

NO.	EXHIBIT DESCRIPTION	BATES NO.	DATE OFFERED	OBJECTION	DATE ADMITTED
17	Email correspondence between Brad Anthony and Elizabeth Gold, dated March 12, 2014.	ROSE000095 - ROSE000097	10-6-16	NO	10-6-16
18	Email correspondence between Brad Anthony and Elizabeth Gold, dated March 19, 2014.	ROSE000098 - ROSE000100			
19	Email correspondence between Brad Anthony, Elizabeth Gold, and Gary Dragul, dated March 25, 2014.	ROSE000101- ROSE000103			
20	Email correspondence between Brad Anthony and Elizabeth Gold, dated April 4, 2014.	ROSE000104			
21	Email correspondence between Brad Anthony and Elizabeth Gold, dated April 7, 2014.	ROSE000105 - ROSE000106			
22	Email correspondence between Brad Anthony and Elizabeth Gold, dated April 15, 2014.	ROSE000107 - ROSE000108			
23	Email correspondence between Brad Anthony, Elizabeth Gold, and Gary Dragul, dated April 21, 2014.	ROSE000111			
24	Email correspondence between Brad Anthony and Elizabeth Gold, dated April 24, 2014.	ROSE000087			
25	Email correspondence between Brad Anthony and Elizabeth Gold, dated April 25, 2014, at 7:53 am.	ROSE000088- ROSE000089			
26	Email correspondence between Brad Anthony and Elizabeth Gold, dated April 25, 2014, at 8:51am.	ROSE000090			
27	Email correspondence between Brad Anthony and Elizabeth Gold, dated April 25, 2014, at 15:58 pm.	ROSE000109 - ROSE000110	10-6-16	NO	10-6-16

NO.	EXHIBIT DESCRIPTION	BATES NO.	DATE OFFERED	OBJECTION	DATE ADMITTED
28	Fifth Amendment to Lease Agreement between Treasure Island, LLC and Rose, LLC, dated April 30, 2014.	ROSE000039-ROSE000043	10-6-16	NO	10-6-16
29	Subordination, Non-Disturbance and Attorney Agreement between Rose, LLC and Senor Frogs Las Vegas, LLC, dated May 6, 2014.	ROSE000044-ROSE000051			
30	Amended Sublease, dated May 6, 2014.	TILLC000039 – TILLC000082			
31	Letter from Kim to Solomon dated June 12, 2014.	TILLC000019			
32	Letter from Williams to Gary Dragul dated August 13, 2014.	TILLC000020			
33	Letter dated September 17, 2014 from Anthony to Andrew Solomon.	TILLC000021 – TILLC000023			
34	September 22, 2014 USPS tracking invoice.	TILLC000024			
35	Letter from Griffis to Rose, LLC dated January 2, 2015.	TILLC000025			
36	Letter dated January 7, 2015 from Gold to Treasure Island, LLC, attention Griffis.	TILLC000026			
37	Letter dated January 15, 2015 from Anthony to Dragul.	TILLC000027 – TILLC000028			
38	Letter dated May 14, 2015 from Anthony to Dragul.	TILLC000029 – TILLC000030			
39	Fed Ex Tracking for May 14, 2015 Default Letter.	TILLC000096			
40	Correspondence dated May 28, 2015, from Brenoch R. Wirthlin, Esq. to Gary J. Dragul regarding Termination of Lease.	ROSE000052	10-6-16	NO	10-6-16

NO.	EXHIBIT DESCRIPTION	BATES NO.	DATE OFFERED	OBJECTION	DATE ADMITTED
41	May 28, 2015 letter noticing termination of lease and Fed Ex delivery confirmations.	TILLC000083 – TILLC000091	10-6-16	NO	10-6-16
42	Correspondence dated May 29, 2015, from Gary Dragul to Najam Khan and Brad Anthony, Esq. regarding Treasure Island Lease Notice.	ROSE000053-ROSE000062			
43	Letter dated May 29, 2015 from Dragul to Kahn and Anthony.	TILLC000031 – TILLC000032			
44	Correspondence with attachments and fax confirmation dated June 3, 2015, from Gary J. Dragul to Najam Khan, and shipping label with June rent check payment.	ROSE000063-ROSE000070			
45	Correspondence with attachments and fax confirmation dated June 3, 2015, from Gary J. Dragul to Najam Khan, cc: Brad Anthony, and shipping label with June rent check payment to Jerry Griffis, regarding Treasure Island Payment Notice, attached hereto in electronic format.	ROSE000071-ROSE000078			
46	Facsimile transmission dated June 3, 2015, from Rose, LLC to Treasure Island, LLC, attention Brad Anthony, six pages.	TILLC000033 – TILLC000038			
47	Refusal of FedEx delivery of June rent check to Jerry Griffis, dated June 4, 2015, attached hereto in electronic format.	ROSE000079			
48	Refusal of FedEx delivery of June 3, 2015 correspondence to Brad Anthony, dated June 4, 2015.	ROSE000080	10-6-16	NO	10-6-16

NO.	EXHIBIT DESCRIPTION	BATES NO.	DATE OFFERED	OBJECTION	DATE ADMITTED
49	Refusal of FedEx delivery of June 3, 2015 correspondence to Najam Khan, dated June 4, 2015.	ROSE000081	10-6-16	NO	10-6-16
50	June 1, 2015 Email from Abigail Watts-FitzGerald to Patrick Sheehan.	TILLC000097			
51	Copy of check no. 6451, in the amount of \$168,127.00, made payable to Treasure Island, LLC from Rose, LLC, dated October 30, 2015.	ROSE000084			
52	Delivery confirmation from USPS for October 30, 2015 letter sent to Mexico.	TILLC000092 – TILLC000093			
53	Correspondence dated October 31, 2015, from Brad R. Anthony to Susan Markusch regarding Percentage Rent, with Certified Mail envelope dated October 30, 2015.	ROSE000082-ROSE000083	10-6-16	NO	10-6-16
54	Deposition of Gary Dragul taken on November 18, 2015.	* EXHIBIT SHREDDED. SEE DEPOSITION LOG. *			
55	December 23, 2015 Letter from Susan E. trench re: "Loan Repayment" letter.	TILLC000094	10-6-16	NO	10-6-16
56	March 21, 2016 Letter from Susan Trench re: Loan Repayment.	TILLC000095	10-6-16	NO	10-6-16
57	Deposition of Brad Anthony taken on March 30, 2016.	* EXHIBIT SHREDDED. SEE DEPOSITION LOG. *			
58	Rose, LLC's Trial Brief dated June 29, 2016.	-	10-6-16	NO	10-6-16
59	Affidavit of David Krouham in Support of Rose's Trial Brief.	-			
60	Affidavit of Gary Dragul in Support of Rose's Trial Brief.	-			
61	Treasure Island, LLC's Trial Brief dated June 29, 2016.	-	10-6-16	NO	10-6-16

[illegible]

## EXHIBIT(S) LIST

Case No.: **A719105**

Trial Date: OCTOBER 6, 2016 ← BENCH TRIAL

Dept. No.: **XI**

Judge: HON. ELIZABETH GONZALEZ

Court Clerk: *DULCE ROMERA*

Plaintiff: **TREASURE ISLAND, LLC**

Recorder: JILL HAWKINS

Counsel for Plaintiff: PATRICK SHEEHAN, ESQ.

vs.

Defendant: **ROSE LLC**

Counsel for Defendant: MICHAEL VAN, ESQ.,

SAMUEZ MARSHALL, EJO.

## TRIAL BEFORE THE COURT

## DEMONSTRATIVE EXHIBITS

[illegible]



**EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE**  
**NOTICE OF DEFICIENCY**  
**ON APPEAL TO NEVADA SUPREME COURT**

**MICHAEL C. VAN, ESQ.**  
**8985 S. EASTERN AVE., SUITE 100**  
**LAS VEGAS, NV 89123**

**DATE: December 13, 2016**  
**CASE: A-15-719105-B**

**RE CASE: TREASURE ISLAND, LLC vs. ROSE, LLC**

**NOTICE OF APPEAL FILED: December 7, 2016**

**YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.**

**PLEASE NOTE: DOCUMENTS NOT TRANSMITTED HAVE BEEN MARKED:**

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)\*\*
  - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)\*\*
- ☒ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)\*\*
  - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ Case Appeal Statement
  - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

---

**NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:**

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

*Please refer to Rule 3 for an explanation of any possible deficiencies.*

---

**\*\*Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.**

# Certification of Copy

State of Nevada }  
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT  
DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT AND CONCLUSIONS OF LAW;  
NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW; DISTRICT COURT  
MINUTES; EXHIBITS LIST; NOTICE OF DEFICIENCY

TREASURE ISLAND, LLC,

Plaintiff(s),

vs.

ROSE, LLC,

Defendant(s),

Case No: A-15-719105-B

Dept No: XI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto  
Set my hand and Affixed the seal of the  
Court at my office, Las Vegas, Nevada  
This 13 day of December 2016.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk



**NOAS**MICHAEL C. VAN, ESQ.  
Nevada Bar No. 3876SAMUEL A. MARSHALL, ESQ.  
Nevada Bar No. 13718**SHUMWAY VAN**

8985 South Eastern Avenue, Suite 100

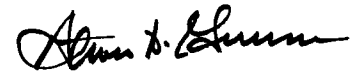
Las Vegas, Nevada 89123

Telephone: (702) 478-7770

Facsimile: (702) 478-7779

Email: michael@shumwayvan.com

samuel@shumwayvan.com

*Attorneys for Defendant/Counterclaimant*

CLERK OF THE COURT

Electronically Filed  
Dec 19 2016 09:28 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court**DISTRICT COURT****CLARK COUNTY, NEVADA**TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Plaintiff

v.

ROSE, LLC, a Nevada limited liability  
company,

Defendant

Case No.: A-15-719105-B

Dept. No.: XI

**NOTICE OF APPEAL**ROSE, LLC, a Nevada limited liability  
company,

Counterclaimant

v.

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Counterdefendant

Please take notice that Defendant/Counterclaimant, Rose, LLC ("Rose"), by and through its counsel of record, Michael C. Van, Esq. and Samuel A. Marshall, Esq. of the law firm of SHUMWAY VAN, hereby appeals to the Supreme Court of Nevada from:

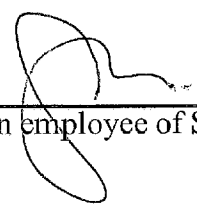
1. All judgments and orders in this case;

Telephone: (702) 478-7770 Facsimile: (702) 478-7779

By: Sam Marshall  
MICHAEL C. VAN, ESQ.  
Nevada Bar No. 3876  
SAMUEL A. MARSHALL, ESQ.  
Nevada Bar No. 13718  
8985 S. Eastern Ave. Suite 100  
Las Vegas, Nevada 89123  
*Attorneys for Defendant/Counterclaimant*

**CERTIFICATE OF SERVICE**

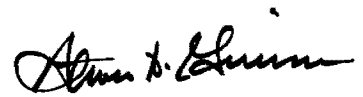
Pursuant to NRCP 5(b), I hereby certify that the foregoing **NOTICE OF APPEAL** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7<sup>th</sup> day of December, 2016 to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet).



---

An employee of Shumway Van

# EXHIBIT A



CLERK OF THE COURT

NEO  
FENNEMORE CRAIG, P.C.  
Patrick J. Sheehan (Bar No. 3812)  
John H. Mowbray (Bar No. 1140)  
300 S. Fourth Street, Suite 1400  
Las Vegas, NV 89101  
Tel.: (702) 692-8011  
Fax: (702) 692-8099  
Email: [psheehan@fclaw.com](mailto:psheehan@fclaw.com)  
*Attorneys for Treasure Island, LLC*

DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada limited  
liability company;

Plaintiff,

vs.

ROSE, LLC, a Nevada limited liability  
company;

Defendant.

ROSE, LLC, a Nevada limited liability  
company,

Counterclaimant,

vs.

TREASURE ISLAND, LLC, a Nevada limited  
liability company,

Counterdefendant.

CASE NO.: A-15-719105-B

DEPT.: XI

NOTICE OF ENTRY OF FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the  
FINDINGS OF FACT AND CONCLUSIONS OF LAW was entered in the above-

1 referenced matter on the 7<sup>th</sup> day of November, 2016, a copy of which is attached hereto.

2 Dated this 7<sup>th</sup> day of November, 2016.

3 FENNEMORE CRAIG, P.C.

4  
5 By: /s/ Patrick J. Sheehan  
6 Patrick J. Sheehan (Bar No. 3812)  
7 John H. Mowbray (Bar No. 1140)  
8 1400 Bank of America Plaza  
9 300 South Fourth St. 14<sup>th</sup> Floor  
10 Las Vegas, NV 89101  
11 *Attorneys for Treasure Island, LLC*  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on November 7, 2016, service of the NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

**null - Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)**

**Fennemore Craig Jones Vargas**

**Contact**

Patrick J. Sheehan

**Email**

psheehan@fclaw.com

**Fennemore Craig, P.C.**

**Contact**

Adam Miller

John H. Mowbray

**Email**

amiller@fclaw.com

jmowbray@fclaw.com

**Shumway Van**

**Contact**

Brent

Rebekah Griffin

Sam Marshall

**Email**

brent@shumwayvan.com

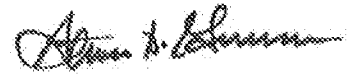
rebekah@shumwayvan.com

samuel@shumwayvan.com

/s/ Adam Miller

An Employee of Fennemore Craig, P.C.

Patrick J. Sheehan (NV Bar No. 3812)  
John H. Mowbray (NV Bar No. 1140)  
FENNEMORE CRAIG, P.C.  
300 S. 4<sup>th</sup> Street, Suite 1400  
Las, Vegas, Nevada 89101  
Telephone: (702) 692-8000  
Facsimile: (702) 692-8099  
Email: [pjsheehan@fclaw.com](mailto:pjsheehan@fclaw.com)  
*Attorney for Plaintiff Treasure Island, LLC*

  
CLERK OF THE COURT

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Plaintiff,

v.

ROSE, LLC, a Nevada limited liability company,

Defendant.

ROSE, LLC, a Nevada limited liability company,

Counterclaimant,

v.

TREASURE ISLAND, LLC, a Nevada limited  
liability company,

Counterclaimant.

CASE NO.: A-15-719105-B

DEPT. NO.: XXIX

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**I. FINDINGS OF FACT.**

1. On or about April 13, 2011, Plaintiff, Treasure Island, entered into a Lease Agreement ("Lease") with Defendant, Rose, LLC ("Rose").

2. Pursuant to the terms of the Lease, Treasure Island leased space to Rose inside the Treasure Island Hotel and Casino in Las Vegas, Nevada (the "Property").

3. One of Rose's obligations under the Lease was to timely pay rent.



1           4.       Per the Lease, rent came in two forms: minimum monthly rent, and quarterly rent  
2 in an amount equal to 7% of modified gross sales.

3           5.       The Lease provided that the rent for gross sales would be paid pursuant to a certain  
4 formula and that, within 30 days of the end of each quarter during the lease term, Rose would  
5 deliver to landlord a writing setting forth the amount of tenant's gross sales made during each  
6 month of the preceding calendar quarter and, concurrently therewith, pay the landlord the  
7 percentage rent due and payable for the preceding calendar quarter.

8           6.       In August, 2012, Treasure Island became aware that Rose was delinquent in  
9 paying several of its contractors.

10          7.       Due to a concern that this failure to pay construction costs could result in a lien  
11 against the Property, Treasure Island, through its General Counsel, Brad Anthony ("Anthony"),  
12 sent Rose a letter reminding it that no liens were permitted under the Lease.

13          8.       This letter was sent in strict compliance with the Lease's notice requirements  
14 which stated that any notices would be sent to Rose at a certain address attention Susan Markusch  
15 with a carbon copy to Operadora.<sup>1</sup>

16          9.       Shortly after that letter was sent, Gary Dragul, President of Rose ("Dragul"), called  
17 Mr. Anthony to discuss the letter that Rose received and to request further relief from the loan  
18 repayment obligation it had with Treasure Island.

19          10.       During that call, Dragul specifically requested that Anthony send all future  
20 correspondences dealing with the Treasure Island-Rose relationship directly and only to him.

21          11.       Although Mr. Dragul testified that his memory of the conversation was different  
22 in that he believed Mr. Anthony suggested that Rose designate one person from Rose whom  
23 Treasure Island could deal with in the future he nevertheless agreed that he did in fact tell Mr.  
24 Anthony to make all future communications to him. The Court finds that Mr. Dragul did in fact  
25 tell Brad Anthony to send all future notices to him and him alone (not Operadora or anyone else).

26  
27  
28 <sup>1</sup> By way of a Fifth Amendment to the lease the notice addresses were changed to state that any notices to Rose were to be sent to a certain address without specifying any individual and to Operadora at both the original address listed and to a Miami law firm.

1           12.     Mr. Anthony's testimony regarding Mr. Dragul's request to change the notice was  
2 much more credible than Mr. Dragul's testimony related to the issue. For example, during his  
3 deposition Mr. Dragul stated he did not recall any conversation with Mr. Anthony after the  
4 August 31<sup>st</sup> letter which contained the notices set forth in the lease. However, during the first day  
5 of testimony upon examination of his own counsel he outlined what he believed occurred during  
6 the conversation. Then, upon questioning from the Court he also outlined what he believed  
7 occurred during the conversation. Then, upon being cross-examined by Plaintiff's counsel he  
8 again stated that he did not recall any conversation taking place. Plaintiff's counsel asked the  
9 question as follows:

10           Q.     ...Sir, do you recall a telephone conversation that you had with  
11 Mr. Anthony following receipt of this letter [the August 31, 2012 letter]?

12           A.     [by Mr. Dragul] I do not.

13           Transcript at page 33 lines 2-5 and also at page 34 lines 5-7. This just after his response to the  
14 Court clearly acknowledging the conversation. See pages 18 and 19. Indeed, the next letter  
15 between the parties references the conversation between Mr. Anthony and Mr. Dragul so the  
16 conversation must have taken place and it must of taken place in between the August 31<sup>st</sup>  
17 correspondence and September 19<sup>th</sup> correspondence which followed.

18           13.     The Court finds that the parties agreed that any further notices would be sent  
19 solely to Mr. Dragul.

20           14.     On September 19, 2012, Anthony sent a letter following up on Mr. Dragul's  
21 request regarding the construction loan repayment.

22           15.     Mr. Anthony complied with Dragul's request for how notice should be provided  
23 and sent the letter directly to Dragul and without Operadora being carbon copied.

24           16.     In the years that followed, Treasure Island sent numerous communications to  
25 Rose.

26           17.     In each instance where money owed to Treasure Island was delinquent, barring  
27  
28

1 one<sup>2</sup>, the communication was sent to Dragul and Operadora was not copied.

2 18. In all of its communications with Treasure Island, Rose did not carbon copy its  
3 subtenant once. Nor was any evidence presented to show that Rose forwarded any of the  
4 communications it received from Treasure Island to Operadora.

5 19. On April 30, 2015, Rose breached the Lease when it failed to pay the 7% gross  
6 sales portion of the rent for the first quarter of 2015.

7 20. As a result, on May 14, 2015, Treasure Island sent Rose a notice.

8 21. Mr. Dragul Rose's President testified that his company had many tenants and that  
9 if any tenant failed to pay rent when due he would begin proceedings to evict that tenant 10 days  
10 after said tenant defaulted on his rental obligations.

11 22. Pursuant to Mr. Dragul's instruction the Notice was sent to Mr. Dragul and not to  
12 Susan Markusch or Operadora.

