did not involve equal-level insurers. (Opp. at 8.) It involved an equitable subrogation claim by the excess insurer St. Paul against the primary insurer Aspen Specialty. *Aspen Specialty*, 528 P.3d 287, 2023 WL 3185274, at *1.

What's more, the Nevada Supreme Court issued these rulings *after* a Nevada federal district court, in a case arising out of the same underlying lawsuit, predicted that the Nevada Supreme Court would allow an excess insurer's equitable subrogation claim even if the case settled within the combined limits. *See Zurich Am. Ins. Co. v. Aspen Specialty Ins. Co.*, No. 20-cv-01374, 2021 WL 3489713, at *2, *4–5 (D. Nev. Aug. 6, 2021).[2]

Accordingly, the best prediction of how the Nevada Supreme Court would rule on this issue is how the Nevada Supreme Court *did* rule. Twice. If the underlying case settles within the combined policy limits, there can be no equitable subrogation claim because the

[2] *Zurich* was later stayed pending the Supreme Court's ruling in *Aspen Specialty*, and the stay has not been lifted after the decision. *Zurich Am. Ins. Co. v. Aspen Specialty Ins. Co.*, No. 20-cv-01374, ECF No. 43 (Mar. 23, 2022).

insured did not suffer any damages, and there is thus no claim to be subrogated to. *St. Paul*, 521 P.3d 418, 2022 WL 17543613, at *2; *Aspen Specialty*, 528 P.3d 287, 2023 WL 3185274, at *2.

North River tries to distinguish these cases by arguing that they didn't involve an underlying bad faith failure to settle, but that was the plaintiff's allegation in both cases. (*See* Opp. at 9); *St. Paul*, 521 P.3d 418, 2022 WL 17543613, at *2 (there was no underlying bad faith claim because the insured "did not suffer damages," not because there was no breach); *Aspen Specialty*, 528 P.3d 287, 2023 WL 3185274, at *2 (same). So that distinction doesn't exist and it is hard to understand why it would matter anyway.

North River also argues that James River breached the implied covenant because it didn't settle the case for less than the $1 million primary limits when it had the chance. (Opp. at 5–7.) But even accepting North River's factual allegations *and* its legal argument that James River breached the implied covenant as true for purposes of this motion, that doesn't save North River's claim. Notwithstanding the alleged breach, the underlying case settled within the combined limits, Shelter Island didn't suffer any damages, and there is thus no claim for North River to be subrogated to. The one Nevada case that North River cites for a contrary conclusion is *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, a federal district court case that, like *Zurich*, wrongly predicted that the Nevada Supreme Court would recognize a claim like North River's. No. 12-cv-01727, 2018 WL 3312965, at *6 (D. Nev. July 5, 2018); (*see* Opp. at 10.)

As explained in James River's opening brief, North River can't plead around this defect, and the Court should dismiss the complaint with prejudice. (*See* Mot. at 9.)

B. Even if California law applied, North River hasn't alleged that its equitable position is superior to James River's.

Despite assertions that California law should apply, North River argues that under *Nevada* law its claim should survive because Nevada's equitable subrogation standards are flexible. (Opp. at 10.) North River can't have it both ways. If Nevada law applies (and it

does), then North River can't state a claim because Shelter Island suffered no damages. If California law applies, then North River still can't state a claim.

Under California law a superior equitable position is an essential element of the claim. *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (1998) ("The essential elements of an insurer's cause of action for equitable subrogation" include that "justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer[.]"). And as this Court recently acknowledged, a "[p]laintiff cannot establish a superior equitable position by simply asserting that it has done nothing wrong." *Capitol Specialty Ins. Corp. v. GEICO Gen. Ins. Co.*, 562 F. Supp. 3d 563, 573 (C.D. Cal. 2021). In other words, it's not enough to allege that the defendant breached the implied covenant. The defendant must be "guilty of some wrongful conduct which makes its equity inferior to that of Plaintiff." *Id.* (internal marks and alterations omitted).

Here, the Complaint contains only a conclusory recitation that James River's equitable position is inferior to North River's. (Compl. ¶ 40.) Nor has North River argued in its opposition that it can plausibly allege that its equitable position is superior to James River's. (*See* Opp. at 7 (North River's recitation of equitable subrogation elements omits the element that North River's equitable position must be superior to James River's); *id.* at 10 (arguing only that "Justice requires that the loss be entirely shifted from North River to James River," but not addressing the parties' relative equitable positions or explaining what facts it could add to plausibly allege equitable superiority).) *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] formulaic recitation of the elements of a cause of action will not do").

Accordingly, even if the Court decides that California law should apply, the Court should dismiss North River's complaint with prejudice on this independent basis.

IV. Conclusion

In the last 7 months the Nevada Supreme Court has twice held that where the underlying claim settled within the combined policy limits, the excess insurer has no claim

to be subrogated to. That is precisely the case here. The Court should dismiss North River's complaint with prejudice.

Dated: July 14, 2023

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Jeffrey V. Commisso
JEFFREY V. COMMISSO

Attorneys for Defendant JAMES RIVER INSURANCE COMPANY

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant James River Insurance Company, certifies that this brief contains 3165 words, which complies with the word limit of L.R. 11-6.1.

Dated: July 14, 2023

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Jeffrey V. Commisso
JEFFREY V. COMMISSO

Attorneys for Defendant JAMES RIVER INSURANCE COMPANY

EXHIBIT 7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	CV 23-00027-PSG-E	Date	August 4, 2023
Title	North River Insurance Company v. James River Insurance Company		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Damon Berry	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **Order GRANTING in Defendant's motion to dismiss without leave to amend.**

Before the Court is Defendant James River Insurance Company's ("Defendant") motion to dismiss Plaintiff North River Insurance Company's ("Plaintiff") complaint for failure to state a claim. *See generally* Dkt. #25 ("*Mot.*"). Plaintiff opposed the motion on July 7, 2023, *see generally* Dkt. #29 ("*Opp.*"), and Defendant replied on July 14, 2023, *see generally* Dkt. #31 ("*Reply*").

The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7 15. Having considered the moving, opposing, and reply papers, the Court **GRANTS** Defendant's motion to dismiss without leave to amend.

I. Factual Background

This case is about a dispute between the parties over a $5 million settlement in a lawsuit against Shelter Island Apartments ("Shelter Island"). *See Complaint*, Dkt. #1 ("*Compl.*") ¶ 6.

A. The Underlying Lawsuit Against Shelter Island

On May 25, 2017, Marcus Collins was tortured and killed inside a unit at the Shelter Island complex in Las Vegas, Nevada. *Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss*, Dkt. # 25 1 ("*Defendant's MPA*"), 3:10 25.

On March 7, 2019, Collins's estate filed a complaint in a Nevada state court against Shelter Island for negligence and wrongful death. *See generally Compl* ¶ 6*; Compl.*, Ex. A.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 23-00027-PSG-E	Date	August 4, 2023
Title	North River Insurance Company v. James River Insurance Company		

Shelter Island had a $1 million primary insurance policy with Defendant, who defended the claim. *Compl.* ¶ 7; *Defendant's MPA* 4:11 13. Shelter Island also had a $10 million excess policy with Plaintiff. *Compl.* ¶ 10.

On March 28, 2019, Collins's estate issued a $1 million settlement demand which Defendant denied. *Id.* ¶ 29. In November 2021, Collins's estate reduced the demand to $875,000, which Defendant again denied. *Id.* ¶ 24. Defendant claims that Plaintiff and Shelter Island agreed with the decisions not to settle. *Defendant's MPA* 4:22 24.

In August 2022, Defendant's counsel "concluded that it would probably not be possible to obtain all the targeted-killing evidence they wanted." *Id.* 4:25 27. Defendant also learned of a more recent murder in a Shelter Island common area, which gave rise to a suit similar to the one filed by Collins's estate. *Id.* 5:1 4. Defendant discovered that in the other suit, Shelter Island's owner testified poorly at deposition and the case settled for the combined $11 million policy limits. *Id.* 5:1 4. Due to this information, Defendant decided to make a $1 million settlement offer. *Id.* 5:5 6. Plaintiff told Defendant not to make such an offer, fearing that it would lead to negotiations and a settlement requiring Plaintiff to pay out its excess policy coverage. *Id.* 5:6 8. Ignoring Plaintiff's objections, Defendant made the $1 million offer to Collins's estate, and the case settled two months later for $5 million. *Id.* 5:9 11. Defendant contributed its $1 million policy limit and Plaintiff contributed $4 million of its $10 million policy. *Id.* 5:11 13.

B. The Equitable Subrogation Claim and Current Motion

On January 4, 2023, Plaintiff filed a complaint in this Court, contending that by settling the claim for $5 million, Defendant breached its duty to settle the underlying suit and the implied covenant of good faith and fair dealing. *Id.* ¶¶ 37 38. Plaintiff therefore asserts a claim for equitable subrogation and contends that by virtue of its $4 million settlement payment, it is subrogated to the rights of Shelter Island against Defendant.

On June 26, 2023, Defendant moved to dismiss for failure to state a claim upon which relief may be granted, and on July 7, 2023, Plaintiff filed its opposition to the motion. *Mot.*; *Opp*. Defendant filed its reply to the opposition on July 14, 2023. *Reply.*

III. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cnty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Accordingly, "for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

IV. Discussion

Defendant argues that Nevada law applies to this case and bars equitable subrogation claims between insurers when the underlying lawsuit settles within the insured's combined policy limits. *Defendant's MPA* 6:15, 7:1 4.

Plaintiff counters that California law applies, under which Plaintiff contends it has properly stated a claim for relief.

A. Choice of Law

The Court first addresses the threshold issue of which state law applies. In determining the applicable state, "a court ordinarily must apply the choice-of-law rules of the State in which it sits." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243 n.8 (1981). California courts apply two choice-of-law tests in contract law: the statutory test set forth in California Civil Code § 1646, and the governmental interests test. *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1197 (S.D. Cal. 2007). Notwithstanding the historical "difference of opinion" in state courts, *see Arno v. Club Med Inc.*, 22 F.3d 1464, 1468 n.6 (9th Cir. 1994), federal courts have developed a consensus that the specific legislative statement of § 1646 governs in contract matters. *See Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma S.A.*, 972 F.3d 1101, 1111 (9th Cir. 2020); *Channell Com.Corp. v. Wilmington Mach. Inc.*, No. ED CV 14-2240 DMG (DTBx), 2016 WL 7638180, at *7 (C.D. Cal. Jun. 17, 2016) (collecting cases). This

is consistent with decisions by California Courts of Appeal. *See Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App. 4th 1436, 1443 (2007); *Gitano Grp., Inc. v. Kemper Grp.*, 26 Cal. App. 4th 49, 56 n.4 (1994).

i. California Civil Code § 1646

Under § 1646, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." *Id.* An insurance policy is a contract, Cal. Ins. Code § 22, and state and federal courts have applied § 1646 to determine how insurance contracts should be construed. *See, e.g.*, *Frontier Oil Corp.*, 153 Cal. App. 4th at 1460 61; *Gitano Grp.*, 26 Cal. App. 4th at 56 n.4; *James River Ins. Co. v. Medolac Labs.*, 290 F. Supp. 3d 956, 963 64 (C.D. Cal. Feb. 22, 2018). Section 1646 only governs the interpretation of contractual terms. All other issues are subject to the governmental interest analysis. *Glob. Commodities*, 972 F.3d at 1111.

