EXHIBIT A TO DOCKETING STATEMENT

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CLERK OF THE COURT

NEO
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DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada limited liability company; Plaintiff, vs. ROSE, LLC, a Nevada limited liability company; Defendant.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

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-

referenced matter on the 7th day of November, 2016, a copy of which is attached hereto.

Dated this 7th day of November, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
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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)

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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.	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.

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

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

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

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

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

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

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

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

[1] 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.

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

> Q. …Sir, do you recall a telephone conversation that you had with Mr. Anthony following receipt of this letter [the August 31, 2012 letter]?
>
> A. [by Mr. Dragul] I do not.

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

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

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

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

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

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

one[2], the communication was sent to Dragul and Operadora was not copied.

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

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

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

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

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

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

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

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

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

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

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

[2] The only exception to this was a letter from Jerry Griffis, 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.

Island.

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

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

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

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

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

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

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

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

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

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

39. Señor Frogs is a subsidiary of Operadora.

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

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

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

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

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

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

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

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

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

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

50. The email states:

> "Pat – thank you for your time today. This email will confirm our discussions. The letter from Mr. Wirthlin to Rose, LLC and Operadora Andersons S.A. de C.V. dated May 28, 2015, was sent to my client for 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.
>
> 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

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

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

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

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

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

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

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

1. The party to be estopped must be apprised of the true facts;

2. He must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has a right to believe it was so intended.

3. The party asserting the estoppel must be ignorant of the true state of facts;

4. He must have relied on his detriment on the conduct of the party to be estopped. In addition silence can raise an estoppel quite as effectively as can words. *Teriano v. Nev. State Bank*, 121 Nev. 217, 223, 112 P3.d 1058, 1062 (2005).

Here, Rose was aware of Treasure Island's decision not to send numerous notices to the attention of Susan Markusch after Mr. Dragul had instructed Mr. Anthony to send all notices to his attention. Thus, Rose was aware that all future notices after August 31, 2012 were being sent to Mr. Dragul and not Ms. Markusch. Similarly, when Mr. Dragul asked Mr. Anthony to send all future notices to his attention he obviously intended that his conduct would be acted upon by Anthony. Next, Treasure Island was clearly ignorant to any change in direction by Rose to change the person who the notice needed to be sent to from Mr. Dragul back to Ms. Markusch since the evidence showed Dragul never 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 4th day of November, 2016.

District Court Judge

JW

Submitted by:

FENNEMORE CRAIG, P.C.

By: _____

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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 7th, 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)

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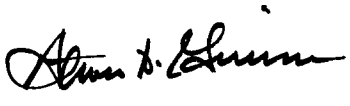
An Employee of Fennemore Craig, P.C.

EXHIBIT B TO DOCKETING STATEMENT



CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada limited liability company; Plaintiff, vs. ROSE, LLC, a Nevada limited liability company; Defendant.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ORDER DENYING MOTION FOR RECONSIDERATION was entered in the above-referenced

matter on the 14th day of December, 2016, a copy of which is attached hereto.

Dated this 16th day of December, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
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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 December 16, 2016, service of the NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION 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):

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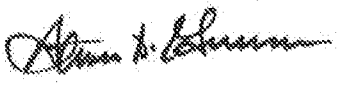
Sam Marshall	samuel@shumwayvan.com

/s/ Adam Miller
An Employee of Fennemore Craig, P.C.



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Attorney for Plaintiff, Treasure Island

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. NO.: XI

ORDER DENYING MOTION FOR RECONSIDERATION

Defendant Rose, LLC having filed a Motion for Reconsideration of the Court's Findings of Facts and Conclusions of Law, the Court having considered the papers and pleadings on file herein and entertained oral argument regarding the same,

IT IS HEREBY ORDERED that the Motion for Reconsideration is denied.

Dated this 14th day of December, 2016.

DISTRICT COURT JUDGE

JW

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: _____

Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
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Attorneys for Plaintiffs/Counterdefendants

EXHIBIT C TO DOCKETING STATEMENT

CLERK OF THE COURT

NEO

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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.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF JUDGMENT**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a JUDGMENT was entered in the above-referenced matter on the 21st day of December,

2016, a copy of which is attached hereto.

Dated this 22nd day of December, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
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 December 22, 2016, service of the NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION 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)

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/s/ Adam Miller
An Employee of Fennemore Craig, P.C.

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Email: psheehan@fclaw.com
Attorney for Plaintiff, Treasure Island

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. NO.: XI

JUDGMENT

This action having come on for trial before the Honorable Judge Gonzalez, presiding, and the issues having been duly tried on October 6 and 7, 2016 and the decision having been duly rendered, the Court grants declaratory judgment that Treasure Island's lease with Rose, LLC is terminated. Judgment is also hereby entered for Treasure Island on Rose, LLC's counterclaims.

The Judgment is based on the Findings of Fact and Conclusions of Law previously signed by the Court.

Dated this 20 day of December, 2016.

DISTRICT COURT JUDGE

JW

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: #13690

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Attorneys for Plaintiffs/Counterdefendants

EXHIBIT D TO DOCKETING STATEMENT

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CLERK OF THE COURT

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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.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS FEES IN THE AMOUNT OF $126,000 AGAINST ROSE, LLC**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS

FEES IN THE AMOUNT OF $126,000 AGAINST ROSE, LLC was entered in the above-referenced matter on the 10th day of January, 2017, a copy of which is attached hereto.

Dated this 11th day of January, 2017.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
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Las Vegas, NV 89101
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 January 11, 2016, service of the NOTICE OF ENTRY OF ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS FEES IN THE AMOUNT OF $126,000 AGAINST ROSE, LLC 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)

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	Sam Marshall	samuel@shumwayvan.com

/s/ Adam Miller
An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

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Attorney 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. NO.: XI

ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS FEES IN THE AMOUNT OF $126,000 AGAINST ROSE, LLC

Plaintiff Treasure Island, LLC ("Treasure Island") having filed a motion for attorney's fees, the Court having reviewed the papers and pleadings filed on behalf of Treasure Island and Rose, LLC relating to the same and good cause appearing therefore the Court awards Treasure Island $126,000 in attorney fees against Rose, LLC.

The Court enters such an Order based on its findings that the lease agreement between the parties contained an attorneys fees clause providing that the prevailing party in any dispute concerning the lease would be entitled to their reasonable attorneys fees. The Court reviewed the motion and the factors set forth by the Nevada Supreme Court in *Schouweiler v. ENC Company, 101 Nev. 827, 834, 712 P2d 786, 790 (1985)* and determined that the fees requested of $126,000 were reasonable. Treasure Island's counsel had the qualities, skill, ability, training, education, experience and standing necessary for the award of the fees. They spent the time required with respect to the specific issues in this case. The litigation was important. The work actually performed by Treasure Island's lawyers was given the proper attention and the final result was successful.

Accordingly, the Court grants Treasure Island's Motion for Attorneys Fees against Rose, LLC in the amount of $126,000.

Dated this 24th day of January, 2017.

DISTRICT COURT JUDGE

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: _____
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John H. Mowbray (Bar No. 1140)
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Las Vegas, NV 89101
Attorneys for Treasure Island, LLC

EXHIBIT E TO DOCKETING STATEMENT

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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.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF FINAL JUDGMENT**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a FINAL JUDGMENT was entered in the above-referenced matter on the 10th day of January, 2017,

a copy of which is attached hereto.

Dated this 11th day of January, 2017.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
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 January 11, 2016, service of the NOTICE OF ENTRY OF JUDGMENT 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)

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Lewis Roca Rothgerber Christie		
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	Rebekah Griffin	rebekah@shumwayvan.com
	Sam Marshall	samuel@shumwayvan.com

/s/ Adam Miller
An Employee of Fennemore Craig, P.C.

JUDG

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Attorney 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. NO.: XI **FINAL JUDGMENT**

This action having come on for trial before the Honorable Judge Gonzalez, presiding, and the issues having been duly tried on October 6 and 7, 2016 and the decision having been duly rendered, the Court GRANTS declaratory judgment that Treasure Island's lease with Rose, LLC is terminated as a result of Rose, LLC's breach. The Court dismisses as moot Treasure Island's

claim for damages as a result of the breach at this time. Judgment is also hereby entered for Treasure Island on Rose, LLC's counterclaims.

Pursuant to NRCP 62(a), execution of this judgment will be stayed for 10 days following written notice of its entry without bond, and for one year thereafter upon the posting of a $850,000 supersedeas bond with the clerk of the Court. If the appeal is not then resolved, Treasure Island, LLC may request that the amount be increased which the Court has stated it will do so to $930,000.

Dated this 5th day of January, 2017.