13 23. Out of an abundance of caution, Mr. Anthony emailed a copy of the notice to the  
14 only other officer of Rose, LLC its legal counsel, Elizabeth Gold.

15 24. Ms. Gold was the person who signed all of the contracts in this matter.

16 25. The letter advised Rose, LLC that it was delinquent on its rent and that it had ten  
17 days to cure that delinquency or it would be in default.

18 26. Pursuant to the express terms of the parties' Lease Agreement, if the overdue rent  
19 payment was not paid within ten days of the notice, Treasure Island had the right to terminate the  
20 parties' lease.

21 27. The Court finds that Rose, LLC did in fact receive the notice and did not pay the  
22 full amount of overdue rent between May 14 and May 28.

23 28. This nonpayment occurred despite Rose having been paid \$247,500 from its  
24 subtenant for the months of January, February and March, which amount represents roughly the  
25 equivalent of the rent monies owed to Treasure Island pursuant to Rose's lease with Treasure  
26

27  
28 <sup>2</sup> The only exception to this was a letter from Jerry Griffia, Treasure Island's Chief Financial Officer, which did  
include notice to Operadora since the subject of that letter was Operadora itself not paying food charges owed to  
Treasure Island.

1 Island.

2 29. The evidence showed that Elizabeth Gold received a copy of the notice of default  
3 no later than May 15, 2015, since she called Brad Anthony on that day and requested additional  
4 time to pay the overdue rent, which Mr. Anthony said Treasure Island would not give Rose.

5 30. Mr. Anthony so testified and Elizabeth Gold did not testify in the trial to dispute  
6 this testimony. Mr. Anthony's testimony in this regard is corroborated by a letter which Ms. Gold  
7 drafted on May 29 which referenced her being emailed the May 14th Notice.

8 31. The Court finds that Mr. Dragul was advised of the May 14 Notice shortly after  
9 Ms. Gold's receipt of the same. This is because Mr. Dragul testified he spoke with Ms. Gold  
10 every morning and several times a day. See transcript at page 40 lines 3-9.

11 32. Although Mr. Dragul testified that he personally did not receive a copy of the  
12 Notice until he received a phone call from David Krouham on May 28 or 29 his testimony is not  
13 credible.

14 33. In Mr. Dragul's deposition, he testified he believed he was advised of the Notice  
15 on May 26.

16 34. Although Mr. Dragul coyly testified that he did not see a copy of the notice until  
17 he returned to his office he was obviously told about the Notice.

18 35. Plaintiff's counsel asked Mr. Dragul if he was told about the notice even though he  
19 did not see the notice and he testified, "I don't remember." See transcript at page 49 lines 17-19.

20 36. The Court believes it is clear the Mr. Dragul was advised of the Notice by May 15  
21 and certainly well before May 28.

22 37. In addition to Rose receiving the notice through Ms. Gold, the evidence showed  
23 that Ms. Markusch (the person mentioned under the original notice provision) also was aware of  
24 the notice since she sent a partial payment for the outstanding rent due shortly after the May 14  
25 notice was received.

26 38. Rose, LLC had its own sublease with an entity called Señor Frogs Las Vegas, LLC  
27 ("Señor Frogs").  
28

1           39.     Señor Frogs is a subsidiary of Operadora.  
2           40.     Pursuant to an express provision in the sublease between Rose and Señor Frogs,  
3 Rose had a duty to provide a copy of any default notices it received from Treasure Island to Señor  
4 Frogs/Operadora.

5           41.     Rose never sent a copy of the May 14th default notice to Señor Frogs/Operadora.

6           42.     On May 28, Treasure Island terminated its lease with Rose via a letter sent by its  
7 counsel, Brenoch Wirthlin.

8           43.     Following receipt of this Notice of Termination Rose attempted to pay the rent,  
9 which Mr. Dragul admitted was overdue since it was due on April 30<sup>th</sup>.

10          44.     However, Treasure Island had already terminated the lease and this action seeking  
11 declaratory relief by both parties began.

12          45.     Upon finding out about Treasure Island's termination of Rose's lease, Señor  
13 Frogs/Operadora hired counsel from Florida to contact Treasure Island.

14          46.     Said counsel did contact Treasure Island (through its counsel).

15          47.     That communication was memorialized in an email setting forth Señor  
16 Frogs/Operadora's position at the time.

17          48.     The email dated June 3, 2015, does not mention the fact that Señor Frogs would  
18 have paid any overdue amounts owed by Rose to Treasure Island.

19          49.     The testimony showed that Señor Frogs had already paid Rose approximately  
20 \$247,500 for the three months involved in the rent delinquency by Rose-January, February and  
21 March, 2015.

22          50.     The email states:

23                 "Pat -- thank you for your time today. This email will confirm our  
24 discussions. The letter from Mr. Wirthlin to Rose, LLC and Operadora  
25 Andersons S.A. de C.V. dated May 28, 2015, was sent to my client for  
26 notice purposes only under Section 11 of the Fifth Amendment to Lease  
Agreement between Rose, LLC and Treasure Island, LLC. As we  
discussed, under Section 9 of the Fifth Amendment, my client is not  
affected by a default by Rose, LLC as the prime tenant.

27                 As we further discussed, Rose, LLC is disputing the default. You have  
28 confirmed with me that your client does not plan on taking any action

1 until the dispute with Rose, LLC is resolved, whether by court action or  
2 settlement between the two parties. None of this will impact adversely on  
3 my client, which will be permitted to continue its sub-tenance. If your  
4 client prevails and terminates Rose, LLC's tenancy, at that point you  
5 would then negotiate a lease directly with my client in accordance with  
6 Section 9 of the Fifth Amendment.

7  
8 Thanks again for your assistance. Please copy me on any further  
9 correspondence. My contact information is below."

10  
11 51. Following this email Señor Frogs did not intervene in this case and is not a party  
12 to this action and thus its rights are not subject to this action.

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
CONCLUSIONS OF LAW

1. The court finds that the lease between Rose and Treasure Island has been  
terminated.

2. Rose's argument that the termination was not proper because the May 14 default  
notice sent to Rose was not sent to the attention of Susan Markusch is without merit for the  
following reasons any one of which would be sufficient:

A. The parties orally modified the lease when Mr. Dragul told Mr. Anthony to send  
all future correspondence to him and him alone sometime between August 31 and  
September 19, 2012  
"[P]arties to a written contract who agree to new terms may orally modify the contract."  
*Jensen v. Jensen*, 104 Nev. 95, 98 (Nev. 1988)(internal citations omitted). "Moreover,  
parties' consent to modification can be implied from conduct consistent with the asserted  
modification." *Id.* "Parol evidence can be admitted to show an oral agreement modifying  
a contract." *Id.* citing *Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 110, 389  
P.2d 923, 924 (1964). This is the case despite a provision stating that the contract can  
only be modified in writing:

Parties may change, add to, and totally control what they  
did in the past. They are wholly unable by any contractual  
action in the present, to limit or control what they may  
wish to do contractually in the future. Even where they  
include in the written contract an express provision that it

1 can only be modified or discharges by a subsequent  
2 agreement in writing, nevertheless their later oral  
3 agreement to modify or discharge their written contract is  
4 both provable and effective to do so.

5 *Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964)  
6 citing *Simpson on Contracts* § 63, at 228 (emphasis added).

7 B. Under the doctrine of estoppel. To prevail on an argument of estoppel, the party  
8 asserting the defense must prove four elements:

- 9 1. The party to be estopped must be apprised of the true facts;
- 10 2. He must intend that his conduct shall be acted upon, or  
11 must so act that the party asserting estoppel has a right to  
12 believe it was so intended.
- 13 3. The party asserting the estoppel must be ignorant of the  
14 true state of facts;
- 15 4. He must have relied on his detriment on the conduct of the  
16 party to be estopped. In addition silence can raise an  
17 estoppel quite as effectively as can words. *Teriano v. Nev.*  
18 *State Bank*, 121 Nev. 217, 223, 112 P.3d 1058, 1062  
19 (2005).

20 Here, Rose was aware of Treasure Island's decision not to send numerous notices to the  
21 attention of Susan Markusch after Mr. Dragul had instructed Mr. Anthony to send all  
22 notices to his attention. Thus, Rose was aware that all future notices after August 31,  
23 2012 were being sent to Mr. Dragul and not Ms. Markusch. Similarly, when Mr. Dragul  
24 asked Mr. Anthony to send all future notices to his attention he obviously intended that  
25 his conduct would be acted upon by Anthony. Next, Treasure Island was clearly ignorant  
26 to any change in direction by Rose to change the person who the notice needed to be sent  
27 to from Mr. Dragul back to Ms. Markusch since the evidence showed Dragul never  
28 changed his direction to have all notices sent to his attention and his attention alone.  
Finally, Treasure Island met the last element since it relied to its detriment by sending the  
notice to the attention Mr. Dragul instead of Ms. Markusch.

1 Estoppel is also applicable since the evidence showed that numerous notices were sent to  
2 the attention of Mr. Dragul and not Ms. Markusch after the August 31, 2012 letter and  
3 neither Dragul or Rose objected. See also, *Chequer, Inc. v. Plainers and Decorators*, 98  
4 Nev. 609, 614, 655 P2.d 996, 998-99 (1982 ("This court has noted that the silence can  
5 raise in estoppel quite as effectively as can words"); *Goldstein v. Hanna*, 97 Nev. 559,  
6 562 (Nev. 1981) (internal citations omitted) ("Thus, 'a person remaining silent when  
7 ought, in the excess of good faith, to have spoken, will not be allowed to speak when he  
8 ought in the exercise of good faith, remain silent.'")

9  
10 C. The Court finds that as a result of the conversation between Mr. Dragul and Mr.  
11 Anthony, Rose waived its right to claim the notice should have been sent to the attention  
12 of Ms. Markusch instead of Mr. Dragul. His conduct in requesting that any future notices  
13 be sent to him and him alone was an intentional relinquishment of any requirement on  
14 Treasure Island's part to send the notice to attention of Ms. Markusch. In addition, the  
15 failure to raise any issues concerning the subsequent notices, which were all sent to the  
16 attention of Mr. Dragul and not Ms. Markusch evidence of intention to waive the right  
17 and thus a waiver is implied from said conduct, *Mahban v. MGM Grand Hotels, Inc.*, 100  
18 Nev. 593, 596, 691 P2.d 421, 423-24 (1984). See also, *Havas v. Atlantic Ins. Co.*, 96  
19 Nev. 586, 588 (Nev. 1980) (internal citations omitted). (The intent of waiver may be  
20 expressed or implied from the circumstances.)

21 D. Rose's claim is also without merit since it received actual notice and Ms.  
22 Markusch herself received notice. In *Stonehenge Land Co. v. Beazer Homes Investments,*  
23 *LLC*, 893 N.E. 2.d 855, 863 (Ohio Ct. App. 2008) the court held that, "Where there is  
24 evidence of actual notice, a technical deviation from a contractual notice requirement will  
25 not bar the action for breach of contract brought against a party that had actual notice."  
26 See also, e.g., *Polizzotto v. D'Agostino*, 129 So. 534, 536 (La. 1930) ("[M]ere  
27 informalities do not violate notice so long as they do not mislead, and give the necessary  
28



1 information to the proper party.”); *Bd. of Comm’rs v. Turner Marine Bulk, Inc.*, 629 So.  
2 2d 1278, 1283 (La. Ct. App. 1993) (“Where adequate notice is in fact given and its  
3 receipt is not contested, technicalities of form may be overlooked.”). In this case it is  
4 clear Rose received actual notice and thus suffered no harm.

5  
6 E. Treasure Island substantially complied with any notice obligations to Rose. In  
7 *Hardy Cos v. SNMARK, LLC*, 126 Nev. 528, 536 (Nev. 2010) the court found that  
8 substantial compliance with notice provisions is met when the owner has actual  
9 knowledge and is not prejudiced. In this case it was clear Rose had actual knowledge of  
10 the notice and the opportunity to cure the default during the ten-day notice period. This  
11 provides the fifth reason why Rose’s argument that the notice to it was ineffective has no  
12 merit.

13 3. Rose may not raise Treasure Island’s failure to carbon copy Operadora as a  
14 defense given the circumstances in this case.

15  
16 A. Rose cannot raise any claims regarding Treasure Island’s failure to notice Señor  
17 Frogs since that claim belongs to Señor Frogs. Señor Frogs is not a party to this case.  
18 Instead, the issue only involves whether or not Treasure Island’s termination of the Rose  
19 Lease was effective. Any notice obligations to Señor Frogs were a separate obligation  
20 that Treasure Island had to Señor Frogs and that is not an issue that could be raised by  
21 Rose pursuant to established law. *Pierce v. Centry Ins.*, 421 N.E. 2d 1252 (App. Ct.  
22 Mass. 1981). (Notice to the insured and notice to the mortgagee have discrete purposes,  
23 however, and it is difficult to see how, as to the party who receives notice, a failure to  
24 give notice to the other, can be anything but merely formal. . . . This quality of separate  
25 obligations has been noted particularly, where, as in the instant case, the insurance policy  
26 contains a so-called ‘standard mortgage clause.’ (Citations omitted.) Under that clause  
27 ‘the result has been that the Courts have held that the agreement of the company with the  
28 mortgagee being separate and divisible from that with the mortgagor. . . ) *See also, e.g.*,

1 *Ellegood v. Am. States Ins. Co.*, 638 N.E.2d 1193, 1195 (Ill. App. Ct. 1994) (“[P]laintiff,  
2 who admittedly received notice and failed to pay the premium, seeks to void defendant's  
3 purported cancellation based on the fortuitous fact that defendant is unable to establish  
4 that it notified the mortgagee. We agree . . . that this would result in an ‘unjustified  
5 windfall’ to the insured.”); *Bradley v. Assocs. Disc. Corp.*, 58 So. 2d 857, 859 (Fla. 1952)  
6 (finding that a defect in the notice’s content did not invalidate the notice where the defect  
7 was relevant only to a third party); *cf. Bryce v. St. Paul Fire & Marine Ins. Co.*, 783 P.2d  
8 246, 247 (Ariz. App. 1989) (“Appellee's failure to give timely notice of the cancellation  
9 to the mortgagee [as required by statute] had no effect on the proper notice of  
10 cancellation given appellant by the premium finance company.”); *Allstate Ins. Co. v.*  
11 *McCrae*, 384 S.E.2d 1, 2 (N.C. 1989) (“Only defective notification to the *insured* renders  
12 cancellation of the policy ineffective and extends the liability of the insurer.”).

13  
14 B. Even if Rose could raise the issue of Treasure Island’s failure to notice Señor  
15 Frogs/Operadora it is estopped from doing so. Dragul told Anthony to send any default  
16 notices to him and not anyone else. As a result, when Anthony sent the notices to Dragul  
17 and not anyone else Rose cannot argue that said notice was defective pursuant to the  
18 estoppel law and reasons cited above.

19 C. Rose waived any claims for the same reasons also. Similarly, Dragul’s insistence  
20 that any notices be sent to him and him alone constitutes a waiver of any argument that  
21 Treasure Island should have sent the notice to Señor Frogs/Operadora.

22  
23 D. Rose’s failure to send the notice to Señor Frogs under its own obligation  
24 precludes Rose from alleging that the notice was ineffective since Señor Frogs was not  
25 carbon copied. This is true under the doctrine of materiality. If Rose felt that Treasure  
26 Island’s obligation to send the notice of default to Señor Frogs was a material term of its  
27 (as opposed to Señor Frogs) contractual rights with Treasure Island then it clearly would  
28 have sent the notice on to Señor Frogs pursuant to its own contractual obligation. Rose

1 not sending the notice to Señor Frogs pursuant to its own contractual obligations shows  
2 that although the notice obligation from Treasure Island to Señor Frogs might have been  
3 material to Señor Frogs, Rose did not believe it was material to it since it failed to send  
4 on the notice to Señor Frogs pursuant to its own obligations.  
5

6 E. The unclean hands doctrine also applies. First, since Rose received the rent from  
7 its subtenant and did not turn those monies over to Treasure Island. The facts were clear  
8 that the subtenant Operadora would pay Rose \$82,500 per month under the sublease and  
9 Rose would in effect take those same monies and pay those over to the landlord.  
10 Although the subtenant Señor Frogs paid Rose \$247,500 for January, February and  
11 March of 2015 Rose did not take those monies and pay the landlord Treasure Island. It  
12 cannot now complain that Treasure Island's failure to notice Señor Frogs somehow  
13 excuses its non-performance under these circumstances. Similarly, the unclean hands  
14 doctrine prevents Rose from arguing that Treasure Island's failure to carbon copy  
15 Operadora on the May 14<sup>th</sup> Notice excuses Rose's non-performance since it had the same  
16 obligation and failed to do so. Again Rose had clear contractual obligations to send any  
17 default notices it received to Señor Frogs. The evidence is clear that Rose never sent any  
18 notices it received from Treasure Island to Señor Frogs including the May 14<sup>th</sup> Notice.  
19 Therefore it cannot now allege that it is somehow excused for its non-performance under  
20 its contract with Treasure Island because Treasure Island did not carbon copy Operadora.  
21

22 The unclean hands doctrine generally bars a party from receiving equitable relief  
23 because of that party's own inequitable conduct. It precludes a party from attaining an  
24 equitable remedy when that party's connection with the subject-matter or transaction in  
25 litigation has been unconscientious, unjust, or marked by the want of good faith. *Park v.*  
26 *Park*, 126 Nev. 745 (2010) ("the District Court found a connection between Appellant's  
27 misconduct, breach of contract, and cause of action for unjust enrichment. ... substantial  
28 evidence supports the District Court's decision to bar Appellant's unjust enrichment

1 claim under the unclean hands doctrine.”). While unclean hands is generally regarded as  
2 an argument that sounds in equity, the Ninth Circuit has recognized that “[t]he unclean  
3 hands doctrine applies not only to equitable claims, but also to legal ones.” *Adler v. Fed.*  
4 *Republic of Nigeria*, 219 F.3d 869 (9<sup>th</sup> Cir. 2000). Here Rose’s failure to pay the rent to  
5 begin with after being paid the same by its subtenant coupled with its insistence that  
6 Treasure Island not provide Operadora notice, and, perhaps most importantly, failing to  
7 provide Operadora the default notice itself, despite its specific contractual obligation to  
8 do so, caused all the harm to occur. If notice to Operadora was so important to Rose, it  
9 should have sent the notice to Operadora itself. It follows logically that since Operadora  
10 had already paid Rose the rent necessary to cover the quarterly rent that was due, Rose  
11 did not want Operadora to know that Rose had not paid the rent to Treasure Island. In  
12 any event, pursuant to the unclean hands doctrine, Rose is prevented from relying upon  
13 the lack of notice to Operadora to excuse its default since its own actions were marked by  
14 the want of good faith. It would be unjust to allow it to use Treasure Island’s failure to  
15 copy Señor Frogs to excuse its non-payment of rent under the circumstances of this case.

16 4. Based on the foregoing, the court concludes that Treasure Island’s termination of  
17 Rose, LLC’s lease was effective and therefore, the lease is of no further force and effect.

18  
19 5. The Court also denies Defendant’s counterclaims for the reasons listed above. In  
20 addition, Treasure Island has accepted the rent and thus Rose’s claim that Treasure Island  
21 breached the lease by failing to accept the rent is without merit. Indeed, the Court is unaware of  
22 any claim that a tenant can make for the failure of the landlord to accept rent. At all times  
23 Treasure Island allowed Rose to continue to lease the space pending the outcome of this  
24 litigation and Treasure Island’s failure to accept the rent for a few months pending the Court’s  
25 decision on whether the acceptance of the rent would not act as a waiver of Treasure Island’s  
26 right to terminate this lease is not an actual breach.