A choice-of-law analysis is only necessary where there is a material conflict in the laws of the two states. *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 919 20 (2001) ("The fact that two or more states are involved does not in itself indicate there is a conflict of laws problem . . . if the relevant laws of each state are identical, there is no problem[.]").

Plaintiff argues that there is no conflict between the applicable laws, and it has stated a claim for equitable subrogation under the laws of either state. *Opp.* 5:1 5. Defendant counters that, in contrast to California law, the Nevada Supreme Court has decided that an excess insurer does not have a claim for equitable subrogation against a primary insurer where the underlying case settles within the combined policy limits. While the two relevant Nevada cases are persuasive, rather than binding,[1] they nonetheless represent the Nevada Supreme Court's position on the issues relevant here, which a federal court sitting in diversity must consider in approximating state law as closely as possible. *See Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001). Because California does not have precedent mirroring the Nevada Supreme Court cases, the Court agrees with Defendant that the Nevada Supreme Court's recent decisions create material conflicts in the states' laws. *See, e.g.*, *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal. App. 5th 159, 170 (2016).

[1] The opinions are unpublished and are therefore not binding. *See* Nev. R. App. P. 36.

Since there is a conflict, the Court applies § 1646, which provides that the applicable law is the law of the place of performance, or, if there is not a specified place of performance, the law of the place where the contract was made. "A contract indicates a place of performance within the meaning of [§] 1646 if the contract expressly specifies a place of performance or if the intended place of performance can be gleaned from the nature of the contract and its surrounding circumstances." *Frontier Oil Corp.*, 153 Cal. App. 4th at 1443. In *Frontier Oil*, the court held that "California, as the location of the risk insured under the policy, was the state where [the defendant] would be obligated to perform its defense obligations under the policy, and the contracting parties knew this at the time the policy was issued." *Id.*; *see also Welles v. Turner Ent.*, 503 F.3d 728, 738 (9th Cir. 2007) ("When the contract does not expressly specify a place of performance . . . the place of performance is the jurisdiction in which the circumstances indicate the parties expected or intended the contract to be performed."). Here, the insurance contract does not state where it is to be performed, and the policy covers seven properties six in Nevada, including Shelter Island, and one in California.

Similar to *Frontier Oil*, here, the parties knew at the time that the policy was issued that the locations of risk were Nevada and California, and that Plaintiff would be obligated to provide coverage for properties in either state. Consequently, Plaintiff was aware: (1) that the majority of the risk insured was in Nevada; (2) that risk pertaining to Shelter Island was in Nevada, and (3) that it was obligated to provide coverage for Shelter Island. *See generally Compl.*, Ex. A. Therefore, the place of performance for the portion of the contract pertaining to this action is Nevada. Since the risk under the *Frontier Oil* insurance policy existed in only one state, rather than in two as it does here, the Court proceeds to assess the second prong of § 1646.

Under §1646, an insurance contract is "made" in the place of acceptance. *Ameron Int'l Corp. v. Am. Home Assur. Co.*, 2011 WL 2261195, at *5 (C.D. Cal. June 6, 2011). Here, it is unclear where the contract was made. Plaintiff argues that the policy was made in either California or Arizona because it was issued to a California citizen and was therefore presumably delivered either to the insured in California or to their insurance agent in Arizona. *Opp.* 4:3 6. Defendant counters that neither the complaint nor the policy support finding that the last act of acceptance occurred in California, Arizona, or other relevant states.[2] *Reply* 3:23 4:3. The Court agrees that there is no clear evidence of the location of acceptance. Accordingly, the second prong of § 1646 is neutral under these circumstances, and the Court considers the governmental interests test.

[2] Namely, Nevada, where there are six insureds, or Virginia, Plaintiff's location. *Reply* 3:23 4:3.

ii. Governmental Interests

"When there is no advance agreement on applicable law, but the action involves the claims of residents from outside California, the trial court may analyze the governmental interests of the various jurisdictions involved to select the most appropriate law." *Wash. Mut. Bank*, 24 Cal. 4th at 915. Under the governmental interests test, the following must be shown: (1) there is a material conflict between the laws of California and Nevada; (2) both states have a legitimate interest in having their law apply to this dispute; and (3) one of the state's interests will be more significantly impaired than the other's. *Wash. Mut. Bank*, 24 Cal.4th at 919 920.

As addressed earlier, there is a material conflict between the laws of California and Nevada. Despite materially different laws, "there is still no problem in choosing the applicable rule of law where only one of the states has an interest in having its law applied." *Hurtado v. Superior Ct.*, 11 Cal. 3d 574, 580 (1974); *see also Wash. Mut. Bank*, 24 Cal.4th at 920 ("[T]he trial court may properly find California law applicable without proceeding to the third step in the analysis if the foreign law proponent fails to identify any actual conflict or to establish the other state's interest in having its own law applied."). Only if the trial court determines that "the laws are materially different *and* that each state has an interest in having its own law applied, thus reflecting an actual conflict, must the court take the final step and select the law of the state whose interests would be 'more impaired' if its law were not applied." *Wash. Mut. Bank*, 24 Cal.4th at 920.

Here, it is unclear that California has any interest in having its law applied. Plaintiff contends that "California has a legitimate interest in whether claims covered under insurance policies issued [to] California insureds are properly handled and settled by their primary insurers." *Opp.* 4:16 18. But the property at issue is not necessarily a "California insured" under the "multiple risk approach" adopted by California courts. *Medina v. Harco Nat'l Ins. Co.*, No. CV1505595BROMRWX, 2016 WL 7647680, at *8 (C.D. Cal. July 29, 2016) (applying the "multiple risk approach" when analyzing the governmental interests test).

"Where a multiple risk policy insures against risks located in several states, it is likely that the courts will view the transaction as if it involved separate policies, each insuring an individual risk, and apply the law of the state of principal location of the particular risk involved." *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 14 Cal. App. 4th 637, 646 (1993) (citation omitted). This "multiple risk approach" applies in this case as the insured properties are located in both Nevada and California. Thus, while one of the insured properties was in

California, Nevada is where the "particular risk involved" occurred, giving it a greater interest than California. *Medina*, 2016 WL 7647680, at *8; *see also Del Real v. U.S. Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 961 (E.D. Cal. 1998), *aff'd sub nom. Del Real v. U.S. Fire Ins. Co.*, 188 F.3d 512 (9th Cir. 1999) (applying California law under the multiple risk approach when accident occurred in California).

Further, the underlying lawsuit resulting in the settlement that is the subject of this dispute occurred in Nevada, giving Nevada a significant interest in the underlying litigation and any subsequent litigation arising from it. *See Compl.* ¶ 6, Dkt. # 6; *see also Stonewall Surplus Lines Ins. Co.*, 14 Cal. App. 4th at 649 (finding California had a greater interest than a foreign state when "the liability imposed grew out of severe injury suffered by a California resident while he was in California and caused by . . . activities which occurred exclusively in this state."). Moreover, "[i]n the context of a bad faith failure to settle, the dispute arises entirely from the insurance company's alleged misconduct in the underlying litigation." *Medina*, 2016 WL 7647680, at *9, n.11. Therefore, "the location of the underlying litigation . . . should bear heav[y] consideration." *Id.* Indeed, nothing shows that California has an interest in having its laws applied in this action. Conversely, the nature of the policy, Shelter Island's location, and the location of the underlying litigation support finding Nevada has an interest in applying its laws here. Thus, the Court applies Nevada substantive law to this dispute.

B. Rule 12(b)(6): Equitable Subrogation

Subrogation applies when one party, the subrogee, involuntarily pays the obligation or loss of another, the subrogor, for which a third party, wrongdoer, or otherwise is eventually found to bear responsibility. *See AT & T Techs., Inc. v. Reid*, 109 Nev. 592, 595-96 (1993). Subrogation creates derivative rights and requires an underlying independent basis upon which the subrogor could have recovered the payment as if the subrogee had never stepped in to assume the loss. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368 (2011).

The Supreme Court of Nevada has "recognized the doctrine of equitable subrogation in a variety of situations." *In re Fontainebleau Las Vegas Holdings*, 289 P.3d 1199, 1209 n.8 (Nev. 2012) (en banc). But it has not issued a binding decision addressing whether it would recognize equitable subrogation in the context of two insurance companies and, if so, what an insurer claiming subrogation would have to prove.

As a general matter, "[t]he task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is

without discrimination because of the federal forum." *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) (quoting *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980)). If the state's highest appellate court has not decided the question presented, then the Court must predict how the state's highest court would decide the question. *Id.*

In December 2022, the Nevada Supreme Court decided *St. Paul Fire & Marine Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania*.[3] 521 P.3d 418, 2022 WL 17543613 (Nev. 2022). There, the court declined to recognize equitable subrogation between Cosmopolitan and Marquee's equal-level excess insurers where the settlement amount for the underlying litigation did not exceed any policy limits. *Id.* at *2. The court reasoned that the "duty to settle" requires the insurer to protect the insured from "unreasonable exposure to a judgment in excess of the" insured's liability coverage limit to the extent an opportunity to settle arises. *Id.* (quoting *Restatement of Liability Insurance* § 24 cmt. b (Am. Law Inst. 2019)). Thus, "exhaustion of the policy limits prior to an excess judgment necessarily protects the insured from the harm that the duties purport to avoid." *Id.* And since the insurers settled the insured's liability before excess-judgment exposure, the insured did not suffer damages and did not have claims to subrogate to the plaintiff, Cosmopolitan's excess insurer. *Id.* Therefore, the court affirmed summary judgment in favor of the defendant, Marquee's excess insurer. *Id.* at 5. Shortly thereafter, the Nevada Supreme Court granted a writ of mandamus in a related action. *Aspen Specialty Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 528 P.3d 287, 2023 WL 3185274 (Nev. 2023). The plaintiff in *St. Paul*, Cosmopolitan's excess insurer, brought actions

[3] Marquee nightclub ("Marquee") operates inside the Cosmopolitan hotel and casino ("Cosmopolitan"). *St. Paul Fire & Marine Insurance Company v. National Union Fire Insurance Company of Pittsburgh, PA.*, 521 P.3d 418, 2022 WL 17543613, at *1 (Nev. 2022). Marquee's primary insurer is Aspen Specialty Insurance, and its excess insurer is National Union Fire Insurance Company. *Aspen Specialty Insurance Company v. Eighth Judicial District Court in and for County of Clark*, 528 P.3d 287, 2023 WL 3185274, at *1 (Nev., 2023). Both of Marquee's policies with these insurers specify that Cosmopolitan is an additional insured. *Id.* Cosmopolitan also has a primary insurer, Zurich American Insurance Company, and an excess insurer, St. Paul Fire & Marine Insurance Company. *Id.* A couple sued Marquee and Cosmopolitan for alleged injuries stemming from a nightclub incident, and a jury found the defendants jointly and severally liable for $160.5 million in compensatory damages. *Id.* All four insurance companies collectively paid confidential settlement amounts that exhausted their respective policy limits prior to the punitive-damages stage. *Id.* Subsequently, Cosmopolitan's insurers, Zurich and St. Paul, filed separate equitable subrogation claims against each of Marquee's insurers.

against Marquee's primary and excess insurers. *Id.* at *1. Both defendants moved for summary judgment. *Id.* at *2. The district court granted the Marquee excess insurer's motion, which the Nevada Supreme Court affirmed in *St. Paul*. *Id.* But before the Nevada Supreme Court issued its decision in *St. Paul*, the district court denied the Marquee primary insurer's motion. *Id.* at 2, n.2. The Marquee primary insurer filed a renewed motion for summary judgment, which the district court denied, prompting the primary insurer to file a writ. *Id.* at *1. In addressing the Marquee primary insurer's writ, the court again commented that the insured did not suffer damages since all four insurers settled the litigation without exceeding the collective policy limits. *Id.* at *2. The district court was therefore bound by *St. Paul*, and the court instructed the district court to grant summary judgment in favor of Marquee's primary insurer. *Id.*