DISTRICT COURT JUDGE

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: _____
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John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
Attorneys for Treasure Island, LLC

Approved as to form and content by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: _____
Daniel F. Polsenberg (Bar No. 2376)
J. Christopher Jorgensen (Bar No. 5382)
Joel D. Henriod (Bar No. 8492)
Abraham G. Smith (Bar No. 13250)
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Attorneys for Rose, LLC

EXHIBIT F TO DOCKETING STATEMENT

MRCN
MICHAEL C. VAN, ESQ.
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SAMUEL A. MARSHALL, ESQ.
Nevada Bar No. 13718
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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	Case No.: A-15-719105-B Dept. No.: XI **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** Hearing Date: November 22, 2016 Hearing Time: 8:30 am
ROSE, LLC, a Nevada limited liability company, Counterclaimant v. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant	

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 moves this Honorable Court, pursuant to EDCR 2.24, NRCP 52(b), NRCP 59(e), and NRCP 69(a) to reconsider its November 7, 2016 Findings of Fact and Conclusions of Law ("FFCL") finding in

favor of Plaintiff ("TI") and denying Rose's Counterclaims, amend its FFCL, amend its judgment, or, in the alternative, set this matter for a new trial. This Motion is made and based upon the following Memorandum of Points and Authorities, the pleadings and papers on file, and any other evidence or argument this Court may allow at the time of hearing on this matter.

DATED this 16 day of November, 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

ORDER SHORTENING TIME

TO ALL INTERESTED PARTIES:

Upon the Declaration of Samuel A. Marshall, Esq., and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the time for hearing of the above-entitled matter will be shortened and will be heard on the 22nd day of Nov, 2016, at the hour of 8:30 a.m. in Department XI of the Eighth Judicial District Court, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155.

_____
DISTRICT COURT JUDGE

Submitted by:

SHUMWAY VAN

By: _____
MICHAEL C. VAN, ESQ. #3876
SAMUEL A. MARSHALL, ESQ. #13718
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Attorneys for Defendant/Counterclaimant

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DECLARATION IN SUPPORT OF ORDER SHORTENING TIME

1. I, Samuel A. Marshall, Esq., am an attorney with the law firm of Shumway Van and counsel for the Defendant/Counterclaimant in the above case. I have personal knowledge of the facts and circumstances stated herein and as for those stated upon information and belief, I believe them to be true.

2. This Court issued its Findings of Fact and Conclusions of Law on November 7th, 2016 finding in favor of Plaintiff/Counterdefendent Treasure Island, LLC ("TI") (the "Decision").

3. Rose's above Motion should be heard on shortened time to allow Rose to protect its leasehold interest within the Treasure Island during the pendency of Rose's eventual appeal.

4. Moreover, it would be in the best interests of the parties, and in the interest of judicial economy, to hear both Rose's above Motion for Reconsideration, to Amend Findings of Fact, to Amend the Judgment, or, in the Alternative, For A New Trial and its subsequently submitted Motion for Stay of Execution During Pendency of Appeal and Waiver of Supersedeas Bond prior to November 22, 2016 and preferably on the same day.

5. I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045), the foregoing is true and correct.[1]

Dated this 16 day of November, 2016.

SAMUEL A. MARSHALL, ESQ.

[1] **NRS 53.045** Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

A. INTRODUCTION

This case is nothing more than an attempt by Plaintiff and Counterdefendant Treasure Island, LLC ("TI") to pirate valuable leased space from its tenant, notwithstanding a long-term contractual occupancy agreement and based purely on a technical leasing infraction. TI has conceded it failed to comply with the notice, no oral modification and merger and integration requirements found in the April 13, 2011 lease (the "Lease") between TI and Rose, LLC ("Rose"), and the additional leasing requirements outlined in the April 30, 2014 Fifth Amendment to the Lease ("Fifth Amendment"). TI has argued the notice provisions are inconsequential and were amended by some ancillary off the books agreement between Brad Anthony ("Mr. Anthony") as general counsel for TI and Gary Dragul ("Mr. Dragul") as President of Rose that the parties embraced sometime between August 31, 2012 and September 19, 2012 (the "Alleged Oral Agreement"), *i.e.*, approximately two (2) years prior to subsequent written notice requirements agreed to by all parties. According to TI, the parties orally modified the written Lease in contravention of its explicit terms and subsequent amendments without even involving or notifying subtenant Senor Frogs.

Trial on this case went from October 6, 2016 through October 7, 2016 and the exhibits used at trial are incorporated herein by reference. Trial testimony was heard from three witnesses, namely: David Krouham ("Mr. Krouham"), president of Grupo Anderson's ("Anderson's") and owner of the Señor Frog's name and brand; Mr. Anthony; and, Mr. Dragul. Most witness inquiry from both sides dealt with the Lease, Fifth Amendment, and the Alleged Oral Agreement.

On November 7, 2016, this Court entered its Findings of Fact and Conclusions of Law (the "Decision") in favor of TI. The crux of this Court's Decision revolves around the Alleged Oral Agreement which the Court held "modified the lease,"[2] the unambiguous notice provisions of the Lease and Fifth Amendment which this Court found Rose had waived "as a result of the [Alleged

[2] The Court's Findings of Fact and Conclusions of Law at Pg. 7, ll. 16-18.

Oral Agreement],"[3] and the Court's finding that Rose "received actual notice" of TI's May 14, 2015 default letter.[4] Thus, this Court mostly based its Decision on the self-serving testimony of Mr. Anthony that a 2012 Alleged Oral Agreement somehow controlled a 2014 written agreement. In doing so, the Court rejected the more plausible explanation that TI had failed to comply with unambiguous Lease terms and that Mr. Anthony's reliance on a 2012 Alleged Oral Agreement to justify the breach is simply backfill designed to rationalize his professional mistake and mitigate his liability.

B. FACTUAL BACKGROUND

On April 13, 2011, TI and Rose entered a Lease for the space located directly adjacent to the body of water where TI historically held its famous pirate shows (the "Premises") wherein a subsidiary of Anderson's, Operadora Andersons ("Operadora"), subleases a portion of the Premises from Rose and operates a Mexican-themed restaurant called Señor Frog's ("Señor Frog's").[5] Without a doubt, the Premises is prime beachfront on the Las Vegas Strip and the Lease itself is a substantial treasure owned by Rose.

Rose is based out of Greenwood Village, Colorado and deals primarily in the business of real estate. Mr. Krouham and Operadora are in Cancun, Mexico and operate over forty (40) restaurants throughout Latin America and the United States. Prior to the execution of the Lease, Mr. Dragul met with Mr. Krouham to discuss the joint venture that would later become one of the most prominent Señor Frog's restaurants in the United States ("Joint Venture"). After reaching a deal agreeable to both Rose and Anderson's, Mr. Dragul approached Phillip G. Ruffin ("Mr. Ruffin"), President of TI, to negotiate the terms of, and eventually enter, the Lease.

From the beginning, Rose has subleased the Premises to Señor Frog's (the "Sublease"), either in whole or in part, and both Rose and Señor Frog's have invested millions of dollars in the Premises to increase the success of the Joint Venture, also known as Senor Frog's Las Vegas, LLC

[3] Id at Pg. 9, ll. 10-12.
[4] Id at Pg. 9, ll. 21-22.
[5] Exhibit 1.

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("SFLV"), in hopes of some eventual return on their investment. Sometime after the Lease was executed and Señor Frog's was operating, it became apparent to both Rose and Anderson's that it would be best to modify the Joint Venture so that Operadora, i.e., Anderson's operating company charged with the responsibility of overseeing the operations of all the Señor Frog's restaurants, could operate Señor Frog's alone while Rose continued to act as its landlord and utilize the majority of the top floor of the Premises for other uses. As a result, SFLV and Rose amended the Sublease on May 6, 2014 (the "Amended Sublease").

Toward the end of 2011 through the beginning of 2012, the Premises underwent extensive construction and remodeling resulting in the Premises having a completely custom Señor Frog's design (the "Señor Frog's Buildout"). Initially, Rose, and the contractor provided by TI, anticipated the cost of the Señor Frog's Buildout to be approximately three million dollars; however, the extensive change orders suggested by the contractor and required by the architect on the project significantly increased Rose's costs by nearly one hundred percent (100%) and, as a result, a dispute arose, that has since been resolved, between Rose and the contractor (the "Construction Dispute").

On August 31, 2012, TI sent a letter to Rose in direct compliance with the notice provisions of the Lease, i.e., the letter was sent to Rose with attention to Susan Markusch ("Ms. Markusch") with a copy sent to Operadora, addressing the Construction Dispute.[6] Shortly thereafter, there was an alleged telephone conversation between Mr. Anthony and Mr. Dragul regarding the same. The substance of that alleged conversation was the main source of controversy between the parties at trial. According to Mr. Anthony, it was during that phone call that "[Mr.] Dragul specifically requested that [Mr.] Anthony send all future correspondence dealing with the Treasure Island-Rose relationship directly and only to him."[7] To support his claim of the Alleged Oral Agreement, Mr. Anthony pointed to his September 19, 2012 letter sent to Mr. Dragul that does not strictly comply with the notice provisions of the Lease and states in pertinent part, "[s]everal days ago, you requested that [TI] postpone your repayment obligations on the $2,500,000.00 interest free

[6] Exhibit 8.
[7] The Court's Findings of Fact and Conclusions of Law at ¶ 10.

loan granted to you in accordance with section 3.4 of the Lease Agreement between [Rose] and [TI]."[8] The September 19, 2012 letter makes no mention of the Alleged Oral Agreement.