1 Dated this 4<sup>th</sup> day of November, 2016.

2  
3   
District Court Judge *Jw*

4 Submitted by:

5 FENNEMORE CRAIG, P.C.

6  
7 By: 

8 Patrick J. Sheehan (Bar No. 3812)  
9 John H. Mowbray (Bar No. 1140)  
10 1400 Bank of America Plaza  
300 South Fourth St. 14<sup>th</sup> Floor  
Las Vegas, NV 89101  
*Attorneys for Treasure Island, LLC*

CERTIFICATE OF SERVICE

Pursuant to NRCPP 5(b), I hereby certify that I am an employee of Pennemore Craig, P.C. and that on November 7, 2016, service of the FINDINGS OF FACT AND CONCLUSIONS OF LAW was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List**

**For Case**

**null - Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)**

**Pennemore Craig Jones Vargas**


Contact	Email
Patrick J. Sheehan	<a href="mailto:psheehan@fcclaw.com">psheehan@fcclaw.com</a>

**Pennemore Craig, P.C.**

Contact	Email
Adam Miller	<a href="mailto:amiller@fcclaw.com">amiller@fcclaw.com</a>
John H. Mowbray	<a href="mailto:jmowbray@fcclaw.com">jmowbray@fcclaw.com</a>

**Shumway Van**

Contact	Email
Brent	<a href="mailto:brent@shumwayvan.com">brent@shumwayvan.com</a>
Gabriela Mercado	<a href="mailto:Gabrielam@shumwayvan.com">Gabrielam@shumwayvan.com</a>
Kamra Fuller	<a href="mailto:karara@shumwayvan.com">karara@shumwayvan.com</a>
Rebekah Griffin	<a href="mailto:rebekah@shumwayvan.com">rebekah@shumwayvan.com</a>
Robin Cordova	<a href="mailto:robin@shumwayvan.com">robin@shumwayvan.com</a>
Sam Marshall	<a href="mailto:samuel@shumwayvan.com">samuel@shumwayvan.com</a>

  
An Employee of Pennemore Craig, P.C.

  
CLERK OF THE COURT

**ASTA**

MICHAEL C. VAN, ESQ.  
Nevada Bar No. 3876

SAMUEL A. MARSHALL, ESQ.  
Nevada Bar No. 13718

**SHUMWAY VAN**

8985 South Eastern Avenue, Suite 100  
Las Vegas, Nevada 89123

Telephone: (702) 478-7770

Facsimile: (702) 478-7779

Email: michael@shumwayvan.com

samuel@shumwayvan.com

*Attorneys for Defendant/Counterclaimant*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Plaintiff

v.

ROSE, LLC, a Nevada limited liability  
company,

Defendant

ROSE, LLC, a Nevada limited liability  
company,

Counterclaimant

v.

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Counterdefendant

Case No.: A-15-719105-B  
Dept. No.: XI

**CASE APPEAL STATEMENT**

1. Name of appellant filing this case appeal statement:  
Defendant/Counterclaimant, Rose, LLC ("Rose")
2. Identify the judge issuing the decision, judgment, or order appealed from:  
The Honorable Elizabeth Gonzalez
3. Identify each appellant and the name and address of counsel for each appellant:

Attorneys for Appellant, Rose, LLC:

MICHAEL C. VAN, ESQ.  
SAMUEL A. MARSHALL, ESQ.  
**SHUMWAY VAN**  
8985 South Eastern Avenue, Suite 100  
Las Vegas, Nevada 89123  
(702) 478-7770

DANIEL F. POLSENBERG, ESQ.  
JOEL D. HENRIOD, ESQ.  
**LEWIS ROCA ROTHGERBER CHRISTIE LLP**  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, Nevada 89169  
(702) 949-8200

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Attorneys for Respondent, Treasure Island, LLC:

PATRICK J. SHEEHAN, ESQ.  
JOHN H. MOWBRAY, ESQ.  
**FENNEMORE CRAIG, P.C.**  
300 S. 4th Street, Suite 1400  
Las Vegas, Nevada 89101  
(702) 692-8000

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

N/A

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

...

...



1 7. Indicate whether appellant is represented by appointed or retained counsel on  
2 appeal:

3 Retained Counsel

4 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the  
5 date of entry of the district court order granting such leave:

6 N/A

7 9. Indicate the date the proceedings commenced in the District Court, e.g., date  
8 complaint, indictment, information, or petition was filed:

9 Complaint filed May 28, 2015

10 10. Provide a brief description of the nature of the action and result in the District Court,  
11 including the type of judgment or order being appealed and the relief granted by the District Court:

12 This is an action for breach of lease. Rose holds a lease for space  
13 within the Treasure Island ("TI") that is not set to expire for another twenty-  
14 four (25) years. Rose pays rent to TI in two (2) methods, monthly rent and  
15 quarterly percentage rent based on Rose's subtenant's, Señor Frog's,  
16 quarterly gross sales. In the early part of 2015, Rose missed a percentage  
17 rent payment. Under the Lease and Fifth Amendment thereto, TI was to  
18 provide Rose with notice of any breach pursuant to an agreed upon method  
19 and matter. TI failed to provide Rose with notice of its missed payment in  
20 accordance with the written contracts between the parties.

21 TI initiated the above case, after Rose made several attempts to cure  
22 its missed payment, seeking breach of lease and declaratory relief. Rose  
23 filed a Counterclaim for breach of contract, breach of the implied covenant  
24 of good faith and fair dealing, and for a declaratory judgment.

25 The District Court ruled in favor of TI on the basis that there was an  
26 alleged verbal agreement between the parties, prior to the Fifth Amendment  
27 which placed additional notice requirements on TI, wherein it was agreed  
28 that TI would not comply with the notice provisions as outlined in the lease.  
The evidence provided by TI of this agreement was largely based on the  
testimony of TI's general counsel, Brad Anthony. As a result, the District  
Court terminated the lease between the parties.

Rose appeals from the "Findings of Fact and Conclusions of Law" entered  
November 7, 2016 terminating its lease with TI.

...

11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

This case has not been the subject of an appeal or an original writ proceeding.

12. Indicate whether this appeal involves child custody or visitation:

This case does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

Although Rose has made several attempts to settle this matter, Treasure Island refuses to entertain a reasonable settlement that would involve Rose remaining a tenant of Treasure Island.

DATED this 7<sup>th</sup> day of December, 2016.

SHUMWAY VAN

By:



MICHAEL C. VAN, ESQ.

Nevada Bar No. 3876

SAMUEL A. MARSHALL, ESQ.

Nevada Bar No. 13718

8985 S. Eastern Ave. Suite 100

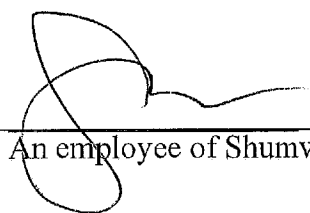
Las Vegas, Nevada 89123

*Attorneys for Defendant/Counterclaimant*

SHUMWAY • VAN  
8985 South Eastern Avenue, Suite 100  
Las Vegas, Nevada 89123  
Telephone: (702) 478-7770 Facsimile: (702) 478-7779

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that the foregoing CASE APPEAL STATEMENT was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7<sup>th</sup> day of December, 2016 to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet).

  
\_\_\_\_\_  
An employee of Shumway Van

DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**

**Treasure Island LLC, Plaintiff(s)**  
**vs.**  
**Rose LLC, Defendant(s)**

§  
§  
§  
§  
§

Location: **Department 11**  
Judicial Officer: **Gonzalez, Elizabeth**  
Filed on: **05/28/2015**  
Case Number History:  
Cross-Reference Case Number: **A719105**

---

**CASE INFORMATION**

---

**Statistical Closures**

10/12/2016      Judgment Reached (bench trial)

Case Type: **Other Business Court Matters**

Case Flags: **Discovery heard by Department  
Appealed to Supreme Court  
Automatically Exempt from  
Arbitration  
Other Landlord/Tenant Case**

---

**DATE**

**CASE ASSIGNMENT**

---

**Current Case Assignment**

Case Number	A-15-719105-B
Court	Department 11
Date Assigned	09/29/2015
Judicial Officer	Gonzalez, Elizabeth

---

**PARTY INFORMATION**

---

		<i>Lead Attorneys</i>
<b>Plaintiff</b>	<b>Treasure Island LLC</b>	<b>Sheehan, Patrick J.</b> <i>Retained</i> 7023859595(W)
<b>Defendant</b>	<b>Rose LLC</b>	<b>Van, Michael C.</b> <i>Retained</i> 702-478-7770(W)
<b>Counter Claimant</b>	<b>Rose LLC</b>	<b>Van, Michael C.</b> <i>Retained</i> 702-478-7770(W)
<b>Counter Defendant</b>	<b>Treasure Island LLC</b>	<b>Sheehan, Patrick J.</b> <i>Retained</i> 7023859595(W)



---

**DATE**

**EVENTS & ORDERS OF THE COURT**

**INDEX**

---

05/28/2015	 Complaint (Business Court) Filed By: Counter Defendant Treasure Island LLC <i>Complaint</i>
05/28/2015	Case Opened
05/28/2015	Discovery Heard by Department/Deemed Complex
05/29/2015	Other Landlord/Tenant Case
06/17/2015	 Affidavit of Service Filed By: Counter Defendant Treasure Island LLC <i>Affidavit of Service</i>









DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**

07/06/2015	 Answer and Counterclaim Filed By: Counter Claimant Rose LLC <i>Defendant's Answer and Counterclaim</i>
07/07/2015	 Initial Appearance Fee Disclosure Filed By: Counter Claimant Rose LLC <i>Initial Appearance Fee Disclosure</i>
07/25/2015	 Answer to Counterclaim Filed By: Counter Defendant Treasure Island LLC <i>Treasure Island's Answer to Counterclaim</i>
08/12/2015	 Joint Case Conference Report Filed By: Counter Defendant Treasure Island LLC <i>Joint Case Conference Report</i>
08/13/2015	 Arbitration File <i>Arbitration File</i>
08/27/2015	 Motion Filed By: Counter Defendant Treasure Island LLC <i>Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation</i>
09/14/2015	 Opposition to Motion Filed By: Counter Claimant Rose LLC <i>Defendant's Opposition To Plaintiff's Motion For Confirmation That Treasure Island May Collect Rent During The Pendency Of The Litigation</i>
09/21/2015	 Reply in Support Filed By: Counter Defendant Treasure Island LLC <i>Reply in Support of Motion for Confirmation</i>
09/21/2015	Case Reassigned to Department 27 <i>Reassigned From Judge Susan Scann - Dept 29</i>
09/22/2015	 Errata Filed By: Counter Defendant Treasure Island LLC <i>Errata to Reply in Support of Motion for Confirmation</i>
09/29/2015	 Notice of Department Reassignment <i>Notice of Department Reassignment</i>
09/29/2015	 Peremptory Challenge Filed by: Counter Claimant Rose LLC <i>Peremptory Challenge of Jude</i>
10/01/2015	 Business Court Order <i>Business Court Order</i>
10/13/2015	 Motion to Amend Filed By: Counter Claimant Rose LLC <i>Defendant's Motion To Amend Counterclaim</i>

DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**

10/13/2015	 Motion for Protective Order Filed By: Counter Defendant Treasure Island LLC <i>Motion for Protective Order Regarding the Deposition of Phillip G. Ruffin</i>
10/15/2015	 <b>Motion</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Plaintiff's Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation</i>
10/23/2015	 <b>Mandatory Rule 16 Conference</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth)
10/29/2015	 Business Court Order <i>Business Court Scheduling Order and Order Setting Civil Bench Trial and Calendar Call</i>
10/29/2015	 Opposition to Motion Filed By: Counter Defendant Treasure Island LLC <i>Opposition to Defendant's Motion to Amend Counterclaim</i>
11/03/2015	 Opposition to Motion Filed By: Counter Claimant Rose LLC <i>Opposition To Defendant's Motion For Protective Order Regarding The Deposition Of Phillip G. Ruffin</i>
11/04/2015	 Notice of Entry of Order Filed By: Counter Defendant Treasure Island LLC <i>Notice of Entry of Order Granting in Part Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation</i>
11/04/2015	 Order Granting Filed By: Counter Defendant Treasure Island LLC <i>Order Granting in Part Motion for Confirmation that Treasure Island may Collect Rent During the Pendency of the Litigation</i>
11/05/2015	 Reply in Support Filed By: Counter Claimant Rose LLC <i>Reply In Support Of Defendant's Motion To Amend Counterclaim</i>
11/06/2015	 Reply in Support Filed By: Counter Defendant Treasure Island LLC <i>Reply Brief in Support of Motion for Protective Order Regarding Deposition of Phillip G. Ruffin</i>
11/09/2015	 Errata Filed By: Counter Defendant Treasure Island LLC <i>Errata to Reply Brief in Support of Motion for Protective Order Regarding Deposition of Phillip G. Ruffin</i>
11/12/2015	<b>Motion to Amend</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Defendant's Motion To Amend Counterclaim</i>
11/12/2015	<b>Motion for Protective Order</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Plaintiff Treasure Island, LLC's Motion for Protective Order Regarding the Deposition of Phillip G. Ruffin</i>
11/12/2015	 <b>All Pending Motions</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth)

DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**

11/13/2015	 Order Granting Motion Filed By: Counter Claimant Rose LLC <i>Order Granting Rose, LLC's Motion To Amend Counterclaim</i>
11/16/2015	 Counterclaim Filed By: Counter Claimant Rose LLC <i>Defendant's First Amended Counterclaim</i>
11/16/2015	 Notice of Entry of Order Filed By: Counter Claimant Rose LLC <i>Notice Of Entry Of Order</i>
11/17/2015	 <b>Telephonic Conference</b> (4:15 PM) (Judicial Officer: Gonzalez, Elizabeth)
11/17/2015	 Motion for Protective Order Filed By: Attorney Pisanelli, James J <i>Defendant/Counterclaimant Rose LLC's Motion for Protective Order Regarding Date for Deposition of Gary Dragul; Ex Parte Application for Order Shortening Time</i>
11/17/2015	 Opposition to Motion For Protective Order Filed By: Attorney Sheehan, Patrick J. <i>(11/19/15 Withdrawn) Treasure Island LLC's Opposition to Defendant's Motion for Protective Order Regarding Date for Deposition of Gary Dragul and Countermotion to Strike Answer if Dragul Does Not Show Up for His Deposition</i>
11/18/2015	 Notice of Withdrawal of Motion Filed By: Counter Claimant Rose LLC <i>Notice Of Withdrawal Of Rose, LLC's Motion For Protective Order Regarding Date For Deposition Of Gary Dragul And Request To Vacate November 19, 2015, Hearing</i>
11/18/2015	 Opposition to Motion Filed By: Counter Defendant Treasure Island LLC <i>Opposition to Motion of Withdrawal of Rose, LLC's Motion for Protective Order and to the Extent the Motion to Withdraw Constitutes an Opposition to Treasure Island's Motion to Strike - Treasure Island's Reply in Support of its Motion</i>
11/19/2015	 Withdrawal Filed by: Counter Defendant Treasure Island LLC <i>(Opposition Filed 11/17/15) Treasure Island's Withdrawal of Opposition to Motion of Withdrawal of Rose, LLC's Motion for Protective Order and to the Extent the Motion to Withdraw Constitutes an Opposition to Treasure Island's Motion to Strike - Treasure Island's Reply in Support of its Motion</i>
11/20/2015	<b>Hearing</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Hearing: Motion for Protective Order Regarding Date for Deposition of Gary Dragul; Ex Parte Application for Order Shortening Time</i>
11/20/2015	<b>Opposition and Countermotion</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Opposition to Motion for Protective Order Regarding Date for Deposition of Gary Dragul and Countermotion to Strike Answer if Dragul Does Not Show Up for His Deposition</i>
11/20/2015	 <b>All Pending Motions</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth)
11/20/2015	 Response Filed by: Counter Claimant Rose LLC <i>Response To Treasure Island's Withdrawal Of Opposition To Motion Of Withdrawal Of Rose,</i>














DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**

*LLC's Motion For Protective Order*










11/30/2015	 Answer to Counterclaim Filed By: Counter Defendant Treasure Island LLC <i>Treasure Island's Answer to First Amended Counterclaim</i>
01/06/2016	 Order Filed By: Counter Defendant Treasure Island LLC <i>Order Granting, In Part, Treasure Island, LLC's Motion for Protective Order</i>
01/07/2016	 Notice of Entry of Order Filed By: Counter Defendant Treasure Island LLC <i>Notice of Entry of Order Granting, In Part, Treasure Island, LLC's Motion for Protective Order</i>
01/29/2016	 Substitution of Attorney Filed by: Counter Claimant Rose LLC <i>Substitution of Attorney</i>
02/11/2016	 <b>Status Check</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth)
02/19/2016	 <b>Status Check</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Status Check: Agreement / Written Stipulation Regarding Schedule</i>
02/23/2016	 Stipulation and Order Filed by: Counter Claimant Rose LLC <i>Stipulation and Order to Extend Discovery Deadlines (First Request)</i>
02/24/2016	 Notice of Entry of Order Filed By: Counter Claimant Rose LLC <i>Notice of Entry of Order</i>
04/05/2016	 Motion to Continue Trial Filed By: Counter Claimant Rose LLC <i>Defendant's Motion to Continue Trial, Permission to Take the Deposition of Phil Ruffin, and Extend Discovery on an Order Shortening Time (Second Request)</i>
04/11/2016	 Opposition Filed By: Counter Defendant Treasure Island LLC <i>Opposition to Defendant's Motion to Continue Trial and Opposition to Motion to take the Deposition of Phil Ruffin and Extend Discovery</i>
04/13/2016	 Reply in Support Filed By: Counter Claimant Rose LLC <i>Reply in Support of Defendant's Motion to Continue Trial, Permission to Take the Deposition of Phil Ruffin, and Extend Discovery</i>
04/14/2016	<b>Motion to Continue Trial</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Defendant's Motion to Continue Trial, Permission to Take the Deposition of Phil Ruffin, and Extend Discovery on an Order Shortening Time (Second Request)</i>
04/14/2016	<b>Calendar Call</b> (8:45 AM) (Judicial Officer: Gonzalez, Elizabeth)
04/14/2016	 <b>All Pending Motions</b> (8:45 AM) (Judicial Officer: Gonzalez, Elizabeth)



DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**





04/18/2016	<b>CANCELED Bench Trial</b> (1:30 PM) (Judicial Officer: Gonzalez, Elizabeth) <i>Vacated</i>
05/19/2016	 Notice of Entry of Stipulation and Order Filed By: Counter Defendant Treasure Island LLC <i>Notice of Entry of Stipulation and Order Regarding Trial Date</i>
05/19/2016	 Stipulation and Order Filed by: Counter Defendant Treasure Island LLC <i>Stipulation and Order Regarding Trial Date</i>
05/25/2016	<b>CANCELED Bench Trial</b> (10:00 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Vacated</i>
06/13/2016	 <b>Settlement Conference</b> (9:30 AM) (Judicial Officer: Scotti, Richard F.)
06/29/2016	 Trial Memorandum Filed by: Counter Defendant Treasure Island LLC <i>Trial Brief</i>
06/30/2016	 Brief Filed By: Counter Claimant Rose LLC <i>Defendant/Counterclaimant's Trial Brief</i>
06/30/2016	 Certificate of Service Filed by: Counter Claimant Rose LLC <i>Certificate of Service for Defendant/Counterclaimant's Trial Brief</i>
07/08/2016	 <b>Status Check</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth)
07/15/2016	 Order Setting Civil Bench Trial <i>Order Setting Civil Bench Trial and Calendar Call</i>
07/27/2016	 Motion to Strike Filed By: Counter Defendant Treasure Island LLC <i>Motion to Strike David Krouham</i>
08/09/2016	 Opposition to Motion Filed By: Counter Claimant Rose LLC <i>Defendant's Opposition to Treasure Island, LLC's Motion to Strike David Krouham</i>
08/10/2016	 Notice Filed By: Counter Claimant Rose LLC <i>Notice of Issuance of Trial Subpoena for Phil Ruffin</i>
08/10/2016	 Notice Filed By: Counter Claimant Rose LLC <i>Notice of Issuance of Trial Subpoena for Brad Anthony</i>
08/10/2016	 Notice Filed By: Counter Claimant Rose LLC <i>Notice of Issuance of Trial Subpoena for Jerry Griffis</i>
08/10/2016	

DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**









	 Notice Filed By: Counter Claimant Rose LLC <i>Notice of Issuance of Trial Subpoena for Najam Khan</i>
08/23/2016	 Reply in Support Filed By: Counter Defendant Treasure Island LLC <i>Plaintiff's Reply in Support of its Motion to Strike David Krouham</i>
08/25/2016	 Reply in Support Filed By: Counter Claimant Rose LLC <i>Sur-Reply in Support of Defendant's Opposition to Treasure Island, LLC's Motion to Strike David Krouham</i>
09/01/2016	<b>Calendar Call</b> (8:45 AM) (Judicial Officer: Gonzalez, Elizabeth)
09/01/2016	<b>Motion to Strike</b> (8:45 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Plaintiff's Motion to Strike David Krouham</i>
09/01/2016	 <b>All Pending Motions</b> (8:45 AM) (Judicial Officer: Gonzalez, Elizabeth)
09/06/2016	 Pre-trial Memorandum Filed by: Counter Defendant Treasure Island LLC <i>Joint Pretrial Memorandum</i>
09/06/2016	<b>CANCELED Bench Trial</b> (1:30 PM) (Judicial Officer: Gonzalez, Elizabeth) <i>Vacated</i>
09/09/2016	 Notice Filed By: Counter Claimant Rose LLC <i>Notice of Issuance of Amended Trial Subpoena for Phil Ruffin</i>
09/09/2016	 Notice Filed By: Counter Claimant Rose LLC <i>Notice of Issuance of Amended Trial Subpoena for Najam Khan</i>
09/09/2016	 Notice Filed By: Counter Claimant Rose LLC <i>Notice of Issuance of Amended Trial Subpoena for Jerry Griffis</i>
09/09/2016	 Notice Filed By: Counter Claimant Rose LLC <i>Notice of Issuance of Amended Trial Subpoena for Brad Anthony</i>
09/16/2016	<b>Motion</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth) Events: 08/10/2016 Notice <i>Notice of Issuance of Trial Subpoena for Phil Ruffin</i>
09/16/2016	<b>Motion</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth) Events: 08/10/2016 Notice <i>Notice of Issuance of Trial Subpoena for Brad Anthony</i>
09/16/2016	<b>Motion</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth) Events: 08/10/2016 Notice <i>Notice of Issuance of Trial Subpoena for Jerry Griffis</i>
09/16/2016	<b>Motion</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth)

DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**





Events: 08/10/2016 Notice  
*Notice of Issuance of Trial Subpoena for Najam Khan*

09/16/2016	 <b>All Pending Motions</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth)
09/19/2016	 Motion to Quash Filed By: Counter Defendant Treasure Island LLC <i>Motion to Quash Subpoena Regarding Phillip G. Ruffin on Order Shortening Time</i>
09/20/2016	 Motion to Quash Filed By: Counter Defendant Treasure Island LLC <i>Motion to Quash Subpoena Regarding Phillip G. Ruffin on Order Shortening Time</i>
09/21/2016	 Opposition to Motion Filed By: Counter Claimant Rose LLC <i>Opposition to Plaintiff's Motion to Quash Subpoena Regarding Phillip G. Ruffin</i>
09/22/2016	<b>Motion to Quash</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Plaintiff's Motion to Quash Subpoena Regarding Phillip G. Ruffin on Order Shortening Time</i>
09/22/2016	<b>Motion to Quash</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Plaintiff's Motion to Quash Subpoena Regarding Phillip G. Ruffin on Order Shortening Time</i>
09/22/2016	 <b>All Pending Motions</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth)
09/27/2016	 Order Filed By: Counter Defendant Treasure Island LLC <i>Order Granting Plaintiff's Motion to Quash Subpoena Regarding Phillip G Ruffin</i>
09/29/2016	 Notice of Entry of Order Filed By: Counter Defendant Treasure Island LLC <i>Notice of Entry of Order Granting Plaintiff's Motion to Quash Subpoena Regarding Phillip G. Ruffin</i>
10/05/2016	 Pre-trial Memorandum Filed by: Counter Claimant Rose LLC <i>Defendant/Counterclaimant Limited Pre-Trial Memorandum</i>
10/06/2016	 <b>Bench Trial</b> (9:30 AM) (Judicial Officer: Gonzalez, Elizabeth) <b>10/06/2016-10/07/2016</b>
10/12/2016	 Order to Statistically Close Case <i>Civil Order to Statistically Close Case</i>
10/25/2016	 Reporters Transcript <i>Transcript of Proceedings: Bench Trial - Day 2 October 7, 2016</i>
10/25/2016	 Reporters Transcript <i>Transcript of Proceedings: Bench Trial - Day 1 October 6, 2016</i>
11/07/2016	 Notice of Entry Filed By: Counter Defendant Treasure Island LLC <i>Notice of Entry of Findings of Fact and Conclusions of Law</i>

DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**

11/07/2016	 Findings of Fact, Conclusions of Law and Order Filed By: Counter Defendant Treasure Island LLC <i>Findings of Fact and Conclusions of Law</i>
11/18/2016	 Motion for Attorney Fees Filed By: Counter Defendant Treasure Island LLC <i>Motion for Attorney's Fees</i>
11/18/2016	 Motion Filed By: Counter Claimant Rose LLC <i>Motion for Reconsideration, to Amend Findings of Fact, to Amend the Judgment, or, in the Alternative, for a New Trial on an Order Shortening Time</i>
11/18/2016	 Motion for Stay of Execution Filed By: Counter Claimant Rose LLC <i>Motion for Stay of Execution During Pendency of Appeal and Waiver of Supersedeas Bond on an Order Shortening Time</i>
12/06/2016	 Opposition Filed By: Counter Defendant Treasure Island LLC <i>Opposition to Motion for Reconsideration</i>
12/06/2016	 Opposition Filed By: Counter Defendant Treasure Island LLC <i>Opposition to Motion for Stay</i>
12/07/2016	 Notice of Appeal Filed By: Counter Claimant Rose LLC <i>Notice of Appeal</i>
12/07/2016	 Case Appeal Statement Filed By: Counter Claimant Rose LLC <i>Case Appeal Statement</i>
12/07/2016	 Notice of Association of Counsel Filed By: Counter Claimant Rose LLC <i>Notice of Association of Counsel</i>
12/07/2016	 Reply Filed by: Counter Claimant Rose LLC <i>Reply in Support of Rose, LLC's Motion For Stay of Execution During Pendency of Appeal and Waiver of Supersedeas Bond</i>
12/07/2016	 Reply Filed by: Counter Claimant Rose LLC <i>Reply in Support of Rose, LLC's Motion For Reconsideration, to Amend Findings of Fact, to Amend the Judgment, or, in the Alternative, for a New Trial</i>
12/08/2016	<b>Motion For Reconsideration (8:30 AM)</b> (Judicial Officer: Gonzalez, Elizabeth) <i>Defendant/Counterclaimant, Rose, LLC's Motion for Reconsideration, to Amend Findings of Fact, to Amend the Judgment, or, in the Alternative, for a New Trial on an Order Shortening Time</i>
12/08/2016	<b>Motion For Stay (8:30 AM)</b> (Judicial Officer: Gonzalez, Elizabeth) <b>12/08/2016, 12/14/2016</b> <i>Defendant/Counterclaimant, Rose, LLC's Motion for Stay of Execution During Pendency of</i>

DEPARTMENT 11  
**CASE SUMMARY**  
**CASE NO. A-15-719105-B**

	<i>Appeal and Waiver of Supersedeas Bond on an Order Shortening Time</i>	
12/08/2016	 <b>All Pending Motions</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth)	
12/12/2016	 Opposition Filed By: Counter Claimant Rose LLC <i>Rose, LLC's Opposition to Treasure Island, LLC's Motion For Attorney's Fees</i>	
12/12/2016	 Filed Under Seal <i>Motion to Seal "Supplemental Brief Regarding Superseadeas Bond Requierment"</i>	
12/12/2016	 Filed Under Seal <i>Supplemental Brief Regarding Supersedes Bond Requirements</i>	
12/14/2016	<b>Argument</b> (8:30 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Argument re: Bond</i>	
12/23/2016	<b>Motion for Attorney Fees</b> (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Motion for Attorney's Fees</i>	

DATE	FINANCIAL INFORMATION	
	<b>Counter Claimant</b> Rose LLC	
	Total Charges	1,960.50
	Total Payments and Credits	1,960.50
	<b>Balance Due as of 12/13/2016</b>	<b>0.00</b>
	<b>Counter Defendant</b> Treasure Island LLC	
	Total Charges	1,642.00
	Total Payments and Credits	1,642.00
	<b>Balance Due as of 12/13/2016</b>	<b>0.00</b>

## BUSINESS COURT CIVIL COVER SHEET

XXI X

County, Nevada

Case No. \_\_\_\_\_  
(Assigned by Clerk's Office)**I. Party Information** (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Treasure Island, LLC

Defendant(s) (name/address/phone):

Rose, LLC

Attorney (name/address/phone):

Patrick J. Sheehan

Fennemore Craig, P.C.

300 South Fourth Street, Suite 1400

Las Vegas, NV 89101

Attorney (name/address/phone):

**II. Nature of Controversy** (Please check the applicable boxes for both the civil case type and business court case type)☐ Arbitration Requested**Civil Case Filing Types****Real Property****Landlord/Tenant**

- ☐ Unlawful Detainer  
☒ Other Landlord/Tenant

**Title to Property**

- ☐ Judicial Foreclosure  
☐ Other Title to Property

**Other Real Property**

- ☐ Condemnation/Eminent Domain  
☐ Other Real Property

**Construction Defect & Contract****Construction Defect**

- ☐ Chapter 40  
☐ Other Construction Defect

**Contract Case**

- ☐ Uniform Commercial Code  
☐ Building and Construction

- ☐ Insurance Carrier  
☐ Commercial Instrument  
☐ Collection of Accounts  
☐ Employment Contract  
☐ Other Contract

**Torts****Negligence**

- ☐ Auto  
☐ Premises Liability  
☐ Other Negligence

**Malpractice**

- ☐ Medical/Dental  
☐ Legal  
☐ Accounting  
☐ Other Malpractice

**Other Torts**

- ☐ Product Liability  
☐ Intentional Misconduct  
☐ Employment Tort  
☐ Insurance Tort  
☐ Other Tort

**Civil Writs**

- ☐ Writ of Habeas Corpus  
☐ Writ of Mandamus  
☐ Writ of Quo Warrant  
☐ Writ of Prohibition  
☐ Other Civil Writ

**Judicial Review/Appeal/Other Civil Filing****Judicial Review**

- ☐ Foreclosure Mediation Case

**Appeal Other**

- ☐ Appeal from Lower Court

**Other Civil Filing**

- ☐ Foreign Judgment  
☐ Other Civil Matters

**Business Court Filing Types****CLARK COUNTY BUSINESS COURT**

- ☐ NRS Chapters 78-89  
☐ Commodities (NRS 91)  
☐ Securities (NRS 90)  
☐ Mergers (NRS 92A)  
☐ Uniform Commercial Code (NRS 104)  
☐ Purchase/Sale of Stock, Assets, or Real Estate  
☐ Trademark or Trade Name (NRS 600)  
☐ Enhanced Case Management  
☒ Other Business Court Matters

**WASHOE COUNTY BUSINESS COURT**

- ☐ NRS Chapters 78-88  
☐ Commodities (NRS 91)  
☐ Securities (NRS 90)  
☐ Investments (NRS 104 Art.8)  
☐ Deceptive Trade Practices (NRS 598)  
☐ Trademark/Trade Name (NRS 600)  
☐ Trade Secrets (NRS 600A)  
☐ Enhanced Case Management  
☐ Other Business Court Matters

May 20, 2015

Date

Signature of initiating party or representative

  
CLERK OF THE COURT

Patrick J. Sheehan (NV Bar No. 3812)  
John H. Mowbray (NV Bar No. 1140)  
FENNEMORE CRAIG, P.C.  
300 S. 4<sup>th</sup> Street, Suite 1400  
Las, Vegas, Nevada 89101  
Telephone: (702) 692-8000  
Facsimile: (702) 692-8099  
Email: [psheehan@fclaw.com](mailto:psheehan@fclaw.com)  
*Attorney for Plaintiff Treasure Island, LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Plaintiff,

v.

ROSE, LLC, a Nevada limited liability company,

Defendant.

CASE NO.: A-15-719105-B

DEPT. NO.: XXIX

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

ROSE, LLC, a Nevada limited liability company,

Counterclaimant,

v.

TREASURE ISLAND, LLC, a Nevada limited  
liability company,

Counterclaimant.

**I. FINDINGS OF FACT.**

1. On or about April 13, 2011, Plaintiff, Treasure Island, entered into a Lease Agreement ("Lease") with Defendant, Rose, LLC ("Rose").

2. Pursuant to the terms of the Lease, Treasure Island leased space to Rose inside the Treasure Island Hotel and Casino in Las Vegas, Nevada (the "Property").

3. One of Rose's obligations under the Lease was to timely pay rent.

1           4.       Per the Lease, rent came in two forms: minimum monthly rent, and quarterly rent  
2 in an amount equal to 7% of modified gross sales.

3           5.       The Lease provided that the rent for gross sales would be paid pursuant to a certain  
4 formula and that, within 30 days of the end of each quarter during the lease term, Rose would  
5 deliver to landlord a writing setting forth the amount of tenant's gross sales made during each  
6 month of the preceding calendar quarter and, concurrently therewith, pay the landlord the  
7 percentage rent due and payable for the preceding calendar quarter.

8           6.       In August, 2012, Treasure Island became aware that Rose was delinquent in  
9 paying several of its contractors.

10          7.       Due to a concern that this failure to pay construction costs could result in a lien  
11 against the Property, Treasure Island, through its General Counsel, Brad Anthony ("Anthony"),  
12 sent Rose a letter reminding it that no liens were permitted under the Lease.

13          8.       This letter was sent in strict compliance with the Lease's notice requirements  
14 which stated that any notices would be sent to Rose at a certain address attention Susan Markusch  
15 with a carbon copy to Operadora.<sup>1</sup>

16          9.       Shortly after that letter was sent, Gary Dragul, President of Rose ("Dragul"), called  
17 Mr. Anthony to discuss the letter that Rose received and to request further relief from the loan  
18 repayment obligation it had with Treasure Island.

19          10.       During that call, Dragul specifically requested that Anthony send all future  
20 correspondences dealing with the Treasure Island-Rose relationship directly and only to him.

21          11.       Although Mr. Dragul testified that his memory of the conversation was different  
22 in that he believed Mr. Anthony suggested that Rose designate one person from Rose whom  
23 Treasure Island could deal with in the future he nevertheless agreed that he did in fact tell Mr.  
24 Anthony to make all future communications to him. The Court finds that Mr. Dragul did in fact  
25 tell Brad Anthony to send all future notices to him and him alone (not Operadora or anyone else).

26  
27  
28 <sup>1</sup> By way of a Fifth Amendment to the lease the notice addresses were changed to state that any notices to Rose were to be sent to a certain address without specifying any individual and to Operadora at both the original address listed and to a Miami law firm.



1           12. Mr. Anthony's testimony regarding Mr. Dragul's request to change the notice was  
2 much more credible than Mr. Dragul's testimony related to the issue. For example, during his  
3 deposition Mr. Dragul stated he did not recall any conversation with Mr. Anthony after the  
4 August 31<sup>st</sup> letter which contained the notices set forth in the lease. However, during the first day  
5 of testimony upon examination of his own counsel he outlined what he believed occurred during  
6 the conversation. Then, upon questioning from the Court he also outlined what he believed  
7 occurred during the conversation. Then, upon being cross-examined by Plaintiff's counsel he  
8 again stated that he did not recall any conversation taking place. Plaintiff's counsel asked the  
9 question as follows:

10           Q. ...Sir, do you recall a telephone conversation that you had with  
11 Mr. Anthony following receipt of this letter [the August 31, 2012 letter]?

12           A. [by Mr. Dragul] I do not.

13 Transcript at page 33 lines 2-5 and also at page 34 lines 5-7. This just after his response to the  
14 Court clearly acknowledging the conversation. See pages 18 and 19. Indeed, the next letter  
15 between the parties references the conversation between Mr. Anthony and Mr. Dragul so the  
16 conversation must have taken place and it must of taken place in between the August 31<sup>st</sup>  
17 correspondence and September 19<sup>th</sup> correspondence which followed.

18           13. The Court finds that the parties agreed that any further notices would be sent  
19 solely to Mr. Dragul.

20           14. On September 19, 2012, Anthony sent a letter following up on Mr. Dragul's  
21 request regarding the construction loan repayment.

22           15. Mr. Anthony complied with Dragul's request for how notice should be provided  
23 and sent the letter directly to Dragul and without Operadora being carbon copied.

24           16. In the years that followed, Treasure Island sent numerous communications to  
25 Rose.

26           17. In each instance where money owed to Treasure Island was delinquent, barring  
27  
28

1 one<sup>2</sup>, the communication was sent to Dragul and Operadora was not copied.

2 18. In all of its communications with Treasure Island, Rose did not carbon copy its  
3 subtenant once. Nor was any evidence presented to show that Rose forwarded any of the  
4 communications it received from Treasure Island to Operadora.

5 19. On April 30, 2015, Rose breached the Lease when it failed to pay the 7% gross  
6 sales portion of the rent for the first quarter of 2015.

7 20. As a result, on May 14, 2015, Treasure Island sent Rose a notice.

8 21. Mr. Dragul Rose's President testified that his company had many tenants and that  
9 if any tenant failed to pay rent when due he would begin proceedings to evict that tenant 10 days  
10 after said tenant defaulted on his rental obligations.

11 22. Pursuant to Mr. Dragul's instruction the Notice was sent to Mr. Dragul and not to  
12 Susan Markusch or Operadora.

13 23. Out of an abundance of caution, Mr. Anthony emailed a copy of the notice to the  
14 only other officer of Rose, LLC its legal counsel, Elizabeth Gold.

15 24. Ms. Gold was the person who signed all of the contracts in this matter.

16 25. The letter advised Rose, LLC that it was delinquent on its rent and that it had ten  
17 days to cure that delinquency or it would be in default.

18 26. Pursuant to the express terms of the parties' Lease Agreement, if the overdue rent  
19 payment was not paid within ten days of the notice, Treasure Island had the right to terminate the  
20 parties' lease.

21 27. The Court finds that Rose, LLC did in fact receive the notice and did not pay the  
22 full amount of overdue rent between May 14 and May 28.