Prior to these cases, a Nevada district court decided a motion to dismiss a claim for equitable subrogation in another related case where Cosmopolitan's primary insurer sued Marquee's primary insurer. The district court stated the elements of equitable subrogation, one of which requires that "the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends." *Zurich Am. Ins. Co. v. Aspen Specialty Ins. Co.*, No. 220CV01374APGDJA, 2021 WL 3489713, at *3 (D. Nev. Aug. 6, 2021) (quoting *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1292 (Cal. Ct. App. 1998) (emphasis omitted)).[4]

While the Supreme Court of Nevada addressed motions for summary judgment in *St. Paul* and *Aspen*, rather than motions to dismiss, the Court is nonetheless required to "predict how the state high court would resolve" the novel issue before it. In *St. Paul* and *Aspen*, the Nevada Supreme Court repeated that the settlement of claims within policy limits meant the plaintiffs did not suffer damages, and therefore their equitable subrogation claims failed. *St. Paul Fire & Marine Insurance Company*, 2022 WL 17543613, at *2; *Aspen Specialty Ins. Co.*, 2023 WL

[4] The district court "look[ed] to California law for guidance because the Supreme Court of Nevada often does that when deciding an issue of first impression." *Zurich Am. Ins. Co. v. Aspen Specialty Ins. Co.*, No. 220CV01374APGDJA, 2021 WL 3489713, at *3 (D. Nev. Aug. 6, 2021). At the time, the Supreme Court of Nevada had "not addressed whether it would recognize equitable subrogation in the context of two insurance companies and, if so, what an insurer claiming subrogation would have to prove." *Id.* at 2. The Supreme Court of Nevada has since decided *St. Paul* and *Aspen*. Accordingly, the Court relies on *Zurich* only to provide the elements of equitable subrogation and otherwise follows the Nevada Supreme Court's guidance.

3185274, at *2. It follows that here, since Plaintiff has not shown that the $5 million settlement amount exceeded the $11 million combined policy limits, Plaintiff has not shown that Shelter Island suffered damages to state an equitable subrogation claim.

Accordingly, the Court grants Defendant's motion to dismiss Plaintiff's claim. Since Plaintiff cannot plead additional facts that would show the underlying case settled for an amount in excess of the $11 million combined policy limits, amendment would be futile. Therefore, the Court denies Plaintiff leave to amend. *See Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1118 (9th Cir. 2013) ("As a general rule, [d]ismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment.")

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion to dismiss without leave to amend.

IT IS SO ORDERED.

EXHIBIT 8

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF Central District of California

Form 1. Notice of Appeal from a Judgment or Order of a United States District Court

U.S. District Court case number: 2:23-cv-00027-PSG-E

Notice is hereby given that the appellant(s) listed below hereby appeal(s) to the United States Court of Appeals for the Ninth Circuit.

Date case was first filed in U.S. District Court: 01/04/2023

Date of judgment or order you are appealing: 08/04/2023

Docket entry number of judgment or order you are appealing: 33

Fee paid for appeal? *(appeal fees are paid at the U.S. District Court)*

◉ Yes ○ No ○ IFP was granted by U.S. District Court

List all Appellants *(List **each** party filing the appeal. Do not use "et al." or other abbreviations.)*

The North River Insurance Company

Is this a cross-appeal? ○ Yes ◉ No

If yes, what is the first appeal case number?

Was there a previous appeal in this case? ○ Yes ◉ No

If yes, what is the prior appeal case number?

Your mailing address (if pro se):

City: State: Zip Code:

Prisoner Inmate or A Number (if applicable):

Signature /s/ Sabrina H. Strong **Date** August 31, 2023

Complete and file with the attached representation statement in the U.S. District Court

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 6. Representation Statement

Instructions for this form: http://www.ca9.uscourts.gov/forms/form06instructions.pdf

Appellant(s) *(List **each** party filing the appeal, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:

The North River Insurance Company

Name(s) of counsel (if any):

Sabrina H. Strong, Zoheb P. Noorani
O'MELVENY & MYERS LLP

Address: 400 South Hope Street, Los Angeles, CA 90071

Telephone number(s): (213) 430-6000

Email(s): sstrong@omm.com; znoorani@omm.com

Is counsel registered for Electronic Filing in the 9th Circuit? ◉ Yes ○ No

---

Appellee(s) *(List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)*

Name(s) of party/parties:

James River Insurance Company

Name(s) of counsel (if any):

Jeffrey Vincent Commisso, Benjamin D. Brooks, John T. Brooks
SHEPPARD MULLIN RICHTER AND HAMPTON LLP

Address: 501 West Broadway, 18th Floor, San Diego, CA 92101

Telephone number(s): (619) 338-6500

Email(s): jcommisso@sheppardmullin.com; bbrooks@sheppardmullin.com; jbrooks@sheppardmullin.com

To list additional parties and/or counsel, use next page.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Is counsel registered for Electronic Filing in the 9th Circuit? ○ Yes ○ No

Appellees

Name(s) of party/parties:

James River Insurance Company

Name(s) of counsel (if any):

Jennifer Yu Sacro, Larry Mark Golub
SACRO AND WALKER LLP

Address: 700 North Brand Boulevard, Suite 610, Glendale, CA 91203

Telephone number(s): (818) 721-9597

Email(s): jsacro@sacrowalker.com; lgolub@sacrowalker.com

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

EXHIBIT 9

No. 23-55757

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTH RIVER INSURANCE COMPANY,

Appellant,

v.

JAMES RIVER INSURANCE COMPANY,

Appellee.

On Appeal from the United States District Court for the Central District of California, Hon. Philip S. Gutierrez, Case No. 23-cv-00027-PSG-E

APPELLANT'S OPENING BRIEF

Sabrina H. Strong
sstrong@omm.com
Zoheb P. Noorani
znoorani@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for Appellant The North River Insurance Company

CORPORATE OWNERSHIP STATEMENT OF THE NORTH RIVER INSURANCE COMPANY

The North River Insurance Company, a New Jersey corporation, is wholly-owned by United States Fire Insurance Company, a Delaware corporation, which is wholly-owned by Crum & Forster Holdings Corp., a Delaware corporation, which is wholly-owned by Fairfax (US) Inc., a Delaware corporation, which is substantially owned by FFHL Group Ltd., a Canadian company, which is wholly-owned by Fairfax Financial Holdings Limited, a Canadian public company.

Dated: December 6, 2023

O'MELVENY & MYERS LLP

By: */s/ Sabrina H. Strong*
Sabrina H. Strong
Zoheb P. Noorani
400 South Hope Street
Los Angeles, CA 90071
Attorneys for The North River Insurance Company

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This is a dispute between an excess insurer (Appellant The North River Insurance Company ("North River")) and a primary insurer (Appellee James River Insurance Company ("James River")) about the latter's unreasonable failure to settle a claim against the parties' insured for an amount within its $1 million policy limits, subjecting the insured to a settlement demand *five times* those limits. Fortunately for the insured, North River stepped in when James River refused to pay anything more than its policy limits, and protected the insured from an even worse potential judgment at trial. North River now seeks to recover its payment from the wrongdoer, James River.

James River, as the primary insurer, agreed to defend the parties' insured against claims for negligence and wrongful death. During that litigation, James River had ample opportunity to fulfill its obligation to reasonably settle the claim within the $1 million limits of James River's insurance policy. Over the course of two and a half years, the underlying plaintiff made three settlement demands on James River for an amount at or below the $1 million primary policy limits. Despite a factual record that put James River on notice that there was a substantial likelihood of an adverse verdict and a judgment in excess of $1 million, James River refused to effectuate a prompt, fair, and equitable settlement. Having lost patience with James River, the claimants increased their demand to $5 million.

That new demand implicated North River's $10 million excess policy. James River's failure to protect the insured was now subjecting both insurers to potential liability for failure to settle. After James River belatedly agreed to contribute its full limits of $1 million, North River then paid the $4 million balance under a full reservation of rights. To protect its own interests and those of its insured, North River involuntarily funded the settlement and reserved the right to seek reimbursement of its payment.

North River thus brought this action to recoup its $4 million payment from James River, which chose to gamble with North River's policy limits rather than settle the claim within its own policy limits when it had the chance. On those grounds, North River asserted a cause of action against James River in the Central District of California (the "District Court") for breach of the implied covenant of good faith and fair dealing—a claim the insured could have brought itself had North River not responded appropriately and paid $4 million to the underlying claimants on the insured's behalf. Because the claim belonged to the insured but for North River's payment, North River brings its action through the doctrine of equitable subrogation.

Two bedrock insurance principles anchor an excess insurer's equitable subrogation claim against a primary insurer. First, as part of its duty of good faith and fair dealing, a primary insurer defending its insured has a duty to accept a

reasonable settlement demand within its limits. If the primary insurer unreasonably refuses to settle and the insured suffers an excess judgment, the insured has a "bad faith" claim against the primary insurer for the full amount of the settlement or judgment, regardless of policy limits.

Second, generally, an insurer that compensates its insured for loss caused by a third-party wrongdoer or tortfeasor can "stand in the shoes" of the insured and pursue the insured's claims against that third party through the equitable doctrine of subrogation. A common example is when an insurer compensates its insured for injuries incurred in an automobile accident and then pursues the claim the insured would have had against the tortfeasor driver. As a result of these equitable subrogation laws, a majority of states across the country recognize that an excess insurer who compensates the insured for its losses resulting from a primary insurer's bad faith refusal to settle has a claim against that primary insurer.

The District Court's dismissal with prejudice of North River's complaint—on a motion to dismiss and without oral argument—resulted from two critical errors. First, the District Court incorrectly held that Nevada law, rather than California law, applied to North River's claim. There is no conflict between the state's laws, and the District Court should have applied California law. In any event, under either of California's choice of law rules, California law governs because (i) Nevada has no interest in having its laws applied to this dispute

between a California insured—into whose shoes North River steps—and its Arizona insurer and (ii) James River's policy was issued to a California corporation with a California "Service of Suit" provision. There is no dispute that if California law applies, North River's claim is not barred as a matter of law because California recognizes equitable subrogation between insurers even if the ultimate loss is within the insured's collective policy limits.

Second, in predicting how the Nevada Supreme Court would rule on James River's motion to dismiss, the District Court misapplied a single unpublished decision of a divided and shorthanded Nevada Supreme Court. In that nonbinding decision, *St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co.,* 2022 WL 17543613 (Nev., Dec. 8, 2022) ("*St. Paul*"), the Nevada Supreme Court—deciding a motion for summary judgment—denied an excess insurer's subrogation claim against a same-level excess insurer because all four settling insurers made the collective decision to settle the underlying claim for an amount that exhausted but did not exceed their policy limits. A three-justice panel then applied the holding in *St. Paul* to bar the excess insurer's subrogation claim against the primary insurer in *Aspen Specialty Ins. Co. v. Eighth Judicial Dist. Court of Nev*., 2023 WL 3185274 (Nev., Apr. 28, 2023) ("*Aspen*").