This Court found, "Mr. Anthony's testimony regarding Mr. Dragul's request to change the notice was much more credible than Mr. Dragul's testimony related to the issue"[9] and "[Mr. Dragul] agreed that he did in fact tell Mr. Anthony to make all future communications to him"[10]; however, Mr. Dragul never agreed to the same. While it may appear Mr. Anthony's testimony regarding this issue has merit considering all disclosed correspondence from TI to Rose after that point, and prior to June 12, 2014, were sent only to Mr. Dragul and not to Operadora, TI has produced no writing memorializing the Alleged Oral Agreement it alleges amended the Lease. Regardless of whether Mr. Dragul made any such request, and he testified at trial that he did not[11], the notice provisions of the Lease were amended by the Fifth Amendment on April 30, 2014, almost two (2) years after the Alleged Oral Agreement.[12]

On April 30, 2014, Rose and TI executed the Fifth Amendment.[13] Section 11 of the Fifth Amendment revised and supplemented the notice provisions under the Lease. For example, Rose updated its address, the parties reiterated TI's requirement to send notices to Operadora, and TI agreed to send all notices to Operadora's counsel in Florida.[14] Therefore, any Alleged Oral Agreement between Mr. Anthony and Mr. Dragul was superseded by the Fifth Amendment which imposed additional notice requirements on TI and makes no mention of any agreement between Mr. Anthony and Mr. Dragul. In fact, the correspondence between TI and Rose following the Fifth Amendment more fully complied with the Fifth Amendment notice requirements than it did the Alleged Oral Agreement.

TI has disclosed four (4) letters sent to Rose following the Fifth Amendment and prior to TI's May 14, 2015 default notice. More specifically, on June 12, 2014, Mikyung Kim sent a letter

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[8] Exhibit 9.
[9] Id at ¶12.
[10] Id at ¶11.
[11] Trial Transcript at Pg. 38, ll. 18-20.
[12] Exhibit 28.
[13] Id.
[14] Id.

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to Rose addressed solely to Andrew Solomon ("Mr. Solomon") and not directly to Mr. Dragul.[15] The next correspondence disclosed by TI was again addressed to Mr. Solomon and makes no mention of Mr. Dragul.[16] The next correspondence disclosed by TI is totally at odds with the Alleged Oral Agreement and nearly complies with the Lease and Fifth Amendment as copies were also sent to Operadora and its counsel; however, this letter was sent to Rose with attention to Mr. Dragul rather than Ms. Markusch.[17] Finally, on January 15, 2015, Mr. Anthony sent a notice solely to Rose with attention to Mr. Dragul[18]; however, in his deposition, Mr. Anthony testified that he believed he actually did carbon copy Operadora on this correspondence but omitted to indicate the same on the letter.[19] After the Fifth Amendment and prior to May 14, 2015, not one letter sent by TI to Rose was sent directly to Mr. Dragul without copying Operadora. Therefore, if there was an Alleged Oral Agreement regarding notice between Mr. Anthony and Mr. Dragul in 2012, that agreement was amended and superseded in writing by the parties two (2) years later with the execution of the Fifth Amendment as evidenced by the record. Therefore, the controlling document governing notice should have been the Fifth Amendment.

In addition to relying on Mr. Anthony's testimony, this Court held "Rose cannot raise any claims regarding Treasure Island's failure to notice Señor Frogs since that claim belongs to Señor Frogs"[20]; however, SFLV is not a party to the Lease at issue in this case and even though Rose bargained for the additional requirement that TI to not only notify Operadora but also its counsel in Florida, that bargained for term was a requirement of TI's under the Lease for the benefit of Rose. Under Section 9(d) of the Sublease, Rose and SFLV acknowledge TI's requirement to notify SFLV of any breach on the part of Rose under the Lease.[21] In relevant part, the Sublease provides, "If [SFLV] cures any alleged default under the [Lease] on behalf of [Rose] and to the satisfaction of [TI]... [Rose] will be responsible to repay [SFLV] within thirty (30) days for any monetary

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[15] Exhibit 31.
[16] Exhibit 33.
[17] Exhibit 35.
[18] Exhibit 37.
[19] Exhibit 57 at 79:18-20.
[20] The Court's Findings of Fact and Conclusions of Law at Pg. 10, ll. 16-17.
[21] Exhibit 30.

amounts reasonably expended to cure the alleged default...."[22] Additionally, the Sublease states, "If [SFLV] cures an alleged default under the [Lease]... more than four (4) times, then [Rose] will not object to [SFLV's] efforts to assume the [Lease]."[23] Having heavily negotiated these extremely favorable terms of the Amended Sublease, Rose negotiated with TI to amend the notice provisions under the Fifth Amendment to ensure Rose's rights under the Sublease were protected. Therefore, regardless of whether there was an Alleged Oral Agreement between Mr. Anthony and Mr. Dragul to orally modify the contract, TI accepted Rose's additional notice requirements in a new written contract, the Fifth Amendment. TI's requirement to notify Operadora and its Florida counsel of any breach on the part of Rose was not simply for the benefit of SFLV; rather, Rose negotiated for that specific language and requirement for its own benefit. Considering Rose bargained for TI's requirement to notify its subtenant of Rose's breach under the Lease, Rose should have been permitted to raise claims that TI failed to follow such requirements.

Had TI properly notified the appropriate parties, either SFLV or Rose would have cured Rose's missed Percentage Rent payment and TI would not have been able to bring this case before the Court. Furthermore, Rose would not have been forced to incur, and continue to incur, substantial litigation fees defending its position, and this Court would not have terminated Rose's extremely valuable asset and significant leasehold interest in the Premises. TI's failure to send its May 14, 2015 default notice to Ms. Markusch, Operadora, and its counsel in Florida was a material breach of the Lease and, as a result, this Court should have allowed Rose to raise TI's failure to comply with the Lease as a defense to its failure to cure within ten (10) days from its receipt of TI's May 14, 2015 default notice. Therefore, in the interest of equity and contract principles, Rose respectfully requests this Court reconsider its finding in favor of TI and, instead, find in favor of Rose with respect to both TI's claims and Rose's counterclaims.

...

...

...

[22] Id.
[23] Id.

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II. LEGAL ARGUMENT

Regardless of whether this Court found Mr. Anthony to be more credible than Mr. Dragul with respect to Mr. Anthony's self-serving testimony, it should have enforced the Lease and Fifth Amendment as written.

A. THIS COURT SHOULD RECONSIDER ITS FINDING THAT THE ALLEGED ORAL AGREEMENT BETWEEN MR. ANTHONY AND MR. DRAGUL CONTROLLED THE NOTICE PROVISIONS AFTER A SUBSEQUENT WRITING WAS EXECUTED BY THE PARTIES

1. This Court's Decision is in violation of the Parol Evidence Rule.

With respect to oral modifications of written contracts, the Supreme Court has repeatedly stated that "[i]t has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written."[24] The Court has also held that when a provision in a contract, such as a notice provision, is "clear on its face," it "must be interpreted [and enforced] as written."[25] Additionally, "[w]here an agreement is unambiguous, no extrinsic evidence is admissible to modify, vary, or contradict its language."[26] Moreover, "[t]he parol evidence rule does not permit the admission of evidence that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous. With respect to ambiguity, parol evidence is admissible to prove a separate oral agreement regarding any matter not included in the contract or to clarify ambiguous terms so long as the evidence does not contradict the terms of the written agreement."[27] Finally, the "parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have been merged therein."[28] In this case, TI never argued that the Lease terms were ambiguous or otherwise unclear. Without a doubt, the notice

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[24] Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 278, 21 P.3d 16, 20 (2001).
[25] Id. at 280; see also Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (citing Southern Trust v. K & B Door Co., 104 Nev. 564, 568, 763 P.2d 353, 355 (1988) (holding that if a document is facially clear, it will be construed according to its language)).
[26] County of Clark v. Bonanza No. 1, 96 Nev. 643, 652, 615 P.2d 939, 944 (1980).
[27] Ringle v. Bruton, 86 P.3d 1032, 120 Nev. 82 (2004).
[28] Grimsley v. Charles River Labs., 2011 U.S. Dist. LEXIS 111683 at *31-32 (D. Nev. 2011) quoting Daly v. Del E. Webb Corp., 96 Nev. 359, 609 P.2d 319, 320 (Nev. 1980).

provisions in this case are clear on their face and should have been enforced as the Lease was always very specific with respect to appropriate notice procedures.[29] Along with the requirements for any notice to be in writing, Section 19.6 of the Lease outlines the methods and manner of proper notice under the Lease[30]:

> Any notice or other communication required or permitted to be given by a party hereunder shall be in writing, and shall be deemed to have been given by such party to the other party or parties (a) on the date of personal delivery, (b) on the date delivered by a nationally recognized overnight courier service when deposited for overnight delivery, (c) on the next Business Day following any facsimile transmission to a party at its facsimile number set forth below; provided, however, such delivery is concurrent with delivery pursuant to the provisions of clauses (a), (b) or (d) of this Section 19.6, or (d) three (3) Business Days after being placed in the United States mail, as applicable, registered or certified, postage prepaid addressed to the following addresses (each of the parties shall be entitled to specify a different address and/or contact person by giving notice as aforesaid):
>
> If to Landlord:
> Treasure Island, LLC
> 3300 Las Vegas Blvd., South
> Las Vegas, NV 89109
> Attn: Najam Khan
> Facsimile: 702-894-7680
> E-mail: nkhan@treasureisland.com
>
> With a copy via facsimile to:
>
> Brad Anthony, General Counsel
> Facsimile: 702-894-7295
> E-mail: banthony@treasureisland.com
>
> If to Tenant:
> Rose, LLC
> 8301 E. Prentice Ave., Suite 210
> Greenwood Village, CO 80111
> Attn: Susan Markusch
> Facsimile: 303-221-5501
> E-mail: susan@gdare.com
>
> With a copy to:
>
> Operadora Andersons S.A. de C.V.
> Boulevard Kakulkan km 14.2
> Cancun, Mexico
> C.P. 77500 Zona Hotelera

Section 19.6 of the Lease is clear and unambiguous; therefore, it should have been enforced. TI was required to send any default notice to Rose with attention to its controller, Ms.

[29] Exhibit 1 at Section 19.6.
[30] Id.

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Markusch, and send a copy of the same to Operadora in Cancun, Mexico. Mr. Anthony's self-serving testimony that he and Mr. Dragul had an oral agreement was not an agreement "regarding any matter not included in the contract" nor did it "clarify ambiguous terms"; rather, the alleged agreement modified TI's notice requirements under Section 19.6 in total "contradict[ion] [of] the terms of the written agreement" in direct violation of the parol evidence rule as outlined above.

Additionally, the Fifth Amendment's language is also clear and unambiguous and should have been enforced. In relevant part, TI and Rose amended the notice provision of Section 19.6 to reiterate TI's requirement to send Operadora a copy of any notice sent to Rose and added an additional requirement that TI also send a copy of any such notice to SFLV's counsel in Florida.[31] Section 11 of the Fifth Amendment specifically provides[32]:

> The Parties agree that for purposes of Section 19.6 of the Lease, Tenant's notice address is updated to 5690 DTC Boulevard, Suite 515, Greenwood Village, CO 80111, and that copies of notices sent to Tenant per the Lease shall also be sent to Subtenant addressed to: Operadora Andersons S.A. de C.V, Boulevard Kukulkan km 14.2, Cancun, Mexico, C.P. 77500 Zona Hotelera, and to Subtenant's counsel, addressed to: Ronald R. Fieldstone, Esq. and Susan Trench, Esq., Arnstein & Lehr LLP, 200 South Biscayne Boulevard, Suite 3600, Miami, Florida 33131.

As such, the Lease as currently amended continues to require TI to notice Operadora directly of any alleged breach or default *and* was strengthened to require TI to provide notice directly to the operating subtenant's counsel.

The Lease as amended clearly provided Rose with heavily negotiated and reinforced notice rights and cure options. Mr. Anthony is a fiduciary of, and general counsel to, TI. He is well aware of the parol evidence rule and the practice of ensuring that all oral agreements should be memorialized in a writing. However, Mr. Anthony's testimony at trial was that he and Mr. Dragul modified the Lease during a phone call in 2012 and that he later allowed his principal, Phillip G. Ruffin ("Mr. Ruffin"), to sign a contract in 2014, the Fifth Amendment, with which Mr. Anthony had no intentions of complying. Allowing the Fifth Amendment to be executed knowing he was not going to comply with the same was, without a doubt, contracting in bad faith. Therefore, this Court should not have found in favor of TI and the written documents should have governed.

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[31] Exhibit 6 at Section 11.

[32] Id.

2. **This Court's Decision is in violation of the express provisions of the Lease.**

Section 19.7 of the Lease specifically provides, "[t]his Lease constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and supersedes all prior assignments, understandings, negotiations, and discussions, whether oral or written." Furthermore, Section 19.9 states, "[n]o supplement, modification, waiver or termination or this Lease shall be binding unless executed in writing by both parties. No waiver of any of the provisions of this Lease shall be deemed or shall constitute a waiver of any other provisions (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided."

Notwithstanding the above provisions of the Lease, this Court found an Alleged Oral Agreement between Mr. Anthony and Mr. Dragul modified the express terms of the Lease. Not only is such a finding in violation of the Statute of Frauds and the Parol Evidence Rule, it is in direction violation of the bargained for terms of the contract. The parties in this case have executed several written amendments to the Lease and the Alleged Oral Agreement is the only alleged modification of the Lease that is not in writing. Considering the express terms of the Lease, the past performance of the parties and the history of written amendments modifying the Lease, this Court should not have held there was an Alleged Oral Agreement between the parties that was completely contrary to the Lease.

3. **Regardless of whether there was an oral modification to the Lease, there was a subsequent writing that superseded any such modification.**

Putting aside the fact that Rose disputes there was ever an oral modification to the Lease in 2012, the Fifth Amendment modified the Lease in 2014 and any other Alleged Oral Agreement related thereto with respect to notice. As outlined above, Section 19.6 of the Lease provides, "each of the parties shall be entitled to specify a different address and/or contact person by giving notice as aforesaid." Assuming for the sake of argument there was an oral modification to the Lease in 2012, notwithstanding Sections 19.7 and 19.9 of the Lease as outlined above, and Section 19.6 was modified as argued by TI, it was later modified in 2014 by the Fifth Amendment.

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Similar to Section 19.7 of the Lease, Section 9(d)(c) of the Fifth Amendment specifically provides, "[t]his Agreement... constitutes the entire agreement of the parties hereto constituting its subject matter except as outlined herein." Likewise, Section 9(d)(d) of the Fifth Amendment reiterates Section 19.9 of the Lease and provides, "[t]his Agreement... may not be modified except in writing signed by both parties or by their respective successors in interest." Finally, as outlined above, the "parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have been merged therein."[33] Therefore, regardless of whether there was an Alleged Oral Agreement between Mr. Anthony and Mr. Dragul, the Fifth Amendment specifically amended the notice provisions of the Lease and "consistut[ed] the entire agreement of the parties... concerning [notice]." Therefore, this Court should not have found in favor of TI in its Decision as TI's entire argument relied on the Alleged Oral Agreement that was modified by a subsequent writing in 2014.

Because of the extremely favorable cure rights provided to Rose in the Sublease – in that SFLV was willing to cure any monetary default of Rose's up to four (4) times before it could attempt to contract directly with TI – Rose modified the notice provisions to include Operadora's counsel in Florida to ensure its subtenant received notice of any default so it could cure the same upon inquiry to Rose regarding its intentions. Furthermore, neither Rose nor TI made any attempt to remove Ms. Markusch as the contact person for Rose. Although TI somewhat complied with the Fifth Amendment and sent notices to Operadora and its counsel on (2) two of the (4) four correspondence subsequent to the Fifth Amendment, TI failed to include Operadora and its counsel on the May 14, 2015 notice of default at issue in this case.

Rose's intention for increasing TI's notice requirements under the Lease with the Fifth Amendment was to avoid the exact scenario before the Court. Although it was also in Operadora's best interest for it to receive notice of Rose's breach in that it could keep the status quo and maintain its relationship and contract with Rose, the contractual obligations under the Fifth Amendment were between Rose and TI. TI agreed to notify Operadora and its counsel to which it

[33] Grimsley v. Charles River Labs. at 31-32.

somewhat complied following the Fifth Amendment; however, TI completely failed to comply with its notice obligations when the anticipated scenario meant to be avoided eventually occurred. Therefore, regardless of whether there was an Alleged Oral Agreement regarding notice in 2012, that agreement was overwritten by the Fifth Amendment in 2014.

B. THIS COURT SHOULD AMEND ITS DECISION TO ADDRESS THE FIFTH AMENDMENT AND FIND THE ALLEGED ORAL MODIFICATION WAS SUPERSEDED BY THE FIFTH AMENDMENT

Under NRCP 52(b), this Court may "amend its findings or make additional findings and may amend the judgment accordingly." Additionally, NRCP 59(e) provides the basis for altering or amending a judgment. It should be noted that no judgment has been entered in this case; however, out of an abundance of caution, Rose is treating this Court's Decision as a judgment for purposes of this Motion and Rose seeks to modify the Court's Decision and any resulting judgment to reflect the timeline of agreements between the parties in this case. More specifically, even if this Court is inclined to hold there was an Alleged Oral Agreement between the parties after the Lease was executed, the parties executed the Fifth Amendment two (2) years later, effectively disregarding any Alleged Oral Agreement entered in 2012.