23 28. This nonpayment occurred despite Rose having been paid \$247,500 from its  
24 subtenant for the months of January, February and March, which amount represents roughly the  
25 equivalent of the rent monies owed to Treasure Island pursuant to Rose's lease with Treasure  
26

27  
28 <sup>2</sup> The only exception to this was a letter from Jerry Griffiths, Treasure Island's Chief Financial Officer, which did include notice to Operadora since the subject of that letter was Operadora itself not paying food charges owed to Treasure Island.

1 Island.

2 29. The evidence showed that Elizabeth Gold received a copy of the notice of default  
3 no later than May 15, 2015, since she called Brad Anthony on that day and requested additional  
4 time to pay the overdue rent, which Mr. Anthony said Treasure Island would not give Rose.

5 30. Mr. Anthony so testified and Elizabeth Gold did not testify in the trial to dispute  
6 this testimony. Mr. Anthony's testimony in this regard is corroborated by a letter which Ms. Gold  
7 drafted on May 29 which referenced her being emailed the May 14th Notice.

8 31. The Court finds that Mr. Dragul was advised of the May 14 Notice shortly after  
9 Ms. Gold's receipt of the same. This is because Mr. Dragul testified he spoke with Ms. Gold  
10 every morning and several times a day. See transcript at page 40 lines 3-9.

11 32. Although Mr. Dragul testified that he personally did not receive a copy of the  
12 Notice until he received a phone call from David Krouham on May 28 or 29 his testimony is not  
13 credible.

14 33. In Mr. Dragul's deposition, he testified he believed he was advised of the Notice  
15 on May 26.

16 34. Although Mr. Dragul coyly testified that he did not see a copy of the notice until  
17 he returned to his office he was obviously told about the Notice.

18 35. Plaintiff's counsel asked Mr. Dragul if he was told about the notice even though he  
19 did not see the notice and he testified, "I don't remember." See transcript at page 49 lines 17-19.

20 36. The Court believes it is clear the Mr. Dragul was advised of the Notice by May 15  
21 and certainly well before May 28.

22 37. In addition to Rose receiving the notice through Ms. Gold, the evidence showed  
23 that Ms. Markusch (the person mentioned under the original notice provision) also was aware of  
24 the notice since she sent a partial payment for the outstanding rent due shortly after the May 14  
25 notice was received.

26 38. Rose, LLC had its own sublease with an entity called Señor Frogs Las Vegas, LLC  
27 ("Señor Frogs").  
28

- 1           39.     Señor Frogs is a subsidiary of Operadora.
- 2           40.     Pursuant to an express provision in the sublease between Rose and Señor Frogs,
- 3     Rose had a duty to provide a copy of any default notices it received from Treasure Island to Señor
- 4     Frogs/Operadora.
- 5           41.     Rose never sent a copy of the May 14th default notice to Señor Frogs/Operadora.
- 6           42.     On May 28, Treasure Island terminated its lease with Rose via a letter sent by its
- 7     counsel, Brenoch Wirthlin.
- 8           43.     Following receipt of this Notice of Termination Rose attempted to pay the rent,
- 9     which Mr. Dragul admitted was overdue since it was due on April 30<sup>th</sup>.
- 10          44.     However, Treasure Island had already terminated the lease and this action seeking
- 11     declaratory relief by both parties began.
- 12          45.     Upon finding out about Treasure Island's termination of Rose's lease, Señor
- 13     Frogs/Operadora hired counsel from Florida to contact Treasure Island.
- 14          46.     Said counsel did contact Treasure Island (through its counsel).
- 15          47.     That communication was memorialized in an email setting forth Señor
- 16     Frogs/Operadora's position at the time.
- 17          48.     The email dated June 3, 2015, does not mention the fact that Señor Frogs would
- 18     have paid any overdue amounts owed by Rose to Treasure Island.
- 19          49.     The testimony showed that Señor Frogs had already paid Rose approximately
- 20     \$247,500 for the three months involved in the rent delinquency by Rose-January, February and
- 21     March, 2015.
- 22          50.     The email states:
- 23                 "Pat -- thank you for your time today. This email will confirm our
- 24                 discussions. The letter from Mr. Wirthlin to Rose, LLC and Operadora
- 25                 Andersons S.A. de C.V. dated May 28, 2015, was sent to my client for
- 26                 notice purposes only under Section 11 of the Fifth Amendment to Lease
- 27                 Agreement between Rose, LLC and Treasure Island, LLC. As we
- 28                 discussed, under Section 9 of the Fifth Amendment, my client is not
- affected by a default by Rose, LLC as the prime tenant.
- As we further discussed, Rose, LLC is disputing the default. You have
- confirmed with me that your client does not plan on taking any action

1 until the dispute with Rose, LLC is resolved, whether by court action or  
2 settlement between the two parties. None of this will impact adversely on  
3 my client, which will be permitted to continue its sub-tenance. If your  
4 client prevails and terminates Rose, LLC's tenancy, at that point you  
5 would then negotiate a lease directly with my client in accordance with  
6 Section 9 of the Fifth Amendment.

7 Thanks again for your assistance. Please copy me on any further  
8 correspondence. My contact information is below."

9 51. Following this email Señor Frogs did not intervene in this case and is not a party  
10 to this action and thus its rights are not subject to this action.

### 11 CONCLUSIONS OF LAW

12 1. The court finds that the lease between Rose and Treasure Island has been  
13 terminated.

14 2. Rose's argument that the termination was not proper because the May 14 default  
15 notice sent to Rose was not sent to the attention of Susan Markusch is without merit for the  
16 following reasons any one of which would be sufficient:

17 A. The parties orally modified the lease when Mr. Dragul told Mr. Anthony to send  
18 all future correspondence to him and him alone sometime between August 31 and  
19 September 19, 2012

20 "[P]arties to a written contract who agree to new terms may orally modify the contract."  
21 *Jensen v. Jensen*, 104 Nev. 95, 98 (Nev. 1988)(internal citations omitted). "Moreover,  
22 parties' consent to modification can be implied from conduct consistent with the asserted  
23 modification." *Id.* "Parol evidence can be admitted to show an oral agreement modifying  
24 a contract." *Id.* citing *Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 110, 389  
25 P.2d 923, 924 (1964). This is the case despite a provision stating that the contract can  
26 only be modified in writing:

27 Parties may change, add to, and totally control what they  
28 did in the past. They are wholly unable by any contractual  
action in the present, to limit or control what they may  
wish to do contractually in the future. Even where they  
include in the written contract an express provision that it

1 can only be modified or discharges by a subsequent  
2 agreement in writing, nevertheless their later oral  
3 agreement to modify or discharge their written contract is  
both provable and effective to do so.

4 *Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964)  
5 citing *Simpson on Contracts* § 63, at 228 (emphasis added).  
6

7 B. Under the doctrine of estoppel. To prevail on an argument of estoppel, the party  
8 asserting the defense must prove four elements:

- 9 1. The party to be estopped must be apprised of the true facts;
- 10 2. He must intend that his conduct shall be acted upon, or  
11 must so act that the party asserting estoppel has a right to  
believe it was so intended.
- 12 3. The party asserting the estoppel must be ignorant of the  
13 true state of facts;
- 14 4. He must have relied on his detriment on the conduct of the  
15 party to be estopped. In addition silence can raise an  
16 estoppel quite as effectively as can words. *Teriano v. Nev.*  
*State Bank*, 121 Nev. 217, 223, 112 P3.d 1058, 1062  
(2005).

17 Here, Rose was aware of Treasure Island's decision not to send numerous notices to the  
18 attention of Susan Markusch after Mr. Dragul had instructed Mr. Anthony to send all  
19 notices to his attention. Thus, Rose was aware that all future notices after August 31,  
20 2012 were being sent to Mr. Dragul and not Ms. Markusch. Similarly, when Mr. Dragul  
21 asked Mr. Anthony to send all future notices to his attention he obviously intended that  
22 his conduct would be acted upon by Anthony. Next, Treasure Island was clearly ignorant  
23 to any change in direction by Rose to change the person who the notice needed to be sent  
24 to from Mr. Dragul back to Ms. Markusch since the evidence showed Dragul never  
25 changed his direction to have all notices sent to his attention and his attention alone.  
26 Finally, Treasure Island met the last element since it relied to its detriment by sending the  
27 notice to the attention Mr. Dragul instead of Ms. Markusch.  
28

1 Estoppel is also applicable since the evidence showed that numerous notices were sent to  
2 the attention of Mr. Dragul and not Ms. Markusch after the August 31, 2012 letter and  
3 neither Dragul or Rose objected. See also, *Chequer, Inc. v. Plainters and Decorators*, 98  
4 Nev. 609, 614, 655 P.2d 996, 998-99 (1982 ("This court has noted that the silence can  
5 raise in estoppel quite as effectively as can words"); *Goldstein v. Hanna*, 97 Nev. 559,  
6 562 (Nev. 1981) (internal citations omitted) ("Thus, 'a person remaining silent when  
7 ought, in the excess of good faith, to have spoken, will not be allowed to speak when he  
8 ought in the exercise of good faith, remain silent.'")

9  
10 C. The Court finds that as a result of the conversation between Mr. Dragul and Mr.  
11 Anthony, Rose waived its right to claim the notice should have been sent to the attention  
12 of Ms. Markusch instead of Mr. Dragul. His conduct in requesting that any future notices  
13 be sent to him and him alone was an intentional relinquishment of any requirement on  
14 Treasure Island's part to send the notice to attention of Ms. Markusch. In addition, the  
15 failure to raise any issues concerning the subsequent notices, which were all sent to the  
16 attention of Mr. Dragul and not Ms. Markusch evidence of intention to waive the right  
17 and thus a waiver is implied from said conduct. *Mahban v. MGM Grand Hotels, Inc.*, 100  
18 Nev. 593, 596, 691 P.2d 421, 423-24 (1984). See also, *Havas v. Atlantic Ins. Co.*, 96  
19 Nev. 586, 588 (Nev. 1980) (internal citations omitted). (The intent of waiver may be  
20 expressed or implied from the circumstances.)

21 D. Rose's claim is also without merit since it received actual notice and Ms.  
22 Markusch herself received notice. In *Stonehenge Land Co. v. Beazer Homes Investments,*  
23 *LLC*, 893 N.E. 2d 855, 863 (Ohio Ct. App. 2008) the court held that, "Where there is  
24 evidence of actual notice, a technical deviation from a contractual notice requirement will  
25 not bar the action for breach of contract brought against a party that had actual notice."  
26 See also, e.g., *Polizzotto v. D'Agostino*, 129 So. 534, 536 (La. 1930) ("[M]ere  
27 informalities do not violate notice so long as they do not mislead, and give the necessary  
28

1 information to the proper party.”); *Bd. of Comm'rs v. Turner Marine Bulk, Inc.*, 629 So.  
2 2d 1278, 1283 (La. Ct. App. 1993) (“Where adequate notice is in fact given and its  
3 receipt is not contested, technicalities of form may be overlooked.”). In this case it is  
4 clear Rose received actual notice and thus suffered no harm.

5  
6 E. Treasure Island substantially complied with any notice obligations to Rose. In  
7 *Hardy Cos v. SNMARK, LLC*, 126 Nev. 528, 536 (Nev. 2010) the court found that  
8 substantial compliance with notice provisions is met when the owner has actual  
9 knowledge and is not prejudiced. In this case it was clear Rose had actual knowledge of  
10 the notice and the opportunity to cure the default during the ten-day notice period. This  
11 provides the fifth reason why Rose’s argument that the notice to it was ineffective has no  
12 merit.

13 3. Rose may not raise Treasure Island’s failure to carbon copy Operadora as a  
14 defense given the circumstances in this case.

15  
16 A. Rose cannot raise any claims regarding Treasure Island’s failure to notice Señor  
17 Frogs since that claim belongs to Señor Frogs. Señor Frogs is not a party to this case.  
18 Instead, the issue only involves whether or not Treasure Island’s termination of the Rose  
19 Lease was effective. Any notice obligations to Señor Frogs were a separate obligation  
20 that Treasure Island had to Señor Frogs and that is not an issue that could be raised by  
21 Rose pursuant to established law. *Pierce v. Centry Ins.*, 421 N.E. 2d 1252 (App. Ct.  
22 Mass. 1981). (Notice to the insured and notice to the mortgagee have discrete purposes,  
23 however, and it is difficult to see how, as to the party who receives notice, a failure to  
24 give notice to the other, can be anything but merely formal. . . . This quality of separate  
25 obligations has been noted particularly, where, as in the instant case, the insurance policy  
26 contains a so-called ‘standard mortgage clause.’ (Citations omitted.) Under that clause  
27 ‘the result has been that the Courts have held that the agreement of the company with the  
28 mortgagee being separate and divisible from that with the mortgagor. . . ) *See also, e.g.*,



1 *Ellegood v. Am. States Ins. Co.*, 638 N.E.2d 1193, 1195 (Ill. App. Ct. 1994) (“[P]laintiff,  
2 who admittedly received notice and failed to pay the premium, seeks to void defendant's  
3 purported cancellation based on the fortuitous fact that defendant is unable to establish  
4 that it notified the mortgagee. We agree . . . that this would result in an ‘unjustified  
5 windfall’ to the insured.”); *Bradley v. Assocs. Disc. Corp.*, 58 So. 2d 857, 859 (Fla. 1952)  
6 (finding that a defect in the notice’s content did not invalidate the notice where the defect  
7 was relevant only to a third party); *cf. Bryce v. St. Paul Fire & Marine Ins. Co.*, 783 P.2d  
8 246, 247 (Ariz. App. 1989) (“Appellee's failure to give timely notice of the cancellation  
9 to the mortgagee [as required by statute] had no effect on the proper notice of  
10 cancellation given appellant by the premium finance company.”); *Allstate Ins. Co. v.*  
11 *McCrae*, 384 S.E.2d 1, 2 (N.C. 1989) (“Only defective notification to the *insured* renders  
12 cancellation of the policy ineffective and extends the liability of the insurer.”).

13  
14 B. Even if Rose could raise the issue of Treasure Island’s failure to notice Señor  
15 Frogs/Operadora it is estopped from doing so. Dragul told Anthony to send any default  
16 notices to him and not anyone else. As a result, when Anthony sent the notices to Dragul  
17 and not anyone else Rose cannot argue that said notice was defective pursuant to the  
18 estoppel law and reasons cited above.

19 C. Rose waived any claims for the same reasons also. Similarly, Dragul’s insistence  
20 that any notices be sent to him and him alone constitutes a waiver of any argument that  
21 Treasure Island should have sent the notice to Señor Frogs/Operadora.

22  
23 D. Rose’s failure to send the notice to Señor Frogs under its own obligation  
24 precludes Rose from alleging that the notice was ineffective since Señor Frogs was not  
25 carbon copied. This is true under the doctrine of materiality. If Rose felt that Treasure  
26 Island’s obligation to send the notice of default to Señor Frogs was a material term of its  
27 (as opposed to Señor Frogs) contractual rights with Treasure Island then it clearly would  
28 have sent the notice on to Señor Frogs pursuant to its own contractual obligation. Rose

1 not sending the notice to Señor Frogs pursuant to its own contractual obligations shows  
2 that although the notice obligation from Treasure Island to Señor Frogs might have been  
3 material to Señor Frogs, Rose did not believe it was material to it since it failed to send  
4 on the notice to Señor Frogs pursuant to its own obligations.

5  
6 E. The unclean hands doctrine also applies. First, since Rose received the rent from  
7 its subtenant and did not turn those monies over to Treasure Island. The facts were clear  
8 that the subtenant Operadora would pay Rose \$82,500 per month under the sublease and  
9 Rose would in effect take those same monies and pay those over to the landlord.  
10 Although the subtenant Señor Frogs paid Rose \$247,500 for January, February and  
11 March of 2015 Rose did not take those monies and pay the landlord Treasure Island. It  
12 cannot now complain that Treasure Island's failure to notice Señor Frogs somehow  
13 excuses its non-performance under these circumstances. Similarly, the unclean hands  
14 doctrine prevents Rose from arguing that Treasure Island's failure to carbon copy  
15 Operadora on the May 14<sup>th</sup> Notice excuses Rose's non-performance since it had the same  
16 obligation and failed to do so. Again Rose had clear contractual obligations to send any  
17 default notices it received to Señor Frogs. The evidence is clear that Rose never sent any  
18 notices it received from Treasure Island to Señor Frogs including the May 14<sup>th</sup> Notice.  
19 Therefore it cannot now allege that it is somehow excused for its non-performance under  
20 its contract with Treasure Island because Treasure Island did not carbon copy Operadora.

21 The unclean hands doctrine generally bars a party from receiving equitable relief  
22 because of that party's own inequitable conduct. It precludes a party from attaining an  
23 equitable remedy when that party's connection with the subject-matter or transaction in  
24 litigation has been unconscientious, unjust, or marked by the want of good faith. *Park v.*  
25 *Park*, 126 Nev. 745 (2010) ("the District Court found a connection between Appellant's  
26 misconduct, breach of contract, and cause of action for unjust enrichment. ... substantial  
27 evidence supports the District Court's decision to bar Appellant's unjust enrichment  
28

1 claim under the unclean hands doctrine.”). While unclean hands is generally regarded as  
2 an argument that sounds in equity, the Ninth Circuit has recognized that “[t]he unclean  
3 hands doctrine applies not only to equitable claims, but also to legal ones.” *Adler v. Fed.*  
4 *Republic of Nigeria*, 219 F.3d 869 (9<sup>th</sup> Cir. 2000). Here Rose’s failure to pay the rent to  
5 begin with after being paid the same by its subtenant coupled with its insistence that  
6 Treasure Island not provide Operadora notice, and, perhaps most importantly, failing to  
7 provide Operadora the default notice itself, despite its specific contractual obligation to  
8 do so, caused all the harm to occur. If notice to Operadora was so important to Rose, it  
9 should have sent the notice to Operadora itself. It follows logically that since Operadora  
10 had already paid Rose the rent necessary to cover the quarterly rent that was due, Rose  
11 did not want Operadora to know that Rose had not paid the rent to Treasure Island. In  
12 any event, pursuant to the unclean hands doctrine, Rose is prevented from relying upon  
13 the lack of notice to Operadora to excuse its default since its own actions were marked by  
14 the want of good faith. It would be unjust to allow it to use Treasure Island’s failure to  
15 copy Señor Frogs to excuse its non-payment of rent under the circumstances of this case.

16 4. Based on the foregoing, the court concludes that Treasure Island’s termination of  
17 Rose, LLC’s lease was effective and therefore, the lease is of no further force and effect.


18  
19 5. The Court also denies Defendant’s counterclaims for the reasons listed above. In  
20 addition, Treasure Island has accepted the rent and thus Rose’s claim that Treasure Island  
21 breached the lease by failing to accept the rent is without merit. Indeed, the Court is unaware of  
22 any claim that a tenant can make for the failure of the landlord to accept rent. At all times  
23 Treasure Island allowed Rose to continue to lease the space pending the outcome of this  
24 litigation and Treasure Island’s failure to accept the rent for a few months pending the Court’s  
25 decision on whether the acceptance of the rent would not act as a waiver of Treasure Island’s  
26 right to terminate this lease is not an actual breach.