There is no basis to conclude that the current Nevada Supreme Court, if all seven Justices were seated and had occasion to consider the precise facts here,

would bar North River's equitable subrogation claim against James River as a matter of law. Critically, at this motion-to-dismiss stage, all of North River's allegations must be taken as true, including its allegation that it did not act as a volunteer by funding the settlement under a full reservation of rights. Further, by deciding North River's claim is barred as a matter of law because the settlement amount did not exceed the insured's collective policy limits, the District Court effectively decided that Nevada would not recognize equitable subrogation between insurers in any circumstance. That ruling does not find support anywhere in Nevada law, including *St. Paul* and *Aspen*. Indeed, such a rule would deviate from the majority of states including California, to which Nevada courts look for guidance on novel issues of law, and it would disincentivize excess insurers from stepping into the fray to protect their insureds from another carrier's bad faith.

The Court should overturn the District Court's order granting James River's motion to dismiss.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S. Code §1332, because the amount in controversy exceeds $75,000.00 exclusive of interest and costs, and because complete diversity exists between Appellant and Appellee. This Court has jurisdiction to review the District Court's dismissal of this action under 28 U.S.C. § 1291. The District Court dismissed Appellant's complaint

without leave to amend on August 4, 2023. (ER-3–12) (the "Order"). Appellant filed its timely Notice of Appeal on August 31, 2023.

ISSUES PRESENTED

1. Did the District Court err in determining that Nevada law, rather than California law, applies to this dispute?

2. If Nevada law applies, did the District Court err in holding that Appellant's claim for equitable subrogation fails as a matter of law?

STATEMENT OF THE CASE

A. The Underlying Lawsuit[1]

On May 25, 2017, Marcus Collins was fatally shot in unit G-312 of the Shelter Island Apartments ("Shelter Island") in Las Vegas, Nevada. (ER-92 ¶ 5.)

Shelter Island was an insured location under the $1 million Commercial General Liability insurance policy that James River issued to L.A. Pacific Center Inc., in Monrovia, California, for the period of March 1, 2017, to March 1, 2018, and that identified Alhambra Place Partnership, LP dba Shelter Island Apartments as an additional named insured. (*Id*. ¶ 7.) Shelter Island was likewise an insured location under the $10 million excess insurance policy that North River issued to L.A. Pacific Center Inc., in Monrovia, California, for the same period, and that also

[1] The facts presented here were pleaded by Appellant in the District Court action, and the District Court was therefore required to accept them as true.

identified Alhambra Place Partnership, LP dba Shelter Island Apartments as an additional named insured. (*Id*. ¶ 10.)

On March 7, 2019, the decedent's estate filed suit in Nevada state court against Shelter Island, alleging negligence and wrongful death (the "Underlying Action"). (*Id*. ¶ 6.) The complaint alleged that Shelter Island "negligently failed to control, supervise and maintain the premises," citing security cameras that did not work or adequately record the grounds and "little, no and/or ineffective security patrols." (ER-104 ¶¶ 15–16.) It alleged that Shelter Island's "conscious disregard for the criminal activity" on the premises created the circumstances that ultimately cost the decedent his life. (ER-105 ¶ 24.) After receiving notice of the claim, James River agreed to defend Shelter Island in the Underlying Action and retained counsel to provide the defense. (ER-104 ¶¶ 12–13.) James River handled the claim from Virginia. (ER-16.)

On March 28, 2019, the plaintiff in the Underlying Action issued a settlement demand to Shelter Island for James River's policy limits of $1 million. (ER-95 ¶ 21.) More than two years went by, and still James River failed to resolve the matter for the insured. During that period, James River learned more about Shelter Island's troubled history. On October 18, 2019, James River was provided a Notice and Declaration of Chronic Nuisance that the Las Vegas Metropolitan Police Department had issued to the Shelter Island Apartments on March 9, 2017,

two days after the plaintiff filed the Underlying Action. (ER-94 ¶ 14.) The notice was based on the number of calls for service to address violence at the property and other disturbance calls from December 2016 through February 2017. (*Id.*)

In or about May 2021, the plaintiff in the Underlying Action issued an offer of judgment for $990,000. (ER-95 ¶ 22.) James River did not accept it. On November 3, 2021, the plaintiff reduced its settlement demand to $975,000. (*Id.* ¶ 24.) Again, James River did not accept it. James River's refusal to affect a settlement was unreasonable given that James River's own defense counsel on or about that same date—and again in February and July 2022—valued the case at over $1 million. (ER-96 ¶ 25.)

On or about August 30, 2022, the plaintiff in the Underlying Action increased its settlement demand to $5 million. (*Id.* ¶ 28.) The case ultimately settled for this amount on November 30, 2022. (*Id.* ¶ 30.) James River contributed the $1 million available under the primary policy limits. (ER-97 ¶ 32.) To protect its insured and subject to a full reservation of rights, including but not limited to its right to reimbursement, North River funded the $4 million balance of the settlement. (*Id.* ¶ 33.) In doing so, North River was not acting as a volunteer. (*Id.* ¶ 34.) North River did so under the belief that it could face bad faith claims from the insured by failing to settle.

B. The District Court's Dismissal of This Action

On January 4, 2023, North River filed this action seeking to recover its $4 million settlement payment under the doctrine of equitable subrogation. (ER-91–99) (the "Complaint"). The Complaint alleged that James River "knew that there was a substantial likelihood of an adverse verdict and a judgment in excess of [James River's] primary policy limit, including an award of punitive damages," and asserted that "there was no reasonable basis not to accept [the plaintiff's] demands within its policy limit." (ER-96 ¶ 27.) Appellant also alleged that "in order to protect [the insured] and pursuant to a complete reservation of its rights under [North River's] excess policy and the law, including, but not limited to, its right to reimbursement, [North River] agreed to fund the balance of the settlement of the Underlying Lawsuit." (ER-97 ¶ 33.) Consistent with the principles of equitable subrogation, North River explicitly alleged that "it was not acting as a volunteer in contributing to the settlement" of the Underlying Action. (*Id*. ¶ 34.)

James River moved to dismiss on the grounds that Nevada does not recognize equitable subrogation between insurers where the ultimate judgment did not exceed all of the insured's available insurance. (*See* ER-5.) On August 4, 2023, the District Court granted James River's motion, dismissing the Complaint without leave to amend. (ER-12.) The District Court based its Order on *St. Paul*, an unpublished decision the Nevada Supreme Court issued in December 2022 that

departed from a fundamental tenet of equitable subrogation. (ER-10–11) (citing *St. Paul*). The nonbinding decision found that the insured nightclub-hotel suffered no damages because its insurers collectively funded the settlement up to their respective policy limits, leaving the insured without a claim to subrogate. (*Id*.) The District Court concluded: "It follows that here, since [North River] has not shown that the $5 million settlement amount exceeded the $11 million combined policy limits, [North River] has not shown that Shelter Island suffered damages to state an equitable subrogation claim." (ER-12.)

The District Court also relied on James River's recitation of facts in its motion, which introduced disputes outside the four corners of the Complaint. The District Court, for instance, cited James River's assertion that "[North River] and Shelter Island agreed with the decisions not to settle," and that when James River purportedly decided to make a $1 million settlement offer, "[North River] told [James River] not to make such an offer, fearing that it would lead to negotiations and a settlement requiring [North River] to pay out its excess policy coverage." (ER-4.) The Complaint does not allege such facts. As the District Court itself observed, it was required at the motion-to-dismiss stage to accept all pleaded facts as true and construe them in the light most favorable to Appellant. (ER-5) (citing *Turner v. City & Cnty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009)).

SUMMARY OF ARGUMENT

The District Court's order dismissing North River's Complaint based on its conclusion that, under Nevada law, there can be no equitable subrogation between insurers where they settled the claim against their insured within their collective policy limits must be overturned for two primary, alternative reasons. First, California law applies to this dispute and California indisputably recognizes equitable subrogation between an excess and primary insurer even where the loss only exceeds the primary insurer's limits. Second, even if the Court were to apply Nevada law, North River's claim is not barred at the motion-to-dismiss stage because it alleged it did not act as a volunteer by contributing to the underlying settlement under a reservation-of-rights and the unpublished Nevada Supreme Court decisions relied upon by the District Court do not accurately reflect binding Nevada law.

ARGUMENT[2]

I. STANDARD OF REVIEW

The District Court's dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed de novo. *See, e.g., Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1144 (9th Cir. 2021). The Court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the

[2] Unless otherwise noted, this brief omits internal quotation marks and original alterations and adds any emphasis reflected in quoted passages.

nonmoving party." *Id.* (citing *Manzarek v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025, 1031 (9th Cir. 2008)). To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The District Court's decision on the appropriate choice of law is also reviewed de novo. *See, e.g., Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1066 (9th Cir. 2021). Underlying factual determinations are reviewed for clear error. *See id.* at 1059. The district court's application of state substantive law in diversity actions is reviewed de novo. *Giles v. GMAC*, 494 F.3d 865, 872 (9th Cir. 2007); *Prieto v. Paul Revere Life Ins. Co*., 354 F.3d 1005, 1010 (9th Cir. 2004).

II. CALIFORNIA LAW APPLIES TO THIS DISPUTE

A district court sitting in diversity presumptively applies the laws of the forum state. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). A court only conducts a choice of law analysis if a party invokes the law of a foreign state and demonstrates a conflict between the state's laws. James River contends that Nevada law applies but fails to demonstrate any conflict between California's and Nevada's equitable subrogation law. Thus, California law applies. Even if the

Court conducts a choice of law analysis, California law governs because James River's policy was issued to a California insured and contemplated performance in California, and California has the greater interest in having its laws applied to this dispute to protect a resident insured.

A. There Is No Conflict Between California and Nevada Law

"A choice-of-law analysis is only necessary where there is a material conflict in the laws of the two states." (ER-6) (citing *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 919–20 (2001) ("The fact that two or more states are involved does not in itself indicate there is a conflict of laws problem . . . if the relevant laws of each state are identical, there is no problem[.]")). Here, there is no problem. There is no conflict between California and Nevada binding authority, which the Court must follow if Nevada law applied.

1. Both states recognize insurers' liability in excess of limits for a violation of the duty of good faith and fair dealing

An essential element of an equitable subrogation claim is that there be a loss to which a third party can subrogate. Here, there is no difference between California and Nevada law because both states hold defending insurers liable for excess judgments if they violate the duty to act reasonably in settlement.

There is a covenant of good faith and fair dealing implicit in every contract, including insurance policies. *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 751 (2007); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308 (2009) ("*Miller*"); *see also*

United States Fid. & Guar. Co. v. Peterson, 91 Nev. 617, 620 (1975) (Nevada looked to California law when it established the implied covenant of good faith and fair dealing in the insurance context). For insurers, this includes a duty to accept reasonable settlement demands within policy limits. *Hamilton v. Md. Cas. Co*., 27 Cal. 4th 718, 724 (2002); *see Miller*, 125 Nev. at 311 (explicitly purporting to expand bad faith liability beyond solely circumstances in which an insurer rejects a settlement offer within the policy limits); *cf. Cromer v. Bristol W. Ins. Grp*., 131 Nev. 1268 (2015) ("An insurer must settle claims promptly, fairly, and equitably once its liability becomes reasonably clear.") (citing NRS 686A.310(1)(e)). Both states recognize that an insurer who violates this duty is liable for the judgment against the insured excess of the policy limits. *Commercial Union Ass. Cos. v. Safeway Stores*, 26 Cal. 3d 912, 916–17 (1980); *see Miller*, 125 Nev. at 314 (an insurer's breach of the duty to settle subjects it to "all compensatory damages proximately caused by its breach," which may exceed the policy limits); *cf. Cromer*, 131 Nev. at *1 (insurer is "not liable for an excess judgment for failing to settle the claim" if there was "no opportunity to settle within policy limits").