C. IF THIS COURT IS UNWILLING TO RECONSIDER OR AMEND ITS DECISION, A NEW TRIAL SHOULD BE GRANTED CONSIDERING THE ERROR IN LAW THAT OCCURRED AT TRIAL

Under NRCP 59(a)(7), a new trial may be granted when "an error in law occur[ed] at the trial and objected to by the party making the motion." As outlined above, the Parol Evidence Rule should have prohibited this Court from allowing an Alleged Oral Agreement to modify the express terms of the written Lease and the express provisions of both the Lease and Fifth Amendment prohibited the parties from entering any such agreement. Furthermore, any Alleged Oral Agreement was superseded by the Fifth Amendment which specifically addressed notice and outlined the requirements related thereto. Therefore, if this Court is unwilling to reconsider or amend its Decision and find in favor a Rose, a new trial should be granted.

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. . .

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III. CONCLUSION

Rose negotiated heavily for the increased notice provisions found in the Fifth Amendment considering it had a subtenant ready and willing to cure any default on its part. Rose and SFLV have invested millions of dollars in the Premises and will only finish repaying the loan they received from TI in the coming months. Should this Court terminate the Lease between Rose and TI, Rose will never recoup its investment in the Premises, will lose out on approximately twenty-five (25) years of valuable real estate on the Las Vegas Strip, and its subtenant will be forced to renegotiate or vacate its presence in the Premises. On the other hand, should this court set aside TI's termination, TI will not be damaged in any regard and will simply retain the benefits and obligations it freely bargained to obtain. Therefore, Rose respectfully requests this Court reconsider its finding in favor of TI and set aside its termination of the Lease.

DATED this 16 day of November, 2016.

SHUMWAY VAN

By: _____

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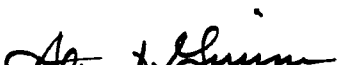
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that the foregoing **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** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 18th day of November, 2016 to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet).

An employee of Shumway Van

EXHIBIT G TO DOCKETING STATEMENT



CLERK OF THE COURT

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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;

2. The "Findings of Fact and Conclusions of Law" filed November 7, 2016, notice of entry of which was served electronically on November 7, 2016 (Exhibit A); and

3. All rulings and interlocutory orders made appealable by any of the foregoing.

DATED this 7th day of December, 2016.

SHUMWAY VAN

By: _____

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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 7th day of December, 2016 to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet).

An employee of Shumway Van

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EXHIBIT A

NEO
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John H. Mowbray (Bar No. 1140)
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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.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

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-

referenced matter on the 7th day of November, 2016, a copy of which is attached hereto.

Dated this 7th day of November, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
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 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)

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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.

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

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

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

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

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

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

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

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

[1] 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.

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

> Q. ...Sir, do you recall a telephone conversation that you had with Mr. Anthony following receipt of this letter [the August 31, 2012 letter]?
>
> A. [by Mr. Dragul] I do not.

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

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

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

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

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

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

one[2], the communication was sent to Dragul and Operadora was not copied.

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

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

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

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

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

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

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

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

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

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

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

[2] The only exception to this was a letter from Jerry Griffis, 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.

Island.

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

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

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

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

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

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

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

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

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

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

39. Señor Frogs is a subsidiary of Operadora.

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

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

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

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

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

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

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

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

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

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

50. The email states:

> "Pat – thank you for your time today. This email will confirm our discussions. The letter from Mr. Wirthlin to Rose, LLC and Operadora Andersons S.A. de C.V. dated May 28, 2015, was sent to my client for 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.
>
> 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

> until the dispute with Rose, LLC is resolved, whether by court action or settlement between the two parties. None of this will impact adversely on my client, which will be permitted to continue its sub-tenance. If your client prevails and terminates Rose, LLC's tenancy, at that point you would then negotiate a lease directly with my client in accordance with Section 9 of the Fifth Amendment.
>
> Thanks again for your assistance. Please copy me on any further correspondence. My contact information is below."

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

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

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

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

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

1. The party to be estopped must be apprised of the true facts;

2. He must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has a right to believe it was so intended.

3. The party asserting the estoppel must be ignorant of the true state of facts;

4. He must have relied on his detriment on the conduct of the party to be estopped. In addition silence can raise an estoppel quite as effectively as can words. *Teriano v. Nev. State Bank*, 121 Nev. 217, 223, 112 P3.d 1058, 1062 (2005).

Here, Rose was aware of Treasure Island's decision not to send numerous notices to the attention of Susan Markusch after Mr. Dragul had instructed Mr. Anthony to send all notices to his attention. Thus, Rose was aware that all future notices after August 31, 2012 were being sent to Mr. Dragul and not Ms. Markusch. Similarly, when Mr. Dragul asked Mr. Anthony to send all future notices to his attention he obviously intended that his conduct would be acted upon by Anthony. Next, Treasure Island was clearly ignorant to any change in direction by Rose to change the person who the notice needed to be sent to from Mr. Dragul back to Ms. Markusch since the evidence showed Dragul never 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 4th day of November, 2016.

District Court Judge

JW

Submitted by:

FENNEMORE CRAIG, P.C.

By: _____

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John H. Mowbray (Bar No. 1140)
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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)

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EXHIBIT H TO DOCKETING STATEMENT

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada limited liability company, Plaintiff, *vs.* ROSE, LLC, a Nevada limited liability company, Defendant.	Case No. A-15-719105-B Dept. No. 11 **AMENDED NOTICE OF APPEAL**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, *vs.* TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

AMENDED NOTICE OF APPEAL

Please take notice that defendant/counterclaimant Rose, LLC hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. "Findings of Fact and Conclusion of Law," filed November 7, 2016, notice of entry of which was served electronically on November 7, 2016 (Exhibit A);

3. "Order Denying Motion for Reconsideration," filed December 14, 2016, notice of entry of which was served electronically on December 16, 2016 (Exhibit B);

4. "Judgment," filed December 21, 2016, notice of entry of which was served electronically on December 22, 2016 (Exhibit C);

5. "Order and Judgment Granting Treasure Island's Motion for Attorneys Fees in the Amount of $126,000 Against Rose, LLC," filed January 10, 2017, notice of entry of which was served electronically on January 11, 2017 (Exhibit D);

6. "Final Judgment," filed January 10, 2017, notice of entry of which was served electronically on January 11, 2017 (Exhibit E); and

7. All rulings and interlocutory orders made appealable by any of the foregoing.

Dated this 17th day of January, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/ Joel D. Henriod*
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EXHIBIT A

EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada limited liability company; Plaintiff, vs. ROSE, LLC, a Nevada limited liability company; Defendant.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

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-

referenced matter on the 7th day of November, 2016, a copy of which is attached hereto.

Dated this 7th day of November, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
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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)

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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.	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.

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

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

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

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

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

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

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

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

[1] 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.

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

> Q. …Sir, do you recall a telephone conversation that you had with Mr. Anthony following receipt of this letter [the August 31, 2012 letter]?
>
> A. [by Mr. Dragul] I do not.

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

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

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

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

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

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

one[2], the communication was sent to Dragul and Operadora was not copied.

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

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

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

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

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

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

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

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

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

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

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

[2] The only exception to this was a letter from Jerry Griffis, 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.

Island.

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

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

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

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

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

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

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

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

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

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

39. Señor Frogs is a subsidiary of Operadora.

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

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

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

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

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

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

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

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

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

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

50. The email states:

> "Pat – thank you for your time today. This email will confirm our discussions. The letter from Mr. Wirthlin to Rose, LLC and Operadora Andersons S.A. de C.V. dated May 28, 2015, was sent to my client for 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.
>
> 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

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

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

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

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

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

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

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

1. The party to be estopped must be apprised of the true facts;

2. He must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has a right to believe it was so intended.

3. The party asserting the estoppel must be ignorant of the true state of facts;

4. He must have relied on his detriment on the conduct of the party to be estopped. In addition silence can raise an estoppel quite as effectively as can words. *Teriano v. Nev. State Bank*, 121 Nev. 217, 223, 112 P3.d 1058, 1062 (2005).

Here, Rose was aware of Treasure Island's decision not to send numerous notices to the attention of Susan Markusch after Mr. Dragul had instructed Mr. Anthony to send all notices to his attention. Thus, Rose was aware that all future notices after August 31, 2012 were being sent to Mr. Dragul and not Ms. Markusch. Similarly, when Mr. Dragul asked Mr. Anthony to send all future notices to his attention he obviously intended that his conduct would be acted upon by Anthony. Next, Treasure Island was clearly ignorant to any change in direction by Rose to change the person who the notice needed to be sent to from Mr. Dragul back to Ms. Markusch since the evidence showed Dragul never 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 4th day of November, 2016.

District Court Judge

JW

Submitted by:

FENNEMORE CRAIG, P.C.

By: _____

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John H. Mowbray (Bar No. 1140)
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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 7th, 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)

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An Employee of Fennemore Craig, P.C.

EXHIBIT B

EXHIBIT B

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada limited liability company; Plaintiff, vs. ROSE, LLC, a Nevada limited liability company; Defendant.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ORDER DENYING MOTION FOR RECONSIDERATION was entered in the above-referenced

matter on the 14th day of December, 2016, a copy of which is attached hereto.