1 Dated this 4<sup>th</sup> day of November, 2016.

2  
3   
4 District Court Judge Jw

5 Submitted by:

6 FENNEMORE CRAIG, P.C.

7 By:   
8 Patrick J. Sheehan (Bar No. 3812)  
9 John H. Mowbray (Bar No. 1140)  
10 1400 Bank of America Plaza  
11 300 South Fourth St. 14<sup>th</sup> Floor  
12 Las Vegas, NV 89101  
13 *Attorneys for Treasure Island, LLC*

**CERTIFICATE OF SERVICE**

Pursuant to NRCp 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on November 7, 2016, service of the FINDINGS OF FACT AND CONCLUSIONS OF LAW was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List**

**For Case**

**null - Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)**

**Fennemore Craig Jones Vargas**


Contact	Email
Patrick J. Sheehan	<a href="mailto:psheehan@fclaw.com">psheehan@fclaw.com</a>

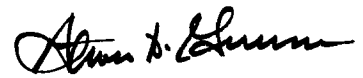
**Fennemore Craig, P.C.**

Contact	Email
Adam Miller	<a href="mailto:amiller@fclaw.com">amiller@fclaw.com</a>
John H. Mowbray	<a href="mailto:jmowbray@fclaw.com">jmowbray@fclaw.com</a>

**Shumway Van**

Contact	Email
Brent	<a href="mailto:brent@shumwayvan.com">brent@shumwayvan.com</a>
Gabriela Mercado	<a href="mailto:Gabrielam@shumwayvan.com">Gabrielam@shumwayvan.com</a>
Kamra Fuller	<a href="mailto:kamra@shumwayvan.com">kamra@shumwayvan.com</a>
Rebekah Griffin	<a href="mailto:rebekah@shumwayvan.com">rebekah@shumwayvan.com</a>
Robin Cordova	<a href="mailto:robin@shumwayvan.com">robin@shumwayvan.com</a>
Sam Marshall	<a href="mailto:samuel@shumwayvan.com">samuel@shumwayvan.com</a>

  
An Employee of Fennemore Craig, P.C.



CLERK OF THE COURT

1 NEO  
2 FENNEMORE CRAIG, P.C.  
3 Patrick J. Sheehan (Bar No. 3812)  
4 John H. Mowbray (Bar No. 1140)  
5 300 S. Fourth Street, Suite 1400  
6 Las Vegas, NV 89101  
7 Tel.: (702) 692-8011  
8 Fax: (702) 692-8099  
9 Email: [psheehan@fcclaw.com](mailto:psheehan@fcclaw.com)  
10 *Attorneys for Treasure Island, LLC*

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

10 TREASURE ISLAND, LLC, a Nevada limited  
11 liability company;

12 Plaintiff,

13 vs.

14 ROSE, LLC, a Nevada limited liability  
15 company;

16 Defendant.

17 ROSE, LLC, a Nevada limited liability  
18 company,

19 Counterclaimant,

20 vs.

21 TREASURE ISLAND, LLC, a Nevada limited  
22 liability company,

23 Counterdefendant.  
24

CASE NO.: A-15-719105-B

DEPT.: XI

NOTICE OF ENTRY OF FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

25 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

26 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the  
27 FINDINGS OF FACT AND CONCLUSIONS OF LAW was entered in the above-  
28

1 referenced matter on the 7<sup>th</sup> day of November, 2016, a copy of which is attached hereto.

2 Dated this 7<sup>th</sup> day of November, 2016.

3 FENNEMORE CRAIG, P.C.

4  
5 By: /s/ Patrick J. Sheehan  
6 Patrick J. Sheehan (Bar No. 3812)  
7 John H. Mowbray (Bar No. 1140)  
8 1400 Bank of America Plaza  
9 300 South Fourth St. 14<sup>th</sup> Floor  
10 Las Vegas, NV 89101  
11 *Attorneys for Treasure Island, LLC*  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on November 7, 2016, service of the NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

**null - Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)**

**Fennemore Craig Jones Vargas**

**Contact**

Patrick J. Sheehan

**Email**

[psheehan@fclaw.com](mailto:psheehan@fclaw.com)

**Fennemore Craig, P.C.**

**Contact**

Adam Miller

John H. Mowbray

**Email**

[amiller@fclaw.com](mailto:amiller@fclaw.com)

[jmowbray@fclaw.com](mailto:jmowbray@fclaw.com)

**Shumway Van**

**Contact**

Brent

Rebekah Griffin

Sam Marshall

**Email**

[brent@shumwayvan.com](mailto:brent@shumwayvan.com)

[rebekah@shumwayvan.com](mailto:rebekah@shumwayvan.com)

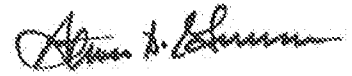
[samuel@shumwayvan.com](mailto:samuel@shumwayvan.com)

/s/ Adam Miller

An Employee of Fennemore Craig, P.C.



Patrick J. Sheehan (NV Bar No. 3812)  
John H. Mowbray (NV Bar No. 1140)  
FENNEMORE CRAIG, P.C.  
300 S. 4<sup>th</sup> Street, Suite 1400  
Las, Vegas, Nevada 89101  
Telephone: (702) 692-8000  
Facsimile: (702) 692-8099  
Email: [psheehan@fclaw.com](mailto:psheehan@fclaw.com)  
*Attorney for Plaintiff Treasure Island, LLC*

  
CLERK OF THE COURT

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Plaintiff,

v.

ROSE, LLC, a Nevada limited liability company,

Defendant.

ROSE, LLC, a Nevada limited liability company,

Counterclaimant,

v.

TREASURE ISLAND, LLC, a Nevada limited  
liability company,

Counterclaimant.

CASE NO.: A-15-719105-B

DEPT. NO.: XXIX

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**I. FINDINGS OF FACT.**

1. On or about April 13, 2011, Plaintiff, Treasure Island, entered into a Lease Agreement ("Lease") with Defendant, Rose, LLC ("Rose").

2. Pursuant to the terms of the Lease, Treasure Island leased space to Rose inside the Treasure Island Hotel and Casino in Las Vegas, Nevada (the "Property").

3. One of Rose's obligations under the Lease was to timely pay rent.

1           4.       Per the Lease, rent came in two forms: minimum monthly rent, and quarterly rent  
2 in an amount equal to 7% of modified gross sales.

3           5.       The Lease provided that the rent for gross sales would be paid pursuant to a certain  
4 formula and that, within 30 days of the end of each quarter during the lease term, Rose would  
5 deliver to landlord a writing setting forth the amount of tenant's gross sales made during each  
6 month of the preceding calendar quarter and, concurrently therewith, pay the landlord the  
7 percentage rent due and payable for the preceding calendar quarter.

8           6.       In August, 2012, Treasure Island became aware that Rose was delinquent in  
9 paying several of its contractors.

10          7.       Due to a concern that this failure to pay construction costs could result in a lien  
11 against the Property, Treasure Island, through its General Counsel, Brad Anthony ("Anthony"),  
12 sent Rose a letter reminding it that no liens were permitted under the Lease.

13          8.       This letter was sent in strict compliance with the Lease's notice requirements  
14 which stated that any notices would be sent to Rose at a certain address attention Susan Markusch  
15 with a carbon copy to Operadora.<sup>1</sup>

16          9.       Shortly after that letter was sent, Gary Dragul, President of Rose ("Dragul"), called  
17 Mr. Anthony to discuss the letter that Rose received and to request further relief from the loan  
18 repayment obligation it had with Treasure Island.

19          10.       During that call, Dragul specifically requested that Anthony send all future  
20 correspondences dealing with the Treasure Island-Rose relationship directly and only to him.

21          11.       Although Mr. Dragul testified that his memory of the conversation was different  
22 in that he believed Mr. Anthony suggested that Rose designate one person from Rose whom  
23 Treasure Island could deal with in the future he nevertheless agreed that he did in fact tell Mr.  
24 Anthony to make all future communications to him. The Court finds that Mr. Dragul did in fact  
25 tell Brad Anthony to send all future notices to him and him alone (not Operadora or anyone else).

26  
27  
28 <sup>1</sup> By way of a Fifth Amendment to the lease the notice addresses were changed to state that any notices to Rose were to be sent to a certain address without specifying any individual and to Operadora at both the original address listed and to a Miami law firm.

1           12. Mr. Anthony's testimony regarding Mr. Dragul's request to change the notice was  
2 much more credible than Mr. Dragul's testimony related to the issue. For example, during his  
3 deposition Mr. Dragul stated he did not recall any conversation with Mr. Anthony after the  
4 August 31<sup>st</sup> letter which contained the notices set forth in the lease. However, during the first day  
5 of testimony upon examination of his own counsel he outlined what he believed occurred during  
6 the conversation. Then, upon questioning from the Court he also outlined what he believed  
7 occurred during the conversation. Then, upon being cross-examined by Plaintiff's counsel he  
8 again stated that he did not recall any conversation taking place. Plaintiff's counsel asked the  
9 question as follows:

10           Q. ...Sir, do you recall a telephone conversation that you had with  
11 Mr. Anthony following receipt of this letter [the August 31, 2012 letter]?

12           A. [by Mr. Dragul] I do not.

13 Transcript at page 33 lines 2-5 and also at page 34 lines 5-7. This just after his response to the  
14 Court clearly acknowledging the conversation. See pages 18 and 19. Indeed, the next letter  
15 between the parties references the conversation between Mr. Anthony and Mr. Dragul so the  
16 conversation must have taken place and it must of taken place in between the August 31<sup>st</sup>  
17 correspondence and September 19<sup>th</sup> correspondence which followed.

18           13. The Court finds that the parties agreed that any further notices would be sent  
19 solely to Mr. Dragul.

20           14. On September 19, 2012, Anthony sent a letter following up on Mr. Dragul's  
21 request regarding the construction loan repayment.

22           15. Mr. Anthony complied with Dragul's request for how notice should be provided  
23 and sent the letter directly to Dragul and without Operadora being carbon copied.

24           16. In the years that followed, Treasure Island sent numerous communications to  
25 Rose.

26           17. In each instance where money owed to Treasure Island was delinquent, barring  
27  
28

1 one<sup>2</sup>, the communication was sent to Dragul and Operadora was not copied.

2 18. In all of its communications with Treasure Island, Rose did not carbon copy its  
3 subtenant once. Nor was any evidence presented to show that Rose forwarded any of the  
4 communications it received from Treasure Island to Operadora.

5 19. On April 30, 2015, Rose breached the Lease when it failed to pay the 7% gross  
6 sales portion of the rent for the first quarter of 2015.

7 20. As a result, on May 14, 2015, Treasure Island sent Rose a notice.

8 21. Mr. Dragul Rose's President testified that his company had many tenants and that  
9 if any tenant failed to pay rent when due he would begin proceedings to evict that tenant 10 days  
10 after said tenant defaulted on his rental obligations.

11 22. Pursuant to Mr. Dragul's instruction the Notice was sent to Mr. Dragul and not to  
12 Susan Markusch or Operadora.

13 23. Out of an abundance of caution, Mr. Anthony emailed a copy of the notice to the  
14 only other officer of Rose, LLC its legal counsel, Elizabeth Gold.

15 24. Ms. Gold was the person who signed all of the contracts in this matter.

16 25. The letter advised Rose, LLC that it was delinquent on its rent and that it had ten  
17 days to cure that delinquency or it would be in default.

18 26. Pursuant to the express terms of the parties' Lease Agreement, if the overdue rent  
19 payment was not paid within ten days of the notice, Treasure Island had the right to terminate the  
20 parties' lease.

21 27. The Court finds that Rose, LLC did in fact receive the notice and did not pay the  
22 full amount of overdue rent between May 14 and May 28.

23 28. This nonpayment occurred despite Rose having been paid \$247,500 from its  
24 subtenant for the months of January, February and March, which amount represents roughly the  
25 equivalent of the rent monies owed to Treasure Island pursuant to Rose's lease with Treasure  
26

27  
28 <sup>2</sup> The only exception to this was a letter from Jerry Griffiths, Treasure Island's Chief Financial Officer, which did  
29 include notice to Operadora since the subject of that letter was Operadora itself not paying food charges owed to  
Treasure Island.

1 Island.

2 29. The evidence showed that Elizabeth Gold received a copy of the notice of default  
3 no later than May 15, 2015, since she called Brad Anthony on that day and requested additional  
4 time to pay the overdue rent, which Mr. Anthony said Treasure Island would not give Rose.

5 30. Mr. Anthony so testified and Elizabeth Gold did not testify in the trial to dispute  
6 this testimony. Mr. Anthony's testimony in this regard is corroborated by a letter which Ms. Gold  
7 drafted on May 29 which referenced her being emailed the May 14th Notice.

8 31. The Court finds that Mr. Dragul was advised of the May 14 Notice shortly after  
9 Ms. Gold's receipt of the same. This is because Mr. Dragul testified he spoke with Ms. Gold  
10 every morning and several times a day. See transcript at page 40 lines 3-9.

11 32. Although Mr. Dragul testified that he personally did not receive a copy of the  
12 Notice until he received a phone call from David Krouham on May 28 or 29 his testimony is not  
13 credible.

14 33. In Mr. Dragul's deposition, he testified he believed he was advised of the Notice  
15 on May 26.

16 34. Although Mr. Dragul coyly testified that he did not see a copy of the notice until  
17 he returned to his office he was obviously told about the Notice.

18 35. Plaintiff's counsel asked Mr. Dragul if he was told about the notice even though he  
19 did not see the notice and he testified, "I don't remember." See transcript at page 49 lines 17-19.

20 36. The Court believes it is clear the Mr. Dragul was advised of the Notice by May 15  
21 and certainly well before May 28.

22 37. In addition to Rose receiving the notice through Ms. Gold, the evidence showed  
23 that Ms. Markusch (the person mentioned under the original notice provision) also was aware of  
24 the notice since she sent a partial payment for the outstanding rent due shortly after the May 14  
25 notice was received.

26 38. Rose, LLC had its own sublease with an entity called Señor Frogs Las Vegas, LLC  
27 ("Señor Frogs").  
28

1           39.     Señor Frogs is a subsidiary of Operadora.  
2           40.     Pursuant to an express provision in the sublease between Rose and Señor Frogs,  
3 Rose had a duty to provide a copy of any default notices it received from Treasure Island to Señor  
4 Frogs/Operadora.

5           41.     Rose never sent a copy of the May 14th default notice to Señor Frogs/Operadora.

6           42.     On May 28, Treasure Island terminated its lease with Rose via a letter sent by its  
7 counsel, Brenoch Wirthlin.

8           43.     Following receipt of this Notice of Termination Rose attempted to pay the rent,  
9 which Mr. Dragul admitted was overdue since it was due on April 30<sup>th</sup>.

10          44.     However, Treasure Island had already terminated the lease and this action seeking  
11 declaratory relief by both parties began.

12          45.     Upon finding out about Treasure Island's termination of Rose's lease, Señor  
13 Frogs/Operadora hired counsel from Florida to contact Treasure Island.

14          46.     Said counsel did contact Treasure Island (through its counsel).

15          47.     That communication was memorialized in an email setting forth Señor  
16 Frogs/Operadora's position at the time.

17          48.     The email dated June 3, 2015, does not mention the fact that Señor Frogs would  
18 have paid any overdue amounts owed by Rose to Treasure Island.

19          49.     The testimony showed that Señor Frogs had already paid Rose approximately  
20 \$247,500 for the three months involved in the rent delinquency by Rose-January, February and  
21 March, 2015.

22          50.     The email states:

23                 "Pat -- thank you for your time today. This email will confirm our  
24 discussions. The letter from Mr. Wirthlin to Rose, LLC and Operadora  
25 Andersons S.A. de C.V. dated May 28, 2015, was sent to my client for  
26 notice purposes only under Section 11 of the Fifth Amendment to Lease  
27 Agreement between Rose, LLC and Treasure Island, LLC. As we  
28 discussed, under Section 9 of the Fifth Amendment, my client is not  
affected by a default by Rose, LLC as the prime tenant.

As we further discussed, Rose, LLC is disputing the default. You have  
confirmed with me that your client does not plan on taking any action

1 until the dispute with Rose, LLC is resolved, whether by court action or  
2 settlement between the two parties. None of this will impact adversely on  
3 my client, which will be permitted to continue its sub-tenance. If your  
4 client prevails and terminates Rose, LLC's tenancy, at that point you  
5 would then negotiate a lease directly with my client in accordance with  
6 Section 9 of the Fifth Amendment.

7  
8 Thanks again for your assistance. Please copy me on any further  
9 correspondence. My contact information is below."

10 51. Following this email Señor Frogs did not intervene in this case and is not a party  
11 to this action and thus its rights are not subject to this action.

12  
13 CONCLUSIONS OF LAW

14 1. The court finds that the lease between Rose and Treasure Island has been  
15 terminated.

16 2. Rose's argument that the termination was not proper because the May 14 default  
17 notice sent to Rose was not sent to the attention of Susan Markusch is without merit for the  
18 following reasons any one of which would be sufficient:

19 A. The parties orally modified the lease when Mr. Dragul told Mr. Anthony to send  
20 all future correspondence to him and him alone sometime between August 31 and  
21 September 19, 2012  
22 "[P]arties to a written contract who agree to new terms may orally modify the contract."  
23 *Jensen v. Jensen*, 104 Nev. 95, 98 (Nev. 1988)(internal citations omitted). "Moreover,  
24 parties' consent to modification can be implied from conduct consistent with the asserted  
25 modification." *Id.* "Parol evidence can be admitted to show an oral agreement modifying  
26 a contract." *Id.* citing *Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 110, 389  
27 P.2d 923, 924 (1964). This is the case despite a provision stating that the contract can  
28 only be modified in writing:

Parties may change, add to, and totally control what they  
did in the past. They are wholly unable by any contractual  
action in the present, to limit or control what they may  
wish to do contractually in the future. Even where they  
include in the written contract an express provision that it

1 can only be modified or discharges by a subsequent  
2 agreement in writing, nevertheless their later oral  
3 agreement to modify or discharge their written contract is  
both provable and effective to do so.

4 *Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964)  
5 citing *Simpson on Contracts* § 63, at 228 (emphasis added).

6  
7 B. Under the doctrine of estoppel. To prevail on an argument of estoppel, the party  
8 asserting the defense must prove four elements:

- 9 1. The party to be estopped must be apprised of the true facts;
- 10 2. He must intend that his conduct shall be acted upon, or  
11 must so act that the party asserting estoppel has a right to  
believe it was so intended.
- 12 3. The party asserting the estoppel must be ignorant of the  
13 true state of facts;
- 14 4. He must have relied on his detriment on the conduct of the  
15 party to be estopped. In addition silence can raise an  
16 estoppel quite as effectively as can words. *Teriano v. Nev.*  
*State Bank*, 121 Nev. 217, 223, 112 P.3d 1058, 1062  
(2005).

17 Here, Rose was aware of Treasure Island's decision not to send numerous notices to the  
18 attention of Susan Markusch after Mr. Dragul had instructed Mr. Anthony to send all  
19 notices to his attention. Thus, Rose was aware that all future notices after August 31,  
20 2012 were being sent to Mr. Dragul and not Ms. Markusch. Similarly, when Mr. Dragul  
21 asked Mr. Anthony to send all future notices to his attention he obviously intended that  
22 his conduct would be acted upon by Anthony. Next, Treasure Island was clearly ignorant  
23 to any change in direction by Rose to change the person who the notice needed to be sent  
24 to from Mr. Dragul back to Ms. Markusch since the evidence showed Dragul never  
25 changed his direction to have all notices sent to his attention and his attention alone.  
26 Finally, Treasure Island met the last element since it relied to its detriment by sending the  
27 notice to the attention Mr. Dragul instead of Ms. Markusch.