This rule protects insureds from insurers' self-interested behavior. "[W]hen the insured faces a potential judgment in excess of the policy limit (an 'excess judgment'), the insurer may have an incentive to undervalue the possibility of a loss at trial, because . . . as long as the insurer's liability is bounded by the policy

limit, taking the case to trial imposes no added risk on the insurer . . .” Restatement of Liability Insurance § 24 cmt. b (2019). In such a case, the insurer is “essentially gambling with the insured’s money, or gambling with the excess insurer’s money, because the insured or the insured’s excess insurer will have to pay any verdict in excess of the policy limit.” *Id.* Giving the defending insurer a duty to make reasonable settlement decisions aligns the interests of insurer and insured, and “creates an incentive for insurers to take into account this risk to insureds and excess insurers.” *Id.* Both Nevada and California share an interest in protecting insureds from bad faith behavior by insurers.

2. Nevada’s and California’s equitable subrogation laws do not “materially conflict”

Under Nevada law, subrogation “is an equitable doctrine created to accomplish what is just and fair as between the parties.” *AT&T Techs., Inc. v. Reid*, 109 Nev. 592, 595 (1993) (quotation omitted). It applies when one party, the subrogee [e.g., the excess insurer], involuntarily pays the obligation or loss of another, the subrogor [e.g., the insured], for which a third party, wrongdoer, or otherwise [e.g., the primary insurer], is eventually found to bear responsibility. *See id.* at 595–96 (1993). Subrogation creates derivative rights and requires an underlying independent basis upon which the subrogor could have recovered the payment as if the subrogee had never stepped in to assume the loss. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368 (2011). That subrogee cannot have acted

as a volunteer. *Laffranchini v. Clark*, 39 Nev. 48, 55 (1915). A volunteer is "one who thrusts himself into a situation on his own initiative, and not one who becomes a party to a transaction upon the urgent petition of a person who is vitally interested, and whose rights would be sacrificed did he not respond to the importunate appeal." *Id.* As an equitable doctrine, the application of subrogation depends upon the individual facts and circumstances presented by each particular case, "and generally, where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor, or in place of the creditor, such person will be so substituted." *Id.* at 56-57; *see also Am. Sterling Bank v. Johnny Mgmt. LV, Inc*., 126 Nev. 423, 428 (2010) (en banc) (subrogation is an "equitable remedy that requires the court to balance the equities based on the facts and circumstances of each particular case.").

Under California law, as with Nevada law, "[a] party who has been required to satisfy a loss created by another's wrongful act is equitably entitled to 'step into the shoes' of the injured party and pursue recovery from the wrongdoer." *Emp'rs Mut. Liab. Ins. Co. v. Tutor-Saliba Corp*., 17 Cal. 4th 632, 639 (1998). "Equitable subrogation is generally appropriate where (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt paid, (4) the subrogee paid off the entire encumbrance, and (5) subrogation would not work any injustice to the rights

of the junior lienholder." *Han v. United States*, 944 F.2d 526, 529 (9th Cir. 1991) (applying California law). Equitable subrogation is a broad equitable remedy, and therefore it applies not only when these five factors are met, but also "whenever one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." *Id.* (quoting *Caito v. United Cal. Bank*, 20 Cal. 3d 694, 704 (1978)). All of the equitable subrogation rules established in binding Nevada law are encompassed within California equitable subrogation law. Thus, California matches Nevada law on equitable subrogation in all material respects.

The Nevada Supreme Court has "recognized the doctrine of equitable subrogation in a variety of situations." *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 578 n.8 (Nev. 2012) (en banc) (collecting cases). However, as the District Court noted, the Nevada Supreme Court "has not published a decision addressing whether it would recognize equitable subrogation in the context of two insurance companies and, if so, what an insurer claiming subrogation would have to prove." (ER-9.) In fact, "[t]here is limited Nevada authority on the doctrine of equitable subrogation," and the Nevada courts look to "the law of other jurisdictions, particularly California, for guidance." *Mort v. United States*, 86 F.3d 890, 893 (9th Cir. 1996) (analyzing California law to apply Nevada law); *Home Haven, Inc. v. United States*, 17 F. App'x 512, 513 (9th Cir. 2001). Thus, to the

extent there are differences between the state's laws because Nevada's is *lacking*, Nevada courts look to California law in any event and no conflict would arise. California has well-developed law on the standards for equitable subrogation between insurers. *See Patent Scaffolding Co. v. William Simpson Const. Co.*, 256 Cal. App. 2d 506, 509 (1967) (listing elements of an insurer's equitable subrogation cause of action and collecting California cases). The unpublished decision in *St. Paul* does not change this analysis for all the reasons explained below. *See infra* __.

Without a "material conflict" between Nevada and California equitable subrogation law, the Court need not conduct a choice of law analysis and should apply California law to this dispute.

B. California's Choice of Law Rules Require Application of California Law to This Dispute

Even if the Court decides to conduct a choice of law analysis, California law governs. A Federal Court in a diversity case will apply the same choice of law rules that the local State Court would apply. *Klaxon Co. v. Stentor Elec. Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941); *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002). Thus, this Court applies California's choice of law rules.

In insurance disputes, California employs two different choice of law rules depending upon the issue presented: (i) Civil Code Section 1646, or (ii) California's governmental interest test. Civil Code Section 1646 determines the

law governing the *interpretation* of an insurance policy. *See Frontier Oil Corp. v. RLI Ins. Co*., 153 Cal. App. 4th 1436, 1461 (2007). California's governmental interest test governs all other choice of law issues that arise under insurance policies. *See id.* (e.g., "the right to recover attorney fees in an action to enforce the insured's rights under the policy" and "right of indemnity for punitive damages," which do not involve policy interpretation).

The District Court acknowledged that Section 1646 only governs the interpretation of the insurance policy, but then erroneously applied Section 1646's choice of law rule to this dispute. (ER-6.) This Court should apply California's governmental interest test because the Court is not tasked with interpreting James River's policy; it is determining whether North River can stand in the shoes of a California insured to assert the insured's claims against the primary insurer, James River. Regardless of which test the Court employs, the result is the same: California law governs.

1. California law applies under the governmental interest test

California's governmental interest test requires a showing that (1) there is a material conflict between the laws of California and another interested state; (2) the other state has a legitimate interest in having its law apply to this dispute; and (3) the other state's interests will be more significantly impaired than California's. *Washington Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 919–20 (2001).

"[A] separate conflict of laws inquiry must be made with respect to each issue in the case." *Id*. at 920.

a. There is no "material conflict" between California and Nevada law

"A state's law is materially different from California law if application of the other state's law leads to a different result." *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1200 (S.D. Cal. 2007). As the party seeking to invoke Nevada law, Appellee bears the burden of establishing that California and Nevada law are "materially different." *Wash. Mut. Bank*, 24 Cal. 4th at 919.

As explained above, there is no "material conflict" between the laws of California and Nevada. *Supra* 13–18. This alone requires the Court to apply California law under this test.

b. Nevada does not have a "strong interest" in having its law applied to this dispute

Even if the laws hypothetically could be characterized as materially different, there would be "still no problem in choosing the applicable rule of law where only one of the states has an interest in having its law applied." *Hurtado v. Superior Ct*., 11 Cal. 3d 574, 580 (1974); *see also Wash. Mut. Bank*, 24 Cal. 4th at 920. But simply showing that two states have some general interest in the dispute is not enough. "Generally, the preference is to apply California law, rather than choose the foreign law as a rule of decision." *Strassberg v. New England Mut. Life Ins. Co*., 575 F.2d 1262, 1264 (9th Cir. 1978). Accordingly, "if application of a

foreign decisional rule will not significantly advance the interests of the foreign state, a California court will conclude that the conflict is 'false' and apply its own law." *Id.* "Only if both California and the foreign state have a strong interest in the application of their own law to the controversy will a true conflict be said to exist," requiring a court to proceed to the final step of the analysis to assess the "comparative impairment" to each states' interest of the choice of one rule over the other. *Id.*; *accord Wash. Mut. Bank*, 24 Cal. 4th at 920.

Application of Nevada law will not significantly advance Nevada's interests in this litigation. A state generally has strong interests in a dispute when its citizens are the injured parties. *See, e.g., Stonewall Surplus Lines Ins. Co. v. Johnson Controls*, 14 Cal. App. 4th 637, 649 (1993) ("California's paramount interest is in protecting its residents by deterring tortfeasors."). The injured Nevada plaintiffs were fully compensated under Nevada law through the settlement of the Underlying Action. Any interest Nevada had in this dispute was extinguished when the underlying plaintiffs were made whole. Nevada has no interest in applying its laws to a collateral bad faith dispute between an excess insurer standing in the shoes of a California insured and that insured's primary insurer. "Bad faith" rules are intended to protect the insured, not the judgment creditors. *See, e.g., Egan v. Mut. of Omaha Ins. Co*., 24 Cal. 3d 809, 818 (1979) (implied covenant of good faith is imposed to ensure that insurer "give[s] at least

as much consideration to the welfare of its insured as it gives to its own interests"). The claims at issue in this dispute are those of the California insured being asserted by its excess insurer, giving California the only state with a "strong interest" in having its laws applied.

The District Court misapplied California caselaw to erroneously conclude that California has *no interest* in this dispute because the Underlying Action occurred in Nevada. (ER-9.) In *Stonewall*, a Wisconsin corporation suffered an adverse verdict of punitive damages after a California resident sustained injuries from the insured's defective automobile battery that was sold in California. 14 Cal. App. 4th at 639. In the insurers' action seeking declarations that they had no duty to indemnify the insured-corporation for punitive damages, the insured alleged that Wisconsin law governed the policies, which would allow it to recover from the insurers. *Id.* The California Court of Appeal found that because the insured and its insurers "carefully considered the complexity of the corporation's activities," the parties should have expected that not only would the corporation's liability to a third party potentially be governed by the state in which the liability arose, but that the corporation's "right to indemnity for such a claim might also be governed by that state's law." *Id.* at 648. The court explicitly distinguished cases where an insured sues its insurer for a breach of the duty to defend. *Id.* at 650 n.9 (discussing *Robert McMullan & Son, Inc. v. United States Fid. & Guar. Co*., 103

Cal. App. 3d 198, 205–6 (applying the law of California, where the insured resided, rather than Florida, where the underlying action occurred)). In such cases, the state where the claim arose has "no interest in deterring the insurer's wrongful conduct." *Id.* In *Stonewall*, California law applied because it "will have a direct impact on a tortfeasor whose activities within this state harmed a California resident," by "altering the future behavior of a defendant by compelling payment directly from the defendant rather than its insurers." *Id.*

The District Court similarly misapplied the analysis in the unpublished Central District of California decision in *Medina v. Harco National Insurance Co*. In *Medina*, two Kansas insureds suffered a $3.5 million judgment that exceeded their $1 million insurance policy limit for California plaintiffs' automobile accident injuries after the out-of-state insurer failed to settle the action within its limits when it had the opportunity before trial. 2016 WL 7647680 at *1 (N.D. Cal. July 29, 2016). The insureds assigned their rights in any action against the insurer to the plaintiffs. *Id*. After an unsuccessful appeal, the insureds paid the policy limits to the underlying plaintiffs, who subsequently sued the insurer for breach of contract and violation of the duty of good faith and fair dealing. *Id*. at *4. The California plaintiffs sued the insurer under assignment because they were not fully compensated for the judgment rendered against the insureds. The district court

found that California thus had a greater interest in the dispute than Kansas and applied California law. *Id.* at *9.