Dated this 16th day of December, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on December 16, 2016, service of the NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION 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)

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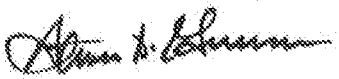
/s/ Adam Miller
An Employee of Fennemore Craig, P.C.



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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. NO.: XI

ORDER DENYING MOTION FOR RECONSIDERATION

Defendant Rose, LLC having filed a Motion for Reconsideration of the Court's Findings of Facts and Conclusions of Law, the Court having considered the papers and pleadings on file herein and entertained oral argument regarding the same,

IT IS HEREBY ORDERED that the Motion for Reconsideration is denied.

Dated this 14th day of December, 2016.

DISTRICT COURT JUDGE

JW

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: _____

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EXHIBIT C

EXHIBIT C

CLERK OF THE COURT

NEO

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DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada limited liability company; Plaintiff, vs. ROSE, LLC, a Nevada limited liability company; Defendant.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF JUDGMENT**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a JUDGMENT was entered in the above-referenced matter on the 21st day of December,

2016, a copy of which is attached hereto.

Dated this 22nd day of December, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
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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 December 22, 2016, service of the NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION 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)

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	Contact	**Email**
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	Rebekah Griffin	rebekah@shumwayvan.com
	Sam Marshall	samuel@shumwayvan.com

/s/ Adam Miller
An Employee of Fennemore Craig, P.C.

JUDG
FENNEMORE CRAIG, P.C.
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Email: psheehan@fclaw.com
Attorney for Plaintiff, Treasure Island

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. NO.: XI

JUDGMENT

This action having come on for trial before the Honorable Judge Gonzalez, presiding, and the issues having been duly tried on October 6 and 7, 2016 and the decision having been duly rendered, the Court grants declaratory judgment that Treasure Island's lease with Rose, LLC is terminated. Judgment is also hereby entered for Treasure Island on Rose, LLC's counterclaims.

The Judgment is based on the Findings of Fact and Conclusions of Law previously signed by the Court.

Dated this 20 day of December, 2016.

DISTRICT COURT JUDGE

JW

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: #13690

Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
Attorneys for Plaintiffs/Counterdefendants

EXHIBIT D

EXHIBIT D

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CLERK OF THE COURT

NEO
FENNEMORE CRAIG, P.C.
Patrick J. Sheehan (Bar No. 3812)
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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.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS FEES IN THE AMOUNT OF $126,000 AGAINST ROSE, LLC**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS

FEES IN THE AMOUNT OF $126,000 AGAINST ROSE, LLC was entered in the above-referenced matter on the 10th day of January, 2017, a copy of which is attached hereto.

Dated this 11th day of January, 2017.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
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 January 11, 2016, service of the NOTICE OF ENTRY OF ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS FEES IN THE AMOUNT OF $126,000 AGAINST ROSE, LLC 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		
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Fennemore Craig, P.C.		
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	Adam Miller	amiller@fclaw.com
	John H. Mowbray	jmowbray@fclaw.com
Lewis Roca Rothgerber Christie		
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	Jessie Helm	jhelm@lrrc.com
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Shumway Van		
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/s/ Adam Miller
An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

ORDR
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Attorney 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. NO.: XI

ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS FEES IN THE AMOUNT OF $126,000 AGAINST ROSE, LLC

Plaintiff Treasure Island, LLC ("Treasure Island") having filed a motion for attorney's fees, the Court having reviewed the papers and pleadings filed on behalf of Treasure Island and Rose, LLC relating to the same and good cause appearing therefore the Court awards Treasure Island $126,000 in attorney fees against Rose, LLC.

The Court enters such an Order based on its findings that the lease agreement between the parties contained an attorneys fees clause providing that the prevailing party in any dispute concerning the lease would be entitled to their reasonable attorneys fees. The Court reviewed the motion and the factors set forth by the Nevada Supreme Court in *Schouweiler v. ENC Company, 101 Nev. 827, 834, 712 P2d 786, 790 (1985)* and determined that the fees requested of $126,000 were reasonable. Treasure Island's counsel had the qualities, skill, ability, training, education, experience and standing necessary for the award of the fees. They spent the time required with respect to the specific issues in this case. The litigation was important. The work actually performed by Treasure Island's lawyers was given the proper attention and the final result was successful.

Accordingly, the Court grants Treasure Island's Motion for Attorneys Fees against Rose, LLC in the amount of $126,000.

Dated this 24th day of January, 2017.

DISTRICT COURT JUDGE

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: _____
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
Attorneys for Treasure Island, LLC

EXHIBIT E

EXHIBIT E

NEO
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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.	**CASE NO.: A-15-719105-B** **DEPT.: XI** **NOTICE OF ENTRY OF FINAL JUDGMENT**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, vs. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a FINAL JUDGMENT was entered in the above-referenced matter on the 10th day of January, 2017,

a copy of which is attached hereto.

Dated this 11th day of January, 2017.

FENNEMORE CRAIG, P.C.

By: /s/ Patrick J. Sheehan
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
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 January 11, 2016, service of the NOTICE OF ENTRY OF JUDGMENT 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		
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	Patrick J. Sheehan	psheehan@fclaw.com
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/s/ Adam Miller
An Employee of Fennemore Craig, P.C.

JUDG

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Attorney 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. NO.: XI **FINAL JUDGMENT**

This action having come on for trial before the Honorable Judge Gonzalez, presiding, and the issues having been duly tried on October 6 and 7, 2016 and the decision having been duly rendered, the Court GRANTS declaratory judgment that Treasure Island's lease with Rose, LLC is terminated as a result of Rose, LLC's breach. The Court dismisses as moot Treasure Island's

claim for damages as a result of the breach at this time. Judgment is also hereby entered for Treasure Island on Rose, LLC's counterclaims.

Pursuant to NRCP 62(a), execution of this judgment will be stayed for 10 days following written notice of its entry without bond, and for one year thereafter upon the posting of a $850,000 supersedeas bond with the clerk of the Court. If the appeal is not then resolved, Treasure Island, LLC may request that the amount be increased which the Court has stated it will do so to $930,000.

Dated this 5th day of January, 2017.

DISTRICT COURT JUDGE

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: _____
Patrick J. Sheehan (Bar No. 3812)
John H. Mowbray (Bar No. 1140)
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
Attorneys for Treasure Island, LLC

Approved as to form and content by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: _____
Daniel F. Polsenberg (Bar No. 2376)
J. Christopher Jorgensen (Bar No. 5382)
Joel D. Henriod (Bar No. 8492)
Abraham G. Smith (Bar No. 13250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169
Attorneys for Rose, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2017, I served the foregoing "Amended Notice of Appeal" on counsel by the Court's electronic filing system and by courtesy email to the persons and addresses listed below:

PATRICK J. SHEEHAN
JOHN H. MOWBRAY
FENNEMORE CRAIG, P.C.
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
PSheehan@FCLaw.com
JMowbray@FCLaw.com

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT I TO DOCKETING STATEMENT

A-15-719105-B

XXI X

BUSINESS COURT CIVIL COVER SHEET

_____ 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):	Defendant(s) (name/address/phone):
Treasure Island, LLC	Rose, LLC
Attorney (name/address/phone):	Attorney (name/address/phone):
Patrick J. Sheehan	
Fennemore Craig, P.C.	
300 South Fourth Street, Suite 1400	
Las Vegas, NV 89101	

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 6, 2015

Date

Signature of initiating party or representative

COMP
FENNEMORE CRAIG, P.C.
Patrick J. Sheehan (Nevada Bar No. 3812)
John H. Mowbray (Nevada Bar No. 1140)
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Email: psheehan@fclaw.com

Attorneys 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.: XXI X

Plaintiff complains and alleges as follows:

COMPLAINT

FIRST CLAIM FOR RELIEF
(Breach of Lease)

1. On or about April 13, 2011, Plaintiff Treasure Island, LLC ("Treasure Island") entered into a 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.

3. One of the obligations of Rose under the Lease was to pay rent in two forms. First, minimum monthly rent. Second, an amount equal to 7% of gross sales.

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

5. The Lease further provided for default interest on any rents or other charges to be paid by Tenant to Landlord if the same was not paid following a 10 day additional notice from the Landlord.

6. Rose breached the Lease and its obligation to pay the 7% gross sales portion of the rent for the first quarter of 2015.

7. As a result, on May 14, 2015, Treasure Island sent Rose, LLC, a notice of default.

8. Despite the obligation to pay the rent under the Lease, and despite the notice of default to pay the rent, Rose, LLC failed and refused to pay the same.

9. As a result of this breach of Lease, Treasure Island has been damaged in an amount to be proven at trial. The damages include not only the missed rent payments, interest and other late charges as provided for under the lease but in addition other damages for future lost rents and other things as set forth in the lease including but not limited to paragraph 15 under the lease.