1 Estoppel is also applicable since the evidence showed that numerous notices were sent to  
2 the attention of Mr. Dragul and not Ms. Markusch after the August 31, 2012 letter and  
3 neither Dragul or Rose objected. See also, *Chequer, Inc. v. Plainers and Decorators*, 98  
4 Nev. 609, 614, 655 P2.d 996, 998-99 (1982 ("This court has noted that the silence can  
5 raise in estoppel quite as effectively as can words"); *Goldstein v. Hanna*, 97 Nev. 559,  
6 562 (Nev. 1981) (internal citations omitted) ("Thus, 'a person remaining silent when  
7 ought, in the excess of good faith, to have spoken, will not be allowed to speak when he  
8 ought in the exercise of good faith, remain silent.'")

9  
10 C. The Court finds that as a result of the conversation between Mr. Dragul and Mr.  
11 Anthony, Rose waived its right to claim the notice should have been sent to the attention  
12 of Ms. Markusch instead of Mr. Dragul. His conduct in requesting that any future notices  
13 be sent to him and him alone was an intentional relinquishment of any requirement on  
14 Treasure Island's part to send the notice to attention of Ms. Markusch. In addition, the  
15 failure to raise any issues concerning the subsequent notices, which were all sent to the  
16 attention of Mr. Dragul and not Ms. Markusch evidence of intention to waive the right  
17 and thus a waiver is implied from said conduct, *Mahban v. MGM Grand Hotels, Inc.*, 100  
18 Nev. 593, 596, 691 P2.d 421, 423-24 (1984). See also, *Havas v. Atlantic Ins. Co.*, 96  
19 Nev. 586, 588 (Nev. 1980) (internal citations omitted). (The intent of waiver may be  
20 expressed or implied from the circumstances.)

21 D. Rose's claim is also without merit since it received actual notice and Ms.  
22 Markusch herself received notice. In *Stonehenge Land Co. v. Beazer Homes Investments,*  
23 *LLC*, 893 N.E. 2.d 855, 863 (Ohio Ct. App. 2008) the court held that, "Where there is  
24 evidence of actual notice, a technical deviation from a contractual notice requirement will  
25 not bar the action for breach of contract brought against a party that had actual notice."  
26 See also, e.g., *Polizzotto v. D'Agostino*, 129 So. 534, 536 (La. 1930) ("[M]ere  
27 informalities do not violate notice so long as they do not mislead, and give the necessary  
28

1 information to the proper party.”); *Bd. of Comm’rs v. Turner Marine Bulk, Inc.*, 629 So.  
2 2d 1278, 1283 (La. Ct. App. 1993) (“Where adequate notice is in fact given and its  
3 receipt is not contested, technicalities of form may be overlooked.”). In this case it is  
4 clear Rose received actual notice and thus suffered no harm.

5  
6 E. Treasure Island substantially complied with any notice obligations to Rose. In  
7 *Hardy Cos v. SNMARK, LLC*, 126 Nev. 528, 536 (Nev. 2010) the court found that  
8 substantial compliance with notice provisions is met when the owner has actual  
9 knowledge and is not prejudiced. In this case it was clear Rose had actual knowledge of  
10 the notice and the opportunity to cure the default during the ten-day notice period. This  
11 provides the fifth reason why Rose’s argument that the notice to it was ineffective has no  
12 merit.

13 3. Rose may not raise Treasure Island’s failure to carbon copy Operadora as a  
14 defense given the circumstances in this case.

15  
16 A. Rose cannot raise any claims regarding Treasure Island’s failure to notice Señor  
17 Frogs since that claim belongs to Señor Frogs. Señor Frogs is not a party to this case.  
18 Instead, the issue only involves whether or not Treasure Island’s termination of the Rose  
19 Lease was effective. Any notice obligations to Señor Frogs were a separate obligation  
20 that Treasure Island had to Señor Frogs and that is not an issue that could be raised by  
21 Rose pursuant to established law. *Pierce v. Centry Ins.*, 421 N.E. 2d 1252 (App. Ct.  
22 Mass. 1981). (Notice to the insured and notice to the mortgagee have discrete purposes,  
23 however, and it is difficult to see how, as to the party who receives notice, a failure to  
24 give notice to the other, can be anything but merely formal. . . . This quality of separate  
25 obligations has been noted particularly, where, as in the instant case, the insurance policy  
26 contains a so-called ‘standard mortgage clause.’ (Citations omitted.) Under that clause  
27 ‘the result has been that the Courts have held that the agreement of the company with the  
28 mortgagee being separate and divisible from that with the mortgagor. . . ) *See also, e.g.*,

1 *Ellegood v. Am. States Ins. Co.*, 638 N.E.2d 1193, 1195 (Ill. App. Ct. 1994) (“[P]laintiff,  
2 who admittedly received notice and failed to pay the premium, seeks to void defendant's  
3 purported cancellation based on the fortuitous fact that defendant is unable to establish  
4 that it notified the mortgagee. We agree . . . that this would result in an ‘unjustified  
5 windfall’ to the insured.”); *Bradley v. Assocs. Disc. Corp.*, 58 So. 2d 857, 859 (Fla. 1952)  
6 (finding that a defect in the notice’s content did not invalidate the notice where the defect  
7 was relevant only to a third party); *cf. Bryce v. St. Paul Fire & Marine Ins. Co.*, 783 P.2d  
8 246, 247 (Ariz. App. 1989) (“Appellee's failure to give timely notice of the cancellation  
9 to the mortgagee [as required by statute] had no effect on the proper notice of  
10 cancellation given appellant by the premium finance company.”); *Allstate Ins. Co. v.*  
11 *McCrae*, 384 S.E.2d 1, 2 (N.C. 1989) (“Only defective notification to the *insured* renders  
12 cancellation of the policy ineffective and extends the liability of the insurer.”).

13  
14 B. Even if Rose could raise the issue of Treasure Island’s failure to notice Señor  
15 Frogs/Operadora it is estopped from doing so. Dragul told Anthony to send any default  
16 notices to him and not anyone else. As a result, when Anthony sent the notices to Dragul  
17 and not anyone else Rose cannot argue that said notice was defective pursuant to the  
18 estoppel law and reasons cited above.

19 C. Rose waived any claims for the same reasons also. Similarly, Dragul’s insistence  
20 that any notices be sent to him and him alone constitutes a waiver of any argument that  
21 Treasure Island should have sent the notice to Señor Frogs/Operadora.

22  
23 D. Rose’s failure to send the notice to Señor Frogs under its own obligation  
24 precludes Rose from alleging that the notice was ineffective since Señor Frogs was not  
25 carbon copied. This is true under the doctrine of materiality. If Rose felt that Treasure  
26 Island’s obligation to send the notice of default to Señor Frogs was a material term of its  
27 (as opposed to Señor Frogs) contractual rights with Treasure Island then it clearly would  
28 have sent the notice on to Señor Frogs pursuant to its own contractual obligation. Rose

1 not sending the notice to Señor Frogs pursuant to its own contractual obligations shows  
2 that although the notice obligation from Treasure Island to Señor Frogs might have been  
3 material to Señor Frogs, Rose did not believe it was material to it since it failed to send  
4 on the notice to Señor Frogs pursuant to its own obligations.  
5

6 E. The unclean hands doctrine also applies. First, since Rose received the rent from  
7 its subtenant and did not turn those monies over to Treasure Island. The facts were clear  
8 that the subtenant Operadora would pay Rose \$82,500 per month under the sublease and  
9 Rose would in effect take those same monies and pay those over to the landlord.  
10 Although the subtenant Señor Frogs paid Rose \$247,500 for January, February and  
11 March of 2015 Rose did not take those monies and pay the landlord Treasure Island. It  
12 cannot now complain that Treasure Island's failure to notice Señor Frogs somehow  
13 excuses its non-performance under these circumstances. Similarly, the unclean hands  
14 doctrine prevents Rose from arguing that Treasure Island's failure to carbon copy  
15 Operadora on the May 14<sup>th</sup> Notice excuses Rose's non-performance since it had the same  
16 obligation and failed to do so. Again Rose had clear contractual obligations to send any  
17 default notices it received to Señor Frogs. The evidence is clear that Rose never sent any  
18 notices it received from Treasure Island to Señor Frogs including the May 14<sup>th</sup> Notice.  
19 Therefore it cannot now allege that it is somehow excused for its non-performance under  
20 its contract with Treasure Island because Treasure Island did not carbon copy Operadora.  
21

22 The unclean hands doctrine generally bars a party from receiving equitable relief  
23 because of that party's own inequitable conduct. It precludes a party from attaining an  
24 equitable remedy when that party's connection with the subject-matter or transaction in  
25 litigation has been unconscientious, unjust, or marked by the want of good faith. *Park v.*  
26 *Park*, 126 Nev. 745 (2010) ("the District Court found a connection between Appellant's  
27 misconduct, breach of contract, and cause of action for unjust enrichment. ... substantial  
28 evidence supports the District Court's decision to bar Appellant's unjust enrichment

1 claim under the unclean hands doctrine.”). While unclean hands is generally regarded as  
2 an argument that sounds in equity, the Ninth Circuit has recognized that “[t]he unclean  
3 hands doctrine applies not only to equitable claims, but also to legal ones.” *Adler v. Fed.*  
4 *Republic of Nigeria*, 219 F.3d 869 (9<sup>th</sup> Cir. 2000). Here Rose’s failure to pay the rent to  
5 begin with after being paid the same by its subtenant coupled with its insistence that  
6 Treasure Island not provide Operadora notice, and, perhaps most importantly, failing to  
7 provide Operadora the default notice itself, despite its specific contractual obligation to  
8 do so, caused all the harm to occur. If notice to Operadora was so important to Rose, it  
9 should have sent the notice to Operadora itself. It follows logically that since Operadora  
10 had already paid Rose the rent necessary to cover the quarterly rent that was due, Rose  
11 did not want Operadora to know that Rose had not paid the rent to Treasure Island. In  
12 any event, pursuant to the unclean hands doctrine, Rose is prevented from relying upon  
13 the lack of notice to Operadora to excuse its default since its own actions were marked by  
14 the want of good faith. It would be unjust to allow it to use Treasure Island’s failure to  
15 copy Señor Frogs to excuse its non-payment of rent under the circumstances of this case.

16 4. Based on the foregoing, the court concludes that Treasure Island’s termination of  
17 Rose, LLC’s lease was effective and therefore, the lease is of no further force and effect.

18  
19 5. The Court also denies Defendant’s counterclaims for the reasons listed above. In  
20 addition, Treasure Island has accepted the rent and thus Rose’s claim that Treasure Island  
21 breached the lease by failing to accept the rent is without merit. Indeed, the Court is unaware of  
22 any claim that a tenant can make for the failure of the landlord to accept rent. At all times  
23 Treasure Island allowed Rose to continue to lease the space pending the outcome of this  
24 litigation and Treasure Island’s failure to accept the rent for a few months pending the Court’s  
25 decision on whether the acceptance of the rent would not act as a waiver of Treasure Island’s  
26 right to terminate this lease is not an actual breach.

1 Dated this 4<sup>th</sup> day of November, 2016.

2  
3   
District Court Judge *Jw*

4  
5 Submitted by:

6 FENNEMORE CRAIG, P.C.

7 By: 

8 Patrick J. Sheehan (Bar No. 3812)  
9 John H. Mowbray (Bar No. 1140)  
10 1400 Bank of America Plaza  
300 South Fourth St. 14<sup>th</sup> Floor  
Las Vegas, NV 89101  
*Attorneys for Treasure Island, LLC*

CERTIFICATE OF SERVICE

Pursuant to NRCPP 5(b), I hereby certify that I am an employee of Pennemore Craig, P.C. and that on November 7, 2016, service of the FINDINGS OF FACT AND CONCLUSIONS OF LAW was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List**

**For Case**

**null - Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)**

**Pennemore Craig Jones Vargas**


Contact	Email
Patrick J. Sheehan	<a href="mailto:psheehan@fcflaw.com">psheehan@fcflaw.com</a>

**Pennemore Craig, P.C.**

Contact	Email
Adam Miller	<a href="mailto:amiller@fcflaw.com">amiller@fcflaw.com</a>
John H. Mowbray	<a href="mailto:jmowbray@fcflaw.com">jmowbray@fcflaw.com</a>

**Shumway Van**

Contact	Email
Brent	<a href="mailto:brent@shumwayvan.com">brent@shumwayvan.com</a>
Gabriela Mercado	<a href="mailto:Gabrielam@shumwayvan.com">Gabrielam@shumwayvan.com</a>
Kamra Fuller	<a href="mailto:kamra@shumwayvan.com">kamra@shumwayvan.com</a>
Rebekah Griffin	<a href="mailto:rebekah@shumwayvan.com">rebekah@shumwayvan.com</a>
Robin Cordova	<a href="mailto:robin@shumwayvan.com">robin@shumwayvan.com</a>
Sam Marshall	<a href="mailto:samuel@shumwayvan.com">samuel@shumwayvan.com</a>

  
An Employee of Pennemore Craig, P.C.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**October 15, 2015**

---

A-15-719105-B	Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)
---------------	--

---

<b>October 15, 2015</b>	<b>8:30 AM</b>	<b>Motion</b>	<b>Plaintiff's Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation</b>
-------------------------	----------------	---------------	--

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

**PARTIES**

<b>PRESENT:</b>	Rickard, Jarrod L. Sheehan, Patrick J.	Attorney Attorney
-----------------	---	----------------------

**JOURNAL ENTRIES**

- Mr. Sheehan sought direction as to whether it is acceptable to collect rent, as long as the Defendant continues to occupy the premises, while parties are disputing whether or not a lease has been terminated; all they ask for is that Defendant stipulates that by the Plaintiff accepting rent, they are not waiving their right to termination. Statement by the Court as to two different options, i.e. rent going to the landlord, or portions going to Escrow. Mr. Rickard stated his client does not care but their preference is that the landlord accepts the payment that is tendered. Following further discussion, COURT ORDERED, motion in GRANTED IN PART; Plaintiff may accept the rent that Defendant tenders. Court further noted no one has stipulated, nor given an advisory opinion, but Plaintiff is not waiving any defenses as a result of accepting any rent that the Defendant tenders.



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**October 23, 2015**

---

A-15-719105-B	Treasure Island LLC, Plaintiff(s)
	vs.
	Rose LLC, Defendant(s)

---

October 23, 2015	8:30 AM	Mandatory Rule 16 Conference
------------------	---------	---------------------------------

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

**PARTIES**

<b>PRESENT:</b>	Mowbray, John H.	Attorney
	Rickard, Jarrod L.	Attorney

**JOURNAL ENTRIES**

- Upon Court's inquiry, Mr. Rickard confirmed parties have held their joint case conference, filed the report, and exchanged initial disclosures; with regards to a protective order, they have a pending motion for a deposition, but he does not think they will need a protective order related to confidential documents; there are no ESI issues. Upon counsel's request, COURT ORDERED, motions on the November 13, 2015 Chambers calendar RESET to the oral calendar for November 12, 2015. Counsel advised, other than 3 noticed depositions, 1 of which is the subject of a pending motion, they do not need anything else in order to go to a settlement conference.

Per parties' request, matter REFERRED to Judge Denton (Department XIII) for a settlement conference on December 18, 2015. Counsel DIRECTED to check their clients' availability regarding the December 18th date and notify the Department XI Law Clerk. COURT ORDERED, discovery cut-off SET on February 5, 2016 per parties' agreement; dispositive motions DUE by February 26, 2016. Matter SET for trial on the stack beginning on April 18, 2016, with Calendar Call on April 14, 2016. Jury Demand, if any, to be filed within five (5) business days.

11-12-15      8:30 AM      MOTION FOR PROTECTIVE ORDER REGARDING THE  
DEPOSITION OF PHILLIP G. RUFFIN...DEFENDANT'S MOTION TO AMEND COUNTERCLAIM

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**November 12, 2015**

---

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
vs.  
Rose LLC, Defendant(s)

---

**November 12, 2015      8:30 AM      All Pending Motions**

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

**PARTIES**

**PRESENT:**      Rickard, Jarrod L.      Attorney  
Sheehan, Patrick J.      Attorney

**JOURNAL ENTRIES**

- DEFENDANT'S MOTION TO AMEND COUNTERCLAIM...PLAINTIFF TREASURE ISLAND, LLC'S MOTION FOR PROTECTIVE ORDER REGARDING THE DEPOSITION OF PHILLIP G. RUFFIN

PLAINTIFF TREASURE ISLAND, LLC'S MOTION FOR PROTECTIVE ORDER REGARDING THE DEPOSITION OF PHILLIP G. RUFFIN: Arguments by counsel regarding the relevance of Mr. Ruffin's testimony. COURT ORDERED, motion GRANTED IN PART. The Court will PERMIT Plaintiff to take the deposition of general counsel; afterwards, if Plaintiff makes the determination they would still like to take Mr. Ruffin's deposition Plaintiff may ask the Court to do so and explain why.

DEFENDANT'S MOTION TO AMEND COUNTERCLAIM: COURT ORDERED, Motion GRANTED.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

## Other Business Court Matters

# COURT MINUTES

November 17, 2015

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
vs.  
Rose LLC, Defendant(s)

**November 17, 2015      4:15 PM      Telephonic Conference**

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

## PARTIES

**PRESENT:** Rickard, Jarrod L. Attorney  
Sheehan, Patrick J. Attorney

## JOURNAL ENTRIES

- Motion for Protective Order Regarding Date for Deposition of Gary Dragul; Ex Parte Application for Order Shortening Time FILED IN OPEN COURT...Opposition to Motion for Protective Order Regarding Date for Deposition of Gary Dragul and Countermotion to Strike Answer if Dragul Does Not Show Up for His Deposition FILED IN OPEN COURT.

Mr. Sheehan requested they argue the motions today. Mr. Rickard argued they had offered to have Mr. Dragul available for deposition on either December 10 or 14 but Treasure Island is unwilling to accept the offer. Court NOTED it does not have as much medical information regarding the sibling. Mr. Rickard stated he was told Mr. Dragul can be available after the Thanksgiving holiday; he was hoping for an email response giving him additional details but he apologizes as he does not have those yet; the sibling appears to be one whom the parents were making decisions for and Mr. Dragul is the second one down the line. Mr. Rickard stated he does not know where the sibling lives.

Mr. Sheehan responded, the deposition had originally been noticed for September 9; Mr. Rickard then said they can produce Mr. Dragul on October 29; a couple of days before the date, Mr. Rickard informed him Mr. Dragul's schedule would prevent him from appearing on the 29th and asked for November 18; unbelievably, 2 days ago he gets the motion for protective order; the motion should be

denied. COURT ORDERED, protective order GRANTED; a date for the deposition will be determined pending medical information. Mr. Rickard is DIRECTED to provide records explaining why the sibling's medical issues need to be handled by Mr. Dragul; if there is a true medical issue they can work with him; otherwise, the deposition will go forward. The Court will review the records in camera and seal them. Court admonished Mr. Richard to be prepared with dates after Thanksgiving. Mr. Rickard stated he will attempt to provide the medical information to Mr. Sheehan by tonight and to the Court by tomorrow. COURT ORDERED, matter SET for hearing on Thursday, November 19, 2015.