Medina and *Stonewall* both support the application of California law to this dispute. Where a state's residents were injured and not yet fully compensated for their injuries that state still has a legitimate interest in having its law applied to the dispute. Here, as discussed above, the Nevada plaintiffs were fully compensated when North River and James River funded the final settlement. *Supra* 21. Thus, unlike California in *Medina*, Nevada has no remaining interest in ensuring its citizens' rights are protected. Whether North River is entitled to equitable subrogation in these circumstances will not affect Shelter Island's behavior in operating in Nevada. Nor does the Underlying Action's location give Nevada an interest in a dispute about nonresident Appellee's wrongful conduct in handling Shelter Island's claim. *See Stonewall*, 14 Cal. App. 4th at 160 n.9. Because only California has an interest in having its laws applied to this dispute, there is no problem applying California law. *Hurtado*, 11 Cal. 3d at 580.

The District Court's reliance on cases utilizing the "multiple risk approach" to find that Nevada has an interest in this dispute is misplaced. (ER 8–9.) California courts apply the "multiple risk approach" to determine the location of insured risks in contractual disputes about coverage under the insurance policy terms. *See Stonewall*, 14 Cal. App. 4th at 646 (finding the "multiple risk

approach" applies in disputes about validity of and rights created under an insurance policy); *Del Real v. U.S. Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 961 (E.D. Cal. 1998), *aff'd sub nom. Del Real v. U.S. Fire Ins. Co*., 188 F.3d 512 (9th Cir. 1999) (using the "multiple risk approach" only when deciding whether California law applied to the *interpretation* of the policy, and not when performing the governmental interest test); *accord Medina*, 2016 WL 7647680 at *8 (applying the "multiple risk approach" because action for insurer's violation of its duty to settle was "effectively a contract dispute").[3]

This is not a dispute about whether a loss is covered under the terms of an insurance contract. The subject of this dispute is the California insured's bad faith claim against its primary insurer. The reasons for applying the "multiple risk approach" when deciding the relevant contacts for disputes arising under the terms of an insurance policy are irrelevant here. When a dispute arises about whether an insurance policy, by its terms, covers a loss, the most relevant contact to determine the applicable state's laws is the place of the insured risk under that contract. Equitable subrogation does not arise under, nor even require, a contractual

[3] Here, the district court's analysis in *Medina* is questionable. "The duty violated—that of dealing fairly and in good faith with the other party to a contract of insurance—is a duty imposed by law, not one arising from the terms of the contract itself." *Richardson v. Emp'rs Liab. Assur. Corp*., 25 Cal. App. 3d 232, 239 (1972). Because a bad faith action is not "essentially a contract dispute," the court should not have applied the "mutual risk approach" to determine the applicable state law.

relationship. *AT&T Techs*., 109 Nev. at 595. The underlying injury—violation of the duty of good faith and fair dealing—also does not arise under contract. *Richardson*, 25 Cal. App. 3d at 239. Thus, the Court should not use the "multiple risk approach" or consider the location of insured risks under the insurance policy when deciding which law applies to North River's equitable subrogation claim. In any event, any interest Nevada could have as a location of insured risk is not a "strong interest" for all the reasons discussed above, and the Court need not reach the final step of the "governmental interest test."

c. California's interests would be "more significantly impaired" if the Court were to apply Nevada law

If the Court were to find that Nevada has a legitimate interest in this litigation, the Court would still need to conduct a "comparative impairment" inquiry, in which it would weigh the interests of each jurisdiction in applying its own respective laws to determine which state's interests would be "more significantly impaired" if the state's law were not applied. *Wash. Mut. Bank*, 24 Cal. 4th at 920. As part of the analysis, the Court "must determine the relative commitment of the respective states to the laws involved and consider the history and current status of the states' laws and the function and purpose of those laws." *Id*.

Even if Nevada were to have any legitimate interest, it would not be "more significantly impaired" if the Court applies California law. As to the history and

status of each states' laws on equitable subrogation claims by excess insurers against primary insurers, only California has published binding decisions in this context. In fact, "[t]here is limited Nevada authority on the doctrine of equitable subrogation" generally, and the Nevada courts look to "the law of other jurisdictions, particularly California, for guidance." *Mort v. United States*, 86 F.3d 890, 893 (9th Cir. 1996). Thus, Nevada's interests would not be impaired if the Court were to apply California law. However, if the Court were to apply Nevada's "limited authority" on equitable subrogation, it would significantly impair California's interests, which are more fully developed.

The function and purpose of bad faith and equitable subrogation laws in California is to protect insureds from primary insurers' harmful conduct by aligning their interests in defending and settling underlying disputes. "Subrogation advances an important policy rationale underlying the tort system by forcing a wrongdoer who helped to cause a loss to bear the burden of reimbursing the insurer for payments made to its insured as a result of the wrongdoer's acts and omissions." *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal. App. 4th 1098, 1119 (2006). As discussed above, giving the defending insurer a duty to make reasonable settlement decisions—lest it face liability for the excess judgment—aligns the interests of insurer and insured. *Supra* 14–15. When an excess insurer covers the insured's excess loss in this scenario, allowing that

insurer to equitably subrogate to the insured's claims against the primary carrier further protects insureds by incentivizing excess carriers to step in and pay. Even if Nevada had an interest in deterring wrongful conduct within its borders, it would not necessitate the application of Nevada law because California has the same policy of deterring insurers' wrongful behavior against their insureds. *See Robert McMullan & Son, Inc. v. United States Fid. & Guar. Co*., 103 Cal. App. 3d 198, 206 (1980). Thus, because the "function and purpose" of equitable subrogation law is to protect insureds, the fact that this dispute involves alleged harm to a California insured gives California the greater interest in this dispute.

2. California law applies under Civil Code § 1646

To the extent the Court finds that Civil Code Section 1646 applies to this dispute, it would also dictate that California law applies. Section 1646 provides that "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Cal. Civ. Code § 1646. The parties' intended place of performance, if not expressly identified, may be gleaned from the nature of the contract. *Frontier Oil Corp*., 153 Cal. App. 4th at 1450.

Here, James River's policy does not state an intended place of performance. However, the policy indicates an intention for performance in California. The

James River policy was issued to a California insured. (ER-16.) The insured's premises are in both Nevada and California (ER-19), but the liability coverage applies to losses in the "coverage territory," defined as all parts of the world (ER-22, ER-34). The policy also has a "California – Service of Suit" provision, which states: "Pursuant to California statutes, this Company designates the following as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insured or any beneficiary hereunder arising out of this contract of insurance." (ER-89.) This clause demonstrates that the parties to the insurance policy—James River and its California insured—intended that claims under the policy would be brought in California, making it the "place of performance" under California law.

If the Court would be unable to determine a single intended place of performance of the James River policy, under the second clause of Section 1646, the Court would look to the place where the insurance contract was made. Cal. Civ. Code § 1646. An insurance contract is "made" in the state where it is delivered and accepted. *See, e.g., Ameron Int'l Corp. v. Am. Home Assur. Co*., 2011 WL 2261195, *5 (C.D. Cal. June 6, 2011) (insurance policy was "made" in California under §1646 because it was accepted and delivered there); *Arno v. Club Med*, 22 F.3d 1464, 1468 n.6 (9th Cir. 1994) (same).

The James River policy was "made" in either California or Arizona. *See* Civ. Code § 1626 ("A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent."). The James River policy was issued to L.A. Pacific Center, Inc, a California citizen. It was delivered to L.A. Pacific Center, Inc. or its insurance agent, Burns & Wilcox Brokerage, which is in Arizona. (ER-16.) The James River policy was *not* "made" in Nevada. Thus, under Civil Code Section 1646, California law would govern.[4]

III. UNDER CALIFORNIA LAW, NORTH RIVER'S SUIT IS NOT BARRED AS A MATTER OF LAW

California law dictates that North River's suit can proceed to discovery. James River moved to dismiss the Complaint solely on the basis that, under Nevada law, Shelter Island suffered no injury to which North River could subrogate because the underlying lawsuit settled with the collective policy limits of the insurers. (*See* ER-5.) The District Court granted dismissal solely on that basis as well, denying leave to amend because North River could not allege a loss excess of the policy limits. (ER-12.) California law indisputably recognizes equitable subrogation between excess and primary insurers, even where the loss only exceeds the primary insurer's limits. *See, e.g., Ace Am. Ins. Co. v. Fireman's Fund*

[4] To the extent the Court cannot determine the insurance policy's intended place of performance or where it was "made" based upon the pleadings, the Court should employ California's governmental interest test, which also dictates that California law applies. *See Engineered Floors, LLC v. Lakeshore Equip. Co*., 2023 WL 3149265, at *11 (C.D. Cal. Mar. 3, 2023), *reconsideration denied*, 2023 WL 4203512 (C.D. Cal. May 18, 2023); *see also* ER-7.

Ins. Co., 2 Cal. App. 5th 159, 170 (2016). Thus, the District Court's Order dismissing North River's suit must be overturned solely on that basis.

North River's Complaint otherwise at least "plausibly" asserts a claim for equitable subrogation under California law when taking all allegations in the Complaint as true. *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1141 (9th Cir. 2021). The Complaint plainly sets out the elements of North River's equitable subrogation claim as follows: (1) the insured suffered a loss for which James River was liable (ER-97 ¶ 36); (2) North River compensated the insured for that loss (*id*.); (3) the insured has an existing, assignable cause of action against James River and could have asserted that action if it had not been compensated by North River (*id*. ¶ 37); (4) North River suffered damages caused by James River's breach of its duty to settle (ER-98 ¶ 39); (5) justice requires that the loss be entirely shifted from North River to James River (*id*. ¶ 40); and (6) North River's payment was reasonable and not voluntary (ER-97 ¶ 34, ER-98 ¶ 41). *See supra* 16–17.

Accordingly, this Court should overturn the District Court's order dismissing Appellant's suit.

IV. UNDER NEVADA LAW, NORTH RIVER'S SUIT IS NOT BARRED AS A MATTER OF LAW

Even under Nevada law, James River's motion to dismiss fails. Where, as here, the state's highest court has not yet decided an issue, "the task of the federal courts is to predict how the state high court would resolve it." *Giles v. GMAC*, 494

F.3d 865, 872 (9th Cir. 2007). "In answering that question, this court looks for 'guidance' to decisions by intermediate appellate courts of the state and by courts in other jurisdictions." *Id*. Although a district court may consider an unpublished decision for its persuasive value, if any, a nonbinding opinion is not dispositive of how the state high court would rule.[5] *Emp'rs Ins. of Wausau v. Granite St. Ins. Co*., 330 F.3d 1214, 1220 n. 8 (9th Cir. 2003).

Here, the District Court erroneously relied upon two related Nevada Supreme Court unpublished decisions—*St. Paul* and *Aspen*—to decide how the state high court would rule on James River's motion to dismiss. *St. Paul* and *Aspen* are inapposite to the facts presented by this case and do not reflect how a full Nevada Supreme Court would rule here in a binding decision. Instead, Nevada would likely follow the majority of states—including California—in recognizing equitable subrogation by an excess insurer against a primary insurer, even where the ultimate loss is within the insured's collective policy limits.