10. The total amount of those damages exceeds $10,000.

11. It has been necessary for Treasure Island to hire an attorney to prosecute this action and it is entitled to its reasonable attorney's fees therefore pursuant to the terms of the Lease.

SECOND CLAIM FOR RELIEF
(Declaratory Relief)

12. Pursuant to the parties' Lease if Tenant failed to pay any installment of rent or any

other amount or charge required to be paid by Tenant [Rose] to Landlord, [Treasure Island] and such failure continued for 10 days from Landlord's written notice to Tenant that any such rent installment, other amount or charge was due, Tenant/Rose was in default.

13. This occurred as Rose failed to pay the 7% gross sales rent payment when due and further, failed to pay the same after a 10 day notice from Treasure Island.

14. As a result, Rose, LLC was and is in default of the Lease.

15. Under paragraph 15.2.1 of the Lease, upon such a default Landlord had the right to terminate the Lease and Tenant's estate thereunder by written notice of such termination.

16. Treasure Island has provided such written notice of termination.

17. Accordingly, the Lease has been terminated.

18. As a result, Plaintiff asks the Court to issue a declaratory relief order stating that the Lease has been terminated and that Rose, LLC needs to remove itself from the premises.

WHEREFORE, Plaintiff prays for relief as follows:

1. For damages in an amount to be proven in excess of $10,000.

2. For an order of declaratory relief declaring the Lease terminated.

3. For its reasonable costs and attorney's fees.

4. For such other and further relief as the Court may allow.

Dated this 29 day of May, 2015.

FENNEMORE CRAIG, P.C.

By: _____

Patrick J. Sheehan, Esq. (Bar No. 3812)
John H. Mowbray (Nevada Bar No. 1140)
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Attorneys for Plaintiff

EXHIBIT J TO DOCKETING STATEMENT

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11/16/2015 04:10:02 PM

CLERK OF THE COURT

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Attorneys for Rose, 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.: XI **DEFENDANT'S FIRST AMENDED COUNTERCLAIM**
ROSE, LLC, a Nevada limited liability company, Counterclaimant, v. TREASURE ISLAND, LLC, a Nevada limited liability company, Counterdefendant.	

FIRST AMENDED COUNTERCLAIM

For its amended counterclaim, Rose, LLC ("Rose") alleges as follows:

PARTIES

1. Rose is a Nevada limited liability company.

2. Rose is informed and believes and thereon alleges that Counterdefendant Treasure Island, LLC ("Treasure Island") is a Nevada limited liability company.

PISANELLI BICE PLLC
400 S. 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89102
702.214.2100

GENERAL ALLEGATIONS

A. Under the Direction of its Owner, Treasure Island Enters Into a Lease With Rose.

3. On or about April 13, 2011, Rose, as the tenant, and Treasure Island, as the landlord, entered into a Lease Agreement (the "Lease") for premises located within the Treasure Island resort hotel casino, consisting of approximately 18,135 square feet (the "Premises").

4. The Lease identifies that the Premises are to be used for the operation of a bar, lounge, restaurant and/or nightclub.

5. Rose is informed and believes that the primary decision-maker for Treasure Island with respect to the Lease is the owner of Treasure Island, Phillip Ruffin ("Ruffin"). Rose is informed and believes that Ruffin directed leasing negotiations with Rose as well as leasing amendments in December, 2011, March through April, 2014 and June through July, 2015.

6. Rose is informed and believes that Ruffin conveyed his position on leasing issues through Treasure Island employees Brad Anthony ("Anthony"), Najam Khan ("Khan"), and/or Jerry Griffis ("Griffis"), all of whom were not authorized to take material actions with respect to the Lease without the advance approval of Ruffin. Indeed, leasing decisions by Treasure Island were often delayed or deferred in order to accommodate Ruffin's work and travel schedule.

B. The Lease's Notice Provisions Require Notice to Rose and its Subtenant.

7. On or about June 11, 2011, Rose entered into a sublease for a portion of the leased Premises with Senor Frog's Las Vegas, LLC ("Senor Frogs") as the subtenant.

8. Section 15 of the Lease identifies certain events of default whereby Rose may be deemed to be in default of the Lease ("Events of Default").

9. Such Events of Default include Rose's failure "to pay any installment of Rent or any other amount or charge required to be paid by Tenant to Landlord pursuant to the terms of this Lease, and such failure continues for ten (10) days from Landlord's written notice to Tenant . . . ."

10. Section 19.6 of the Lease identifies the manner in which the parties are to provide "[a]ny notice or other communication required or permitted to be given by a party hereunder . . . ."

11. Pursuant to Section 19.6, any notice to Rose must be directed to the attention of Susan Markusch at the address identified. Additionally, a copy of any such notice must be provided to Senor Frogs.

12. Section 19.20 of the Lease governs the process by which the landlord shall remedy its default.

13. On or about April 30, 2014, the parties entered into a Fifth Amendment of the Lease which, among other things, updated certain contact information for notice purposes under the Lease with respect to both Rose and Senor Frogs and imposed an additional requirement that Senor Frog's counsel be copied on any notice.

C. Treasure Island Breaches the Lease by Failing to Provide Adequate Notice.

14. On or about May 14, 2015, Treasure Island sent correspondence purporting to provide Rose with notice of an alleged breach of the Lease ("Alleged Breach Notice").

15. However, despite the terms of Section 19.6, Treasure Island failed to deliver its Alleged Breach Notice to the attention of Susan Markusch. Additionally, Treasure Island failed to send a copy to Senor Frogs or counsel for Senor Frogs.

16. Having failed to comply with the Lease's express notice provisions, Treasure Island cannot claim that Rose is in default of the Lease.

17. Treasure Island's failure to comply with the Lease's express notice provision prevented Rose's performance of the Lease.

18. Despite this, Treasure Island sent correspondence to Rose on or about May 28, 2015, purporting to terminate the Lease ("Alleged Termination"). However, like the Alleged Breach Notice, the Alleged Termination failed to comply with the notice requirements of Section 19.6.

19. Treasure Island filed its Complaint against Rose that same day.

PISANELLI BICE PLLC
400 S. 7TH STREET, SUITE 300
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20. Rose is informed and believes that Ruffin was the ultimate decision-maker behind the Alleged Breach Notice and the Alleged Termination. Rose is informed and believes that Ruffin was uninformed or otherwise failed to cross-check Treasure Island's notice practices and the terms of the Lease.

21. Rose is informed and believes that Ruffin directed his staff and/or agents to use this dispute as an opportunity to develop a direct relationship with Senor Frogs or otherwise eliminate any Rose leasing relationship in order to seize the Premises for other business purposes.

D. Treasure Island Commits Additional Breaches of the Lease.

22. Following the time that Treasure Island delivered the Alleged Termination, Rose has attempted, on numerous occasions, to tender rent under the Lease via both wire transfers and cashiers' checks. However, Treasure Island has refused to accept these tenders in violation of the unambiguous terms of the Lease, including Section 3.1's requirement that Rose pay Treasure Island rent "at Landlord's address for notice …."

23. In light of this, Rose sent Notices of Lease Default to Treasure Island representatives on September 11, 2015.

24. Treasure Island has failed to attempt to cure or otherwise respond after the receipt of the default notices.

25. Rose is informed and believes that Ruffin authorized the payment refusals or was uniformed and failed to direct Treasure Island's payment tender and acceptance practices or otherwise ensure compliance with the Lease.

FIRST CAUSE OF ACTION

(Breach of Contract)

26. Rose repeats and realleges the allegations set forth in paragraphs 1 through 25 above as though fully set forth herein.

27. The Lease sets forth certain notice requirements that Treasure Island must follow in order to provide Rose valid and sufficient notice.

28. Despite agreeing to these notice requirements, Treasure Island has breached them.

PISANELLI BICE PLLC
400 S. 7TH STREET, SUITE 300
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702.214.2100

29. In light of its failure to provide sufficient notice, Treasure Island's Alleged Termination is invalid and a breach of the Lease.

30. Rose has continued to attempt tender of its rents under the Lease. However, Treasure Island continues to breach the Lease by rejecting Rose's attempts at tender.

31. Treasure Island's failure to provide notice pursuant to the Lease and refusal to accept Rose's attempts at tender prevents Rose's performance under the Lease.

32. Rose provided Notice of Default on September 11, 2015.

33. Rose has attempted to perform all of its obligations under the Lease.

34. Rose has been damaged by Treasure Island's breaches.

35. Rose has been forced to hire an attorney to prosecute this action and therefore seeks recovery of their attorney's fees and court costs.

SECOND CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith and Fair Dealing)

36. Rose repeats and realleges the allegations set forth in Paragraphs 1 through 35 above as though fully set forth herein.

37. Implied in every agreement under Nevada law is the obligation of good faith and fair dealing.

38. Rose believes that the notice and rent provisions of the Lease are clear and unambiguous; to the extent that Treasure Island has discretion under either provision, there is an implied covenant of good faith and fair dealing that prevents Treasure Island from exercising any discretion unfairly.