11-19-15      8:15 AM      HEARING: MOTION FOR PROTECTIVE ORDER  
REGARDING DATE FOR DEPOSITION OF GARY DRAGUL; EX PARTE APPLICATION FOR  
ORDER SHORTENING TIME...OPPOSITION TO MOTION FOR PROTECTIVE ORDER  
REGARDING DATE FOR DEPOSITION OF GARY DRAGUL AND COUNTERMOTION TO STRIKE  
ANSWER IF DRAGUL DOES NOT SHOW UP FOR HIS DEPOSITION

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**November 20, 2015**

---

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
vs.  
Rose LLC, Defendant(s)

---

**November 20, 2015      3:00 AM      All Pending Motions**

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:**

**REPORTER:**

**PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

- HEARING: MOTION FOR PROTECTIVE ORDER REGARDING DATE FOR DEPOSITION OF GARY DRAGUL; EX PARTE APPLICATION FOR ORDER SHORTENING TIME...OPPOSITION TO MOTION FOR PROTECTIVE ORDER REGARDING DATE FOR DEPOSITION OF GARY DRAGUL AND COUNTERMOTION TO STRIKE ANSWER IF DRAGUL DOES NOT SHOW UP FOR HIS DEPOSITION

Court reviewed the briefing and documents relating to withdrawal of both motion and countermotion. If the parties wish to proceed further with any issues related to the deposition, they may file separate motions.

CLERK'S NOTE: A copy of the above minute order was distributed to parties via electronic mail. / dr  
11-20-15

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**February 11, 2016**

---

A-15-719105-B	Treasure Island LLC, Plaintiff(s)
	vs.
	Rose LLC, Defendant(s)

---

**February 11, 2016      8:30 AM      Status Check**

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

**PARTIES**

<b>PRESENT:</b>	Sheehan, Patrick J.	Attorney
	Van, Michael C.	Attorney

**JOURNAL ENTRIES**

- Mr. Van not present at call of the case. Court directed Law Clerk to call his office. Matter TRAILED.

Matter RECALLED. Mr. Van participated via telephone.

Mr. Van advised discovery is not done; he and Mr. Sheehan had talked; when he substituted in he realized they were right up the discovery cut-off. Mr. Van asked to move the trial for 60 days.

Mr. Sheehan confirmed he would work with Mr. Van on discovery but would prefer not to move the trial date; counsel can take discovery up to that date; it is a pretty simple case, and the only discovery they took was on Defendant's principal, basically 2 witnesses; Plaintiff is willing to let Defendant have Mr. Anthony's deposition and agree to move back dispositive motions. Court noted its calendar's schedule if this case does not go on the current stack; if counsel can stipulate to some of the deadlines and shorten any motions that might be better. Mr. Sheehan added Plaintiff is willing to get rid of the trial and have the Court decide this based on the briefs. Court DIRECTED the parties to discuss a schedule to finish discovery, file briefing, or set an evidentiary hearing with briefing. COURT ORDERED, matter SET for status check on the Chambers calendar for next Friday, February 19, regarding a written stipulation or an email sent to the Law Clerk indicating counsel have reached

a gentleman's agreement. Court noted the April 18 stack goes for 5 weeks.

Mr. Sheehan asked Mr. Van to call him tomorrow to discuss dates for Mr. Anthony's deposition and some briefs.



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**February 19, 2016**

---

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
vs.  
Rose LLC, Defendant(s)

---

**February 19, 2016**

**3:00 AM**

**Status Check**

**Status Check:  
Agreement / Written  
Stipulation  
Regarding Schedule**

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:**

**REPORTER:**

**PARTIES**

**PRESENT:**

**JOURNAL ENTRIES**

- Stipulation and order signed. Matter OFF CALENDAR.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**April 14, 2016**

---

A-15-719105-B	Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)
---------------	--

---

**April 14, 2016                      8:45 AM                      All Pending Motions**

**HEARD BY:** Gonzalez, Elizabeth                      **COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

**PARTIES**

<b>PRESENT:</b>	Marshall, Samuel	Attorney
	Sheehan, Patrick J.	Attorney
	Van, Michael C.	Attorney

**JOURNAL ENTRIES**

- CALENDAR CALL...DEFENDANT'S MOTION TO CONTINUE TRIAL, PERMISSION TO TAKE THE DEPOSITION OF PHIL RUFFIN, AND EXTEND DISCOVERY ON AN ORDER SHORTENING TIME (SECOND REQUEST)

With respect to the motion to continue, Mr. Van advised parties had agreed to a 60-day continuance and go to mediation. Mr. Sheehan disagreed. Mr. Van advised he cannot start trial on Monday (April 18), argued as to the 30(b)(6) deposition, and requested to pass this 60 days and go to mediation within 30; if the matter is not resolved, it is his request to be allowed to take a 2-hour deposition of Mr. Ruffin, and then they will be ready for trial. Mr. Sheehan advised that Mr. Van had asked him about mediation this week; he gave opposing counsel dates, something along April 20th, but he never heard back, so they are here today. CONFERENCE AT BENCH, per Mr. Van's request. COURT ORDERED, trial to COMMENCE on Wednesday, May 25, 2016 at 10:00 AM.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**June 13, 2016**

---

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
   vs.  
   Rose LLC, Defendant(s)

---

**June 13, 2016      9:30 AM      Settlement Conference**

**HEARD BY:** Scotti, Richard F.      **COURTROOM:** RJC Courtroom 11D

**COURT CLERK:** Shelly Landwehr

**RECORDER:**

**REPORTER:**

**PARTIES**

**PRESENT:**      Marshall, Samuel      Attorney  
   Sheehan, Patrick J.      Attorney  
   Van, Michael C.      Attorney

**JOURNAL ENTRIES**

- Court noted parties were unable to settle this matter.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**July 08, 2016**

---

A-15-719105-B	Treasure Island LLC, Plaintiff(s)
	vs.
	Rose LLC, Defendant(s)

---

**July 08, 2016                      3:00 AM                      Status Check**

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:**

**REPORTER:**

**PARTIES**

**PRESENT:**

**JOURNAL ENTRIES**

- Pursuant to the stipulation and order regarding trial date filed on 5/19/16, the Court having reviewed the parties' briefs and the related exhibits and being fully informed, determines that given the declaration of Mr. Krouham submitted as Exhibit 9 to Defendant's brief that a trial is necessary. Parties are RESET on the stack beginning 9/6/16. New Trial Setting Order will ISSUE.

CLERK'S NOTE: A copy of the above minute order was distributed to parties via the E-Service Master List. / dr 7-11-16

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**September 01, 2016**

---

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
                                 vs.  
                                 Rose LLC, Defendant(s)

---

**September 01, 2016      8:45 AM      All Pending Motions**

**HEARD BY:** Gonzalez, Elizabeth      **COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Debbie Winn

**REPORTER:**

**PARTIES**

**PRESENT:**      Marshall, Samuel      Attorney  
                                 Sheehan, Patrick J.      Attorney

**JOURNAL ENTRIES**

- CALENDAR CALL...PLAINTIFF'S MOTION TO STRIKE DAVID KROUHAM

CALENDAR CALL: One to two days estimated for trial. COURT ORDERED, Bench Trial RESET to COMMENCE on Thursday, October 6, 2016 at 9:30 AM.

PLAINTIFF'S MOTION TO STRIKE DAVID KROUHAM: COURT ORDERED, motion ADVANCED from tomorrow's Chambers calendar. Arguments by counsel. Court noted Mr. Krouham's deposition may be taken or he can be excluded. Mr. Marshall stated Defendant agrees that Mr. Krouham's deposition be taken. COURT ORDERED, motion to strike DENIED; however, the Court GRANTS the request for deposition noting counsel have agreed it can be taken by telephone.

With regards to Mr. Ruffin, Mr. Sheehan stated the Defendant is now trying to do a trial subpoena even though they cannot take his deposition as Mr. Ruffin has said no several times. Court stated anyone can subpoenaed for trial; the Court may quash the subpoena.

Mr. Marshall argued that not being able to depose Mr. Ruffin does not mean that he does not have to show up for trial; aside from Mr. Krouham, they also need to find out what Mr. Ruffin would say.

Court stated they do not, since Mr. Ruffin did not provide an affidavit. COURT ORDERED, Mr. Ruffin's testimony cannot be preserved nor his deposition taken prior to trial. However, the Court will consider a motion to quash the subpoena.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**September 16, 2016**

---

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
   vs.  
   Rose LLC, Defendant(s)

---

**September 16, 2016      3:00 AM      All Pending Motions**

**HEARD BY:**    Gonzalez, Elizabeth

**COURTROOM:**    RJC Courtroom 14C

**COURT CLERK:**    Dulce Romea

**RECORDER:**

**REPORTER:**

**PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

- NOTICE OF ISSUANCE OF TRIAL SUBPOENA FOR PHIL RUFFIN...  
...NOTICE OF ISSUANCE OF TRIAL SUBPOENA FOR BRAD ANTHONY...  
...NOTICE OF ISSUANCE OF TRIAL SUBPOENA FOR JERRY GRIFFIS...  
...NOTICE OF ISSUANCE OF TRIAL SUBPOENA FOR NAJAM KHAN

Court notes resolved on September 1st.

CLERK'S NOTE: A copy of the above minute order was distributed via the E-Service Master List. / dr  
9-19-16

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

## Other Business Court Matters

# COURT MINUTES

September 22, 2016

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
vs.  
Rose LLC, Defendant(s)

**September 22, 2016      8:30 AM      All Pending Motions**

HEARD BY: Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

## PARTIES

**PRESENT:** Marshall, Samuel Attorney  
Sheehan, Patrick J. Attorney

## JOURNAL ENTRIES

- PLAINTIFF'S MOTION TO QUASH SUBPOENA REGARDING PHILLIP G. RUFFIN ON ORDER  
SHORTENING TIME...PLAINTIFF'S MOTION TO QUASH SUBPOENA REGARDING PHILLIP G.  
RUFFIN ON ORDER SHORTENING TIME

Argument by Mr. Sheehan as to Mr. Ruffin's information being completely irrelevant to this case, that the Opposition only indicates Mr. Ruffin being a decision maker at the early amendment, and that Mr. Brad Anthony will be appearing for the trial as Plaintiff has accepted that subpoena. Argument by Mr. Marshall as to the standard for quashing a subpoena; upon inquiry of the Court regarding non-privileged information Mr. Ruffin may have that is relevant to the issues at trial, Mr. Marshall argued it goes to motive, and the basis of communication; Mr. Ruffin authorized the lawsuit; additionally, the other witnesses have to fly in, but Mr. Ruffin can drive in from 4 miles away. Following reply by Mr. Sheehan, COURT ORDERED, motion to quash GRANTED; it does not appear that there is any information that Mr. Ruffin possesses that is relevant to the proceedings before this Court that is related to non-privileged information.

10-6-16                      9:30 AM                      BENCH TRIAL



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**October 06, 2016**

---

A-15-719105-B	Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)
---------------	--

---

**October 06, 2016      9:30 AM      Bench Trial**

**HEARD BY:** Gonzalez, Elizabeth      **COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

**PARTIES**

<b>PRESENT:</b>	Marshall, Samuel	Attorney
	Sheehan, Patrick J.	Attorney
	Van, Michael C.	Attorney

**JOURNAL ENTRIES**

- DAY 1

Pursuant to the stipulation of the parties, COURT ORDERED, all exhibits, with the exception of 54, 57, and 63 as those are deposition transcripts, are ADMITTED. Opening statements by Mr. Sheehan and Mr. Van. Testimony and exhibits presented. (See worksheet.) LUNCH RECESS.

Testimony and exhibits continued. (See worksheet.) At the hour of 2:40 PM, the Plaintiff RESTED. Arguments by Mr. Van and Mr. Sheehan regarding Mr. Van's motion for dismissal as a matter of law noting breach of contract cannot proceed. COURT ORDERED, motion DENIED.

Testimony and exhibits presented. (See worksheet.) COURT ORDERED, trial CONTINUED. EVENING RECESS.

10-7-16      10:00 AM      BENCH TRIAL

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**October 07, 2016**

---

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
vs.  
Rose LLC, Defendant(s)

---

**October 07, 2016      10:00 AM      Bench Trial**

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

**PARTIES**

<b>PRESENT:</b>	Marshall, Samuel	Attorney
	Sheehan, Patrick J.	Attorney
	Van, Michael C.	Attorney

**JOURNAL ENTRIES**

- DAY 2

Also present: Brad Anthony, Client Representative for the Plaintiff.

Testimony and exhibits presented. (See worksheet.) LUNCH RECESS.

Testimony and exhibits continued. (See worksheet.) COURT ORDERED, Exhibits 66, 67 and 68 ADMITTED per stipulation. At the hour of 2:56 PM Defendant RESTED. No rebuttal case by the Plaintiff.

Closing arguments Mr. Sheehan and Mr. Van. The Court determined that the Defendant cannot raise Operadora's failure to be named as cc as defense under the circumstances presented in this case. The Court finds Mr. Anthony's testimony related to Mr. Dragul's request to change the notice more credible than Mr. Dragul's testimony related to the issue; the notice of default on May 14 and the notice of termination on May 28 were served in substantial compliance with the notice provisions of the lease, given Mr. Dragul's request to Mr. Anthony; there is no evidence of breach of the covenant

of good faith and fair dealing by Treasure Island. For that reason, the Court FINDS for the Plaintiff and against the Defendant in this matter.

Counsel to prepare findings of fact and conclusions of law.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Business Court Matters**

**COURT MINUTES**

**December 08, 2016**

---

A-15-719105-B      Treasure Island LLC, Plaintiff(s)  
                                 vs.  
                                 Rose LLC, Defendant(s)

---

**December 08, 2016      8:30 AM      All Pending Motions**

**HEARD BY:** Gonzalez, Elizabeth      **COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Dulce Romea

**RECORDER:** Jill Hawkins

**REPORTER:**

**PARTIES**

<b>PRESENT:</b>	Marshall, Samuel	Attorney
	Polsenberg, Daniel F.	Attorney
	Sheehan, Patrick J.	Attorney
	Smith, Abraham G.	Attorney
	Van, Michael C.	Attorney

**JOURNAL ENTRIES**

- DEFENDANT/COUNTERCLAIMANT, ROSE, LLC'S MOTION FOR STAY OF EXECUTION DURING PENDENCY OF APPEAL AND WAIVER OF SUPERSEDEAS BOND ON AN ORDER SHORTENING TIME...DEFENDANT/COUNTERCLAIMANT, ROSE, LLC'S MOTION FOR RECONSIDERATION, TO AMEND FINDINGS OF FACT, TO AMEND THE JUDGMENT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON AN ORDER SHORTENING TIME

Brad Anthony, Client Representative for Plaintiff, present with Mr. Sheehan.

DEFENDANT/COUNTERCLAIMANT, ROSE, LLC'S MOTION FOR RECONSIDERATION, TO AMEND FINDINGS OF FACT, TO AMEND THE JUDGMENT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON AN ORDER SHORTENING TIME: Following arguments by counsel as to whether the findings constitute a judgment, COURT noted the word "judgment" does not appear and ORDERED, Plaintiff to prepare a separate judgment on declaratory relief issues and run it by opposing counsel prior to submission to the Court.

DEFENDANT/COUNTERCLAIMANT, ROSE, LLC'S MOTION FOR STAY OF EXECUTION DURING PENDENCY OF APPEAL AND WAIVER OF SUPERSEDEAS BOND ON AN ORDER SHORTENING TIME: Court noted a stay would be premature if a judgment has not been entered. Mr. Polsenberg explained a stay can be ordered that would be effective upon entry of judgment and notice of appeal. Court so noted. Mr. Polsenberg further requested a nominal bond; security would be necessary for the difference of what Senor Frogs pays them and what they pay Treasure Island; however, they do not have information on what the bond amount should be and the parties should brief it with evidence. Mr. Sheehan disagreed, noting that this issue has been fully briefed and they simply need to figure out the additional space; \$1.5 million is very conservative.

COURT ORDERED, Mr. Polsenberg's request for additional briefing GRANTED. Matter continued to December 14, 2016 at 8:30 AM for the Court to hear the issue on the amount of the bond to take effect. Parties to determine briefing schedule, as long as the briefs are submitted by the day before. Mr. Polsenberg to file his brief by Monday, December 12, at noon. Mr. Sheehan to prepare the order denying the motion for reconsideration as well as the judgment.

The Motion for Attorney's Fees will not be advanced from the December 23rd Chambers calendar per Mr. Sheehan's agreement to an extension of the filing of Defendant's opposition.

CLERK'S COPY

<p>TREASURE ISLAND, LLC, a Nevada limited liability company,</p> <p style="text-align: right;">Plaintiff</p> <p style="text-align: center;">v.</p> <p>ROSE, LLC, a Nevada limited liability company,</p> <p style="text-align: right;">Defendant</p>	<p>Case No.: A-15-719105-B          Dept. No.: XI          Judge: Judge Gonzalez          Court Clerk: DULCE ROMERA          COURT RECORDER: JILL HAWKINS</p> <p><b>STIPULATED EXHIBIT LIST</b></p>
<p>ROSE, LLC, a Nevada limited liability company,</p> <p style="text-align: right;">Counterclaimant</p> <p style="text-align: center;">v.</p> <p>TREASURE ISLAND, LLC, a Nevada limited liability company,</p> <p style="text-align: right;">Counterdefendant</p>	<p>Trial Date: October 6, 2016 <i>&amp; BENCH TRIAL</i>          Trial Time: 9:30 a.m.</p> <p><i>COUNSEL FOR PLTF: PATRICK SHEEHAN, ESQ.</i></p> <p><i>COUNSEL FOR DEPT: MICHAEL VAN, ESQ.</i>  <i>&amp; SAMUEL MARSHALL, ESQ.</i></p>

NO.	EXHIBIT DESCRIPTION	BATES NO.	DATE OFFERED	OBJECTION	DATE ADMITTED
1	Lease Agreement between Treasure Island, LLC and Rose, LLC, dated April 13, 2011.	ROSE000001-ROSE000030	10-6-16	NO	10-6-16
2	First Amendment to Lease Agreement between Treasure Island, LLC and Rose, LLC, dated October 10, 2011.	ROSE000031-ROSE000032	}	}	}
3	Second Amendment to Lease Agreement between Treasure Island, LLC and Rose, LLC, dated December 22, 2011.	ROSE000033			
4	Email correspondence between Brad Anthony and Elizabeth Gold, dated December 16, 2011.	ROSE000094	10-6-16	NO	10-6-16

NO.	EXHIBIT DESCRIPTION	BATES NO.	DATE OFFERED	OBJECTION	DATE ADMITTED
5	Letter from Griffis to Dragul dated January 31, 2012.	TILLC000001	10-6-16	NO	10-6-16
6	Third Amendment to Lease Agreement between Treasure Island, LLC and Rose, LLC, dated April 20, 2012.	ROSE000034- ROSE000035			
7	Letter from Kahn to California Service Center dated May 3, 2012 with sight plans.	TILLC000002 – TILLC000004			
8	Letter from Anthony to Rose, LLC dated August 31, 2012.	TILLC000005 – TILLC000006			
9	Letter from Anthony to Rose, LLC dated September 19, 2012.	TILLC000007 – TILLC000008			
10	Letter from Gold to Treasure Island, LLC dated September 26, 2012.	TILLC000009 – TILLC000010			
11	Unsigned letter from Griffis to Dragul dated November 12, 2012.	TILLC000011			
12	Fourth Amendment to Lease Agreement between Treasure Island, LLC and Rose, LLC, dated April 18, 2013.	ROSE000036- ROSE000038			
13	Letter from Anthony to Rose, LLC dated May 10, 2013.	TILLC000012- TILLC000014			
14	Letter dated November 12, 2013 from Meade to Treasure Island, LLC and Senior Frogs.	TILLC000015 – TILLC000016			
15	Two-page email exchange regarding Bang the Drum All Day, cease and desist, dated January 17, 2014.	TILLC000017 – TILLC000018			
16	Email correspondence between Brad Anthony, Gary Dragul, and Najam Khan, dated March 5, 2014.	ROSE000085- ROSE000086	10-6-16	NO	10-6-16