A. *St. Paul* and *Aspen* Are Inapplicable to North River's Suit

The District Court erred in applying *St. Paul* and *Aspen* to bar North River's claim because those unpublished decisions do not reflect how the Nevada Supreme

[5] The District Court apparently found that it *must* consider the unpublished decisions in its approximation of Nevada law. (ER-6.) Ninth Circuit caselaw is clear that a district court's ability to consider unpublished state appellate decisions is permissive. *See, e.g., U.S. Bank, N.A. v. White Horse Ests. Homeowners Ass'n,* 987 F.3d 858, 863 (9th Cir. 2021) ("When determining the substance of Nevada law, we *may* rely on unpublished Nevada Supreme Court opinions.").

Court would rule in this case. First, *St. Paul* involves a subrogation claim between same-level insurers, making it inapplicable to this dispute between an excess and primary insurer. Even though *Aspen* addressed equitable subrogation between an excess and primary insurer, only three justices decided *Aspen* and thus it is not persuasive as to how the Nevada Supreme Court would rule on this issue. Second, *St. Paul* makes no mention of any insurer asserting a reservation of rights—i.e., the right to assert a subrogated claim for the insured's loss. Unlike at the summary judgment stage in *St. Paul*, the Court here is required to accept as true North River's allegations that it did not act as a volunteer by reserving its rights to recoup its payment. Thus, this Court should not apply either decision to bar North River's claim here.

1. *St. Paul* is inapposite and *Aspen* lacks any precedential or persuasive value

In *St. Paul* and *Aspen*, a patron of a Las Vegas nightclub sued the two insured nightclub-hotels, Marquee and Cosmopolitan, for negligent and intentional torts after security members injured him while attempting to oust him from the club. *St. Paul*, 2022 WL 17543613 at *1. Marquee tendered the claim to both its primary insurer, Aspen, and its excess insurer, National Union, whose policies named Cosmopolitan as an additional insured. *Id.* Aspen and National Union jointly defended both parties. *Id.* Cosmopolitan also had its own primary insurer,

nonparty Zurich, and an excess insurer, St. Paul, who Cosmopolitan notified about its potential exposure about one month before trial. *Id*.

At trial, the jury returned a verdict in favor of the patron for $160.5 million in compensatory damages. *Id*. Before reaching the punitive-damages stage, the four insurers collectively funded a confidential settlement with the patron for an amount that exhausted but did not exceed their collective policy limits. *Id*. After the settlement, Cosmopolitan's excess insurer, St. Paul, brought a subrogation claim against National Union and Aspen for, among other things, breach of the implied covenant of good faith and fair dealing for failing to settle the case within their policy limits. *Id*.

National Union first moved for summary judgment on St. Paul's equitable subrogation claim. *St. Paul Fire & Marine Ins. Co. v. Aspen Specialty Ins. Co.*, 2019 WL 13257683 (Nev. Dist. Ct., Oct. 15, 2019). The trial court granted National Union's motion after National Union argued that there is "no subrogation of two excess carriers in two different towers." *Id.* A six-justice panel (short one justice) of the Nevada Supreme Court decided St. Paul's appeal. *St. Paul*, 2022 WL 17543613. The District Court's Order relied upon *St. Paul* and its reasoning to dismiss Appellant's suit. (*See* ER-10–11.) But *St. Paul* is inapplicable on its face because it involved equitable subrogation between same-level insurers with different named insureds. Here, Appellant is an excess carrier seeking subrogation

against the primary insurer for claims against their mutual insured. Thus, the District Court erred in applying *St. Paul* to this case.

Aspen also moved for summary judgment on St. Paul's equitable subrogation claim. *St. Paul Fire & Marine Ins. Co. v. Aspen Specialty Ins. Co.*, 2020 WL 13616460 (Nev. Dist. Ct., Oct. 9, 2020). The trial court denied Aspen's motion because there were "questions of fact as to whether Aspen did not properly settle when it should have." *Id*. A three-justice panel decided Aspen's appeal in a four-page decision containing minimal reasoning. *Aspen*, 2023 WL 3185274. The *St. Paul* decision holding Cosmopolitan suffered no damages to which St. Paul could subrogate foreclosed St. Paul's equitable subrogation claim against Aspen as well. Whatever value an unpublished decision by the Nevada Supreme Court has, a case decided by only three justices that merely applied an earlier holding in the case to a second motion should have no persuasive value to this Court in deciding how the Nevada Supreme Court would decide whether Appellant's claim is barred as a matter of law accepting all of its allegations as true.

Because there is no decision in which the full Nevada Supreme Court has had an opportunity to address whether equitable subrogation exists between excess and primary insurers, this Court should look to California law on the issue, as the Nevada courts would do. *See supra* 17–18.

2. Unlike the plaintiff in *St. Paul*, North River involuntarily paid the insured's loss

Apart from its lack of precedential value to this case, *St. Paul* cannot be relied on to decide North River's subrogation right because the decision did not turn on whether the excess insurer's payment was voluntary. Because *St. Paul* was decided at the summary judgment stage, the court could decide on the undisputed material facts borne out through discovery whether St. Paul met its burden to establish its equitable subrogation claim, including whether it voluntarily paid the insured's loss.

An insurer is not a volunteer "if [it] pays the debt believing the debt must be paid to protect [its] interests, even though it may ultimately be determined payment was unnecessary." *Nat'l Sur. Corp. v. Public Serv. Mut. Ins. Co*., 2008 U.S. Dist. LEXIS 130955, *12–13 (collecting cases); *see also Genesis Ins. Co. v. Magma Design Automation, Inc*., 2015 WL 5123424, at *12 (N.D. Cal. Aug. 31, 2015), *aff'd*, 705 F. App'x 505 (9th Cir. 2017) ("Since [excess insurer] originally declined coverage under the [excess policy], [its] eventual payment was not 'voluntary.'"); *Aetna Life & Cas. Co. v. Ford Motor Co*., 50 Cal. App. 3d 49, 53–4 (1975) ("[O]ne acting in good faith in making payment under a reasonable belief that it is necessary to his protection is entitled to indemnity or subrogation, even though it develops that he in fact had no interest to protect."); *accord Laffranchini*, 39 Nev. at 55 (a volunteer is "one who thrusts himself into a situation on his own initiative,

and not one who becomes a party to a transaction upon the urgent petition of a person who is vitally interested, and whose rights would be sacrificed did he not respond to the importunate appeal.").

Here, as alleged in the Complaint, North River did not voluntarily pay its insured's obligation. *Supra* 10. Unlike the court in *St. Paul*, this Court must accept North River's allegations as true. North River contributed to the settlement only after James River refused repeated settlement demands *within* its $1 million policy limits, an unreasonable position given that James River's own defense counsel concluded that the settlement value *exceeded* $1 million. When two-plus years of litigation failed to produce a settlement, the underlying plaintiff raised the stakes, demanding a $5 million settlement. (ER-96 ¶ 28.) Once James River finally agreed to contribute its full limits of $1 million (*id*. ¶ 29), North River then paid the $4 million balance under a full reservation of rights to protect its own interests and those of its insured (*supra* 10). A payment made under a reservation of rights is not "voluntary." If North River had not offered to contribute to the settlement, it risked the prospect of bad-faith liability in the event the insured suffered a greater judgment at trial. Thus, although North River did not believe it owed any payment because of James River's bad-faith refusal to settle, North River funded the settlement and reserved the right to seek reimbursement of its payment to protect its own interests and those of its insured.

B. Subrogation Is an Equitable Remedy Not Subject to Bright-Line Rules

With no decision on-point with the facts presented here, the Court must predict how the Nevada Supreme Court would decide Appellee's motion to dismiss. The Nevada Supreme Court is unlikely to adopt the District Court's bright-line rule that there can be no equitable subrogation, as a matter of law, where the ultimate liability is within the collective policy limits. Such a rigid approach is contrary to the equitable nature of a subrogation claim. As the U.S. Supreme Court explained over a century ago: "The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." *Memphis & L. R. R. Co. v. Dow*, 120 U.S. 287, 301–02 (1887). This foundational understanding of the nature of the claim aligns with Nevada's longstanding approach to equitable subrogation. *See Laffranchini*, 39 Nev. at 56–7 ("The right of subrogation . . . is founded upon the facts and circumstances of the particular case."); *Am. Sterling*, 126 Nev. at 428 (subrogation is an "equitable remedy that requires the court to balance the equities based on the facts and circumstances of each particular case.").

The District Court was wrong to find that the Nevada Supreme Court would have dismissed North River's claim solely because the ultimate settlement amount did not exceed its limits. Given the equitable nature of the relief and its

dependence on the facts and circumstances of each case, a subrogation claim cannot be barred as a matter of law solely on the basis that the settlement was within the collective policy limits. Such a blanket rule is even less likely to be issued at the motion-to-dismiss stage. Unlike the procedural posture of *St. Paul*, which had reached summary judgment, the facts and circumstances of North River's subrogation claim have yet to develop. North River's claim is not ripe for a dismissal order that went far beyond anything the Nevada Supreme Court had ever articulated.

Further, *St. Paul* did not hold that there can be no equitable subrogation between insurers as a matter of law, which is the practical result of the District Court's holding. The District Court held that under *St.* Paul, Nevada law does not recognize equitable subrogation where the insurers settle a claim against their insured for an amount within their collective policy limits. Under such a rule, an insured only suffers damages if there is a judgment (or settlement) that exceeds all of its available insurance. Only the amount that exceeds the collective insurance limits is the insured's "loss." But an equitable subrogation claim requires the subrogee (e.g., the excess insurer) to involuntarily *pay* the loss of the subrogor (e.g., the insured). If the only "loss" to the insured is the amount exceeding its *collective* policy limits, the payment made by the excess insurer exhausting its full policy limits is not covering the insured's "loss." The insured may have a claim

against the primary insurer that unreasonably failed to settle within its policy limits when presented with the opportunity to do so. But, because the excess insurer's payment is not covering the insured's "loss"—a necessary element of subrogation—the insured has no claim to which the excess insurer can subrogate. Nor would an excess insurer who pays the insured's "loss" in this scenario have subrogation rights because that insurer would be acting as a volunteer, given that it had no chance of liability beyond its policy limits and was not acting to protect its own interest. *See supra* 36–37. Thus, under the District Court's holding, Nevada would not recognize equitable subrogation between insurers in any situation.

Nothing in *St. Paul* supports the extreme conclusion that there can be no equitable subrogation between insurers as a matter of law. Had it wanted to be an outlier, the *St. Paul* court could have flatly held that Nevada does not recognize equitable subrogation between insurers. It did not. But the District Court here did. By applying *St. Paul* to this case, the District Court made that decision for Nevada, imposing a blanket rule that finds no support in either the Nevada Supreme Court's analysis or the laws of most other states in the Ninth Circuit. The District Court's improper application of *St. Paul* to this case requires reversal of its order dismissing North River's subrogation claim.[6]

[6] This is especially so to the extent the District Court relied on James River's claim that North River purportedly agreed with the decision not to settle, or any other facts appearing only in James River's motion. *Supra* 12.

C. The Nevada Supreme Court Would Not Adopt *St. Paul*'s Flawed Holdings

The Nevada Supreme Court is unlikely to adopt the rule announced in *St. Paul* in a binding decision, even in analogous cases, because the decision misinterprets the authorities that underlie it. After recognizing that every insurer has a duty to protect its insured from unreasonable exposure to a judgment in excess of the insured's liability coverage limit, the Nevada Supreme Court nevertheless concluded that the insured suffered no damages because the insurers all settled within their collective policy limits. In so holding, the court misunderstood when an insured has been "injured" by an insurer's breach of its "duty to settle."

1. The *St. Paul* court misinterpreted authorities holding damages must exceed policy limits

The *St. Paul* court began by finding that an insurer's "'duty to settle' requires the insurer to protect the insured from unreasonable exposure to a judgment in excess of the insured's liability coverage limit to the extent an opportunity to settle arises." *St. Paul*, 2022 WL 17543613 at *5 (citing Restatement of Liability Insurance § 24 cmt. b (2019)). This comment section of the Restatement addresses an insurer's duty to settle to avoid an insured facing judgment excess of *that insurer's policy*, not all insurance that an insured may or may not have to cover the claim. As explained above, this is to align the incentives of the insurer with its insured and excess insurer, so that the primary insurer does

not "gamble" with the insured's money when handling the case. *Supra* 15; *see* Restatement of Liability Insurance § 24 cmt. b (2019). Thus, where a primary insurer violates this duty, the damages to the insured are the amount by which the judgment exceeds the primary carrier's limits, even if that insured has excess insurance.

The *St. Paul* court then found, "exhaustion of the policy limits prior to an excess judgment necessarily protects the insured from the harm that the duties purport to avoid." *St. Paul*, 2022 WL 17543613 at *2 (citing *Safeco Ins. Co. of Am. v. Super. Court of Contra Costa Cnty*., 71 Cal. App. 4th 782 (1999)). The *St. Paul* Court characterizes *Safeco* as "concluding that the cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits." *Id.* The California Court of Appeal in *Safeco*, however, addressed whether an insured can sue an insurer for bad-faith refusal to settle before any judgment had been rendered against it. *Safeco*, 84 Cal. Rptr. 2d at 788. The decision did not address an action between multiple insurers. The court held that there must be final judgment because if the case goes to trial and the verdict is within the insurer's policy limits or is a complete defense verdict, then the insured suffers no damage and has no claim against the insurer. *Id.*; *see also Ace Am*., 2 Cal. App. 5th at 170 (holding that the "final judgment" can be settlement). It is well-settled in California that an insured still has a claim against a primary insurer

for refusal to settle if the ultimate settlement amount exceeds the primary insurer's limits—even where the insured has excess coverage—and an excess carrier has subrogation rights if it pays the amount owed by the insured. *Ace Am.*, 2 Cal. App. 5th at 167 ("Since the insured would have been able to recover from the primary carrier for a judgment in excess of policy limits caused by the carrier's wrongful refusal to settle, the excess carrier . . . stands in the shoes of the insured and should be permitted to assert all claims against the primary carrier which the insured himself could have asserted.").

2. The *St. Paul* court ignored binding Nevada law on equitable subrogation

As the dissent in *St. Paul* explains, the majority misconstrued established Nevada subrogation law in holding Cosmopolitan suffered no damages to which St. Paul could subrogate because it did not suffer a loss exceeding its collective policy limits. *See St. Paul*, 2022 WL 17543613 at *6 n.6.

First, the dissent notes that the majority's reasoning that Cosmopolitan suffered no damages because of St. Paul's settlement contribution "fails to recognize that subrogation substitutes the parties *as if the subrogee had never assumed the subrogor's loss*." *Id.* at *5 (citing *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368 (2011)); *see, e.g., Valley Power Co. v. Toiyabe Supply Co.*, 80 Nev. 458 (1964). In *Valley Power*, insured-corporations suffered losses due to financial crimes committed by their employees, for which they were fully compensated by

their insurer. 80 Nev. at 460. That insurer then became subrogated to the insureds' claim against the tortfeasors. *Id*. As the Nevada Supreme Court in *Valley Power* explained, an insurer that pays its insured "in full for their claimed losses . . . [is] subrogated, by operation of law, to the rights, if any, which the insured may have had against the tortfeasor *before such payments were made*." *Id*. Even though the insureds in *Valley Power* were fully compensated by their insurer, with no loss exceeding its insurance policy limits, they still had a claim against the tortfeasor to which the paying insurer could subrogate. This is because if their insurer had never stepped in to pay, the insureds could have pursued an action against their tortfeasor to recover their losses. After the insurer's payment, the losses belong to the insurer. The tortfeasor's liability does not disappear simply because the insured had the foresight to purchase insurance (or, in this case, excess insurance).

Second, the *St. Paul* court erroneously concluded the insurers' exhaustion of their policy limits provided Cosmopolitan "financial security, protection, and peace of mind," which is the purpose of conferring a "duty to settle" on an insurer. *St. Paul*, 2022 WL 17543613 at *5–6. But, as the dissent correctly notes, this rule ignores established Nevada law that exhaustion of policy limits does not automatically foreclose an insured's damages under breach-of-contract or bad-faith theories. *See Century Sur. Co. v. Andrew*, 134 Nev. 819, 825–26 (2018) (holding

that, in the context of an excess judgment, breach of the duty to defend subjects an insurer to liability for expectation and consequential damages, which may exceed the policy limits); *Miller*, 125 Nev. at 314 (an insurer's breach of the duty to settle subjects it to "all compensatory damages proximately caused by its breach," which may exceed the policy limits).

In *Miller*, the insured tortfeasor was subject to an adverse verdict in excess of its automobile insurance limits after the insurer failed to inform the insured of offers to settle that exceeded the policy limits. 125 Nev. at 306–7. The insurer appealed the jury's verdict in favor of the insured for its bad faith claims against the insurer. *Id.* at 307. The Nevada Supreme Court found that "the covenant of good faith and fair dealing includes a duty to adequately inform the insured of settlement offers" because "a primary insurer's duty to defend includes settlement duties and an insurer must give equal consideration to the insured's interest." *Id.* at 305. The Nevada Supreme Court explicitly purported to expand bad faith liability beyond solely circumstances in which an insurer rejects a settlement offer within the policy limits. *Id*. at 311. The court also "refuse[d] to adopt the absolute rule that a primary liability insurer's bad-faith liability ends upon a timely offer of the insured's policy limits." *Id*. Instead, "[i]f an insurer violates its duty of good faith and fair dealing . . . the insurer's actions can be a proximate cause of the insured's damages arising from a foreseeable settlement or excess judgment." *Id*. at 313–14.

St. Paul and *Aspen* found that because all four insurers offered their full policy limits to settle, the insured suffered no injury and therefore had no claim against National Union to which St. Paul could subrogate. *St. Paul* and *Aspen* are not binding authority for determining Nevada law, but *Valley Power*, *Andrew*, and *Miller* are. This Court must conclude that *St. Paul* and *Aspen* do not accurately reflect Nevada law because they should have found that Cosmopolitan did have a claim against National Union and Aspen—to which St. Paul could subrogate—even though the insurers exhausted their full policy limits.[7]

3. The rule in *St. Paul* creates incentives that harms insureds

The *St. Paul* court's conclusion that the insurers' exhaustion of their limits saves their insured from the same harm the "duty to settle" purports to prevent is also wrong. Allowing the insurer to avoid liability for the insured's excess loss excess by exhausting its policy limits does not align the interests of the insurer and insured in defending the claim. As long as the primary insurer knows that the insured has excess liability coverage, the insurer has an incentive to reject settlement offers for its policy limits, gambling that it can achieve a better result, while not risking any additional liability for losing that bet. *See supra* 15. Such a rule does not protect insureds with the "fortuity" of having "obtained more than

[7] Despite the fact that the Nevada Supreme Court recently decided *St. Paul*, it is reasonable to conclude that the Court would nonetheless not follow its holding given the Court's new composition, including that one of the dissenting justices in *St. Paul* is now the Chief Justice.

one applicable policy." *St. Paul*, 2022 WL 17543613 at *5 (dissent). It punishes those that obtained and paid for additional insurance coverage by requiring those insureds to exhaust the additional coverage for which they paid premiums, whereas those with insufficient coverage can transfer liability entirely to the wrongdoer insurer.

D. Nevada Would Likely Follow California and the Majority of States in Recognizing Equitable Subrogation Between Insurers

As the District Court noted, Nevada courts often look to California law for guidance when deciding issues of first impression. (ER-11 n.4); *see generally St. Paul*, 2022 WL 17543613 (citing California law on equitable subrogation throughout reasoning). Because the only Nevada Supreme Court decision on this issue is unpublished, contains fundamental flaws, and relies on California law for its foundation, the Court should look to California law for guidance in determining whether to categorically bar an action for equitable subrogation where the ultimate loss to the insured was within its collective insurance policy limits. California does not require settlements or judgments excess of all available insurance. *See, e.g., Ace Am.*, 2 Cal. App. 5th at 170.

Again, the practical effect of the District Court's interpretation of *St. Paul* is that Nevada law does not recognize equitable subrogation between insurers. *Supra* 39–40. Nevada would be one of the only states to not recognize equitable subrogation between insurers in these circumstances. In the Ninth Circuit alone,

besides California, at least Arizona, Hawaii, Oregon, and Washington have adopted equitable subrogation rights of an excess insurer against a primary carrier. *See Millers Cas. Ins. Co., of Texas v. Briggs*, 100 Wash. 2d 9 (1983); *Travelers Cas. & Sur. Co. v. Am. Equity Ins. Co*., 93 Cal. App. 4th 1142 (2001); *Cal. Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 185 Ariz. 165 (Ct. App. 1996), *corrected* (Feb. 28, 1996); *School Dist. No. 1, Multnomah Cnty. v. Mission Ins. Co*., 58 Or. App. 692 (1982); *St. Paul Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co*., Hawai'i 449 (2015). Indeed, the majority of states throughout the country give excess insurers equitable subrogation rights against primary insurers. Litig. & Prev. Ins. Bad Faith § 7:9 ("The courts are all but unanimous in holding that a paying excess carrier, as subrogee of the insured's rights, may maintain an action against a primary carrier for the latter's bad faith, excess liability resulting from breach of its settlement duties, or defense duties, or both. The vehicle used has largely been that of equitable subrogation."); *see, e.g., Nat'l Sur. Corp. v. Hartford Cas. Ins. Co*., 493 F.3d 752, 756 n.2 (6th Cir. 2007) (explaining subrogation between primary and excess insurers is the "overwhelming majority" rule and citing cases from 27 jurisdictions in support).

Without a published decision to the contrary, the Court should conclude that Nevada would follow the majority position that excess insurers can have equitable subrogation claims against primary insurers, even where the ultimate settlement or

judgment is within the collective policy limits, as long as the excess insurer did not act as a volunteer.

CONCLUSION

This Court should reverse the District Court's order dismissing North River's claim for equitable subrogation.

Dated: December 6, 2023

O'MELVENY & MYERS LLP

By: /s/ *Sabrina H. Strong*
SABRINA H. STRONG (SB#200292)
ZOHEB P. NOORANI (SB#253871)
400 South Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for The North River Insurance Company

STATEMENT OF RELATED CASES

Pursuant to 9th Cir. R. 28-2.6, Appellant states that it is unaware of any related cases currently pending in this Court.

Dated: December 6, 2023

By: */s/ Sabrina H. Strong*
Sabrina H. Strong
O'MELVENY & MYERS LLP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-55757

I am the attorney or self-represented party.

This brief contains 12,454 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated [ ].
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Sabrina H. Strong **Date** 12/06/2023
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I certify that on the 6th day of December, 2023, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: December 6, 2023

By: */s/ Sabrina H. Strong*
Sabrina H. Strong
O'MELVENY & MYERS LLP