39. Treasure Island breached its duty of good faith and fair dealing by, among other things, delivering notices under the Lease in an unfair manner designed to prevent performance and attempting to contract directly with Senor Frogs. Treasure Island's actions were unfaithful to the purpose and intent of the Lease.

40. Treasure Island also breached its duty of good faith and fair dealing by failing to accept Rose's ongoing tender of rent.

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41. As result of the acts and omissions of Treasure Island, Rose's justified expectations under the Lease have been denied.

42. Rose has been forced to hire an attorney to prosecute this action and therefore seeks recovery of their attorney's fees and court costs.

THIRD CAUSE OF ACTION

(Declaratory Judgment)

43. Rose repeats and realleges the allegations set forth in Paragraphs 1 through 42 above as though fully set forth herein.

44. A true and ripe controversy exists between Rose and Treasure Island as to their respective rights regarding the Lease.

45. As set forth in the Lease, Treasure Island must comply with certain notice requirements in order to provide Rose notice of any alleged breach.

46. However, in sending the Alleged Breach Notice and Alleged Termination, as well as rejecting Rose's tenders, Treasure Island failed to comply with these notice requirements.

47. Treasure Island has refused to accept properly tendered rent payments.

48. Declaratory relief pursuant to NRS 30.040 is necessary to declare the respective rights, responsibilities and obligations of Rose and Treasure Island under the Lease.

49. Rose seeks a declaratory judgment from this Court that Treasure Island failed to comply with the notice requirements of the Lease and, therefore, the Alleged Breach Notice and Alleged Termination are ineffective.

50. Rose also seeks a declaratory judgment from this Court that if Treasure Island failed to comply with its leasing obligations, Treasure Island is not entitled to the relief request in its Complaint.

51. Rose has been forced to hire an attorney to prosecute this action and therefore seeks recovery of their attorney's fees and court costs.

WHEREFORE, Rose prays for judgment as follows:

1. Direct, incidental and consequential damages against Treasure Island in an amount to be proven at trial but, in any event, in excess of $10,000.00;

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2. For a declaratory judgment finding that:

(a) Treasure Island's Alleged Breach Notice and Alleged Termination are invalid;

(b) Rose has not defaulted under the Lease;

(c) The Lease between the parties' remains in effect.

3. For a temporary and permanent injunction precluding Treasure Island from moving forward with terminating the Lease and denying Rose its leasehold interests in the Premises.

4. An award of reasonable costs and attorneys' fees;

5. Prejudgment and post-judgment interest on the foregoing sums at the highest rate permitted by law; and

6. Any additional relief this Court deems to be just and proper on the evidence presented at trial.

DATED this 16th day of November, 2015.

PISANELLI BICE PLLC

By: /s/ Jarrod L. Rickard
James J. Pisanelli, Esq., Bar No. 4027
Jarrod L. Rickard, Esq., Bar No. 10203
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Rose, LLC

PISANELLI BICE PLLC
400 S. 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89102
702.214.2100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 16th day of November, 2015, I caused to be served via the Court's E-Filing system true and correct copies of the above and foregoing **DEFENDANT'S FIRST AMENDED COUNTERCLAIM** to the following:

Patrick J. Sheehan, Esq.
John H. Mowbray, Esq.
FENNEMORE CRAIG, P.C.
300 South Fourth Street, Suite 1400
Las Vegas, NV 89101

/s/ Shannon Thomas
An employee of PISANELLI BICE PLLC

PISANELLI BICE PLLC
400 S. 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89102
702.214.2100

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSE, LLC, a Nevada limited liability company,

Appellant,

vs.

TREASURE ISLAND, LLC, a Nevada limited liability company,

Respondent.

No 71941

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id*. Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District County Eighth Department 11

County Clark Judge Elizabeth G. Gonzalez

District Ct. Case No. A-15-719105-B

2. Attorney filing this docketing statement:

Attorney Daniel F. Polsenberg and Joel D. Henriod

Telephone 702-949-8200

Firm LEWIS ROCA ROTHGERBER CHRISTIE LLP

Address 3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

Client(s) Rose, LLC

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Patrick J. Sheehan and John H. Mowbray Telephone (702) 692-8000

Firm FENNEMORE CRAIG, P.C.

Address 300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101

Client(s) Treasure Island, LLC

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☒ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Dismissal:
- ☐ Lack of jurisdiction
- ☐ Failure to state a claim
- ☐ Failure to prosecute
- ☐ Other (specify)

☐ Grant/Denial of injunction ☐ Divorce Decree:

☐ Grant/Denial of declaratory relief ☐ Original ☐ Modification

☐ Review of agency determination ☐ Other disposition (specify):

5. Does this appeal raise issues concerning any of the following? No.

☐ Child Custody

☐ Venue

☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. Nature of the action. Briefly describe the nature of the action and the result below:

This litigation stems from a dispute regarding the parties' lease. The district court ruled that Treasure Island, the landlord, was justified in terminating the lease with Rose LLC, its tenant, after a notice of default. Although the notice did not comply with the written requirements of the lease as amended, the district court found that the notice complied with a prior oral agreement between Treasure Island's general counsel and Rose's president. The court entered declaratory judgment in Treasure Island's favor on the termination of the lease, dismissed as moot Treasure Island's claims for breach of lease, and denied Rose's counterclaims under the lease.

This is an appeal from the final orders and judgment, which terminate the lease with Treasure Island, as well as an award of attorneys' fees.

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

1. Did the district court err allowing the termination of a long-term[1] lease based on an alleged oral modification of the notice provision, where the notice concededly did not comply with a subsequent written amendment to the notice provision?

2. Did the district court err in excusing Treasure Island from technical compliance with the lease while punishing Rose for a technical default that was cured and resulted in no damages to Treasure Island?

3. Did the district court err in denying Rose's counterclaims under the lease?

4. Did the district court abuse its discretion in its award of attorney's fees?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues? N/A

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

[1] A ten-year initial term with options to extend another 20 years.

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

13. Trial. If this action proceeded to trial, how many days did the trial last?

2 days.

Was it a bench or jury trial? Bench

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from 11/7/16 (Exhibit A); 12/14/16 (Exhibit B); 12/21/16 (Exhibit C); 1/10/17 (Exhibit D); 1/10/17 (Exhibit E)

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served 11/7/16 (Exhibit A); 12/16/16 (Exhibit B); 12/22/16 (Exhibit C); 1/11/17 (Exhibit D); 1/11/17 (Exhibit E)

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing N/A

☒ NRCP 52(b) Date of filing 11/18/16 (Exhibit F)

☒ NRCP 59 Date of filing 11/18/16 (Exhibit F)

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. _, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion 12/14/16 (Exhibit B)

(c) Date written notice of entry of order resolving tolling motion was served 12/16/16 (Exhibit B)

Was service by: N/A

☐ Delivery

☒ Mail/Electronic/Fax

18. Date notice of appeal filed 12/7/16 (Exhibit G); 1/17/17 (Exhibit H)
If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

19. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

The time limit for filing the notices of appeal from the final judgment and order granting fees are governed by NRAP 3A(b)(1) and 3A(b)(8).

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a) ☒ NRAP 3A(b)(1) ☐ NRS 38.205

☐ NRAP 3A(b)(2) ☐ NRS 233B.150

☐ NRAP 3A(b)(3) ☐ NRS 703.376

☒ Other (specify) NRAP 3A(b)(8)

(b) Explain how each authority provides a basis for appeal from the judgment or order:

This is an appeal from what may have been a final "judgment" pursuant to NRAP 3A(b)(1).

A final judgment and order granting fees were entered on January 11, 2017 (Exhibits D and E), and appellant's amended notice of appeal perfects this Court's jurisdiction.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Treasure Island, LLC
Rose, LLC

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

N/A

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Plaintiff filed its "Complaint" on May 28, 2015 for breach of lease and declaratory relief (Exhibit I).

Defendant filed its "First Amended Counterclaims" on November 16, 2015 for breach of contract, breach of implied covenant of good faith and fair dealing and declaratory judgment (Exhibit J).

All claims were resolved by the "Final Judgment," entered on January 11, 2017 (Exhibit E).

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

N/A (Rose's original notice of appeal from the "Findings of Fact and Conclusions of Law" (Exhibit A) was premature, but the jurisdictional defect was resolved by the entry of a final judgment on January 11, 2017 (Exhibit E), as reflected in the amended notice of appeal)

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)

- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Rose, LLC	Abraham G. Smith
Name of appellants	Name of counsel of record
January 31, 2017	*/s/ Abraham G. Smith*
Date	Signature of counsel of record
Clark County, Nevada	
State and county where signed	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this "Docketing Statement" was filed electronically with the Nevada Supreme Court on the 31st day of January, 2017. Electronic service of the foregoing "Docketing Statement" shall be made in accordance with the Master Service List as follows:

PATRICK J. SHEEHAN
JOHN H. MOWBRAY
FENNEMORE CRAIG, P.C.
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

THOMAS J. TANKSLEY
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

Dated this 31st day of January, 2017

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP