

Case No. 71941

In the Supreme Court of Nevada

ROSE, LLC,

Appellant,

vs.

TREASURE ISLAND, LLC,

Respondent.

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APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable ELIZABETH GOFF GONZALEZ, District Judge
District Court Case No. A719105

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1 THE COURT: Okay.

2 THE WITNESS: Thank you very much.

3 THE COURT: Mr. Van, you're up.

4 DIRECT EXAMINATION

5 BY MR. VAN:

6 Q Mr. Dragul, what you do for a living?

7 A I'm the owner of GDA Real Estate Services LLC. In
8 Colorado we are in the real estate business, commercial real
9 estate business.

10 Q Tell me about GDA Realty. How many square feet does
11 it have under contract?

12 A Well, I'll say it a different way.

13 Q Okay.

14 A We're a shopping-center-acquisition business. We buy
15 shopping centers around the country. We currently are involved
16 in 22 states and have over 80 properties.

17 Q Okay. How many tenants do you have?

18 A Over 2000, less than 3000.

19 Q And how many properties do you deal with?

20 A 82.

21 Q Roughly how many square feet do you manage?

22 A We're involved in roughly somewhere between 7.6 and
23 8.1 million square feet. We're selling sometimes and buying.

24 Q Fair enough. It's a fluid business?

25 A Yeah.

JD Reporting, Inc.

1 Q Tell me about the first time that you came in contact
2 with Mr. Krouham.

3 A I called David after several attempts to talk to him
4 about bringing Señor Frog's to Las Vegas.

5 Q And at that time had you already had a conversation
6 with Treasure Island?

7 A We had.

8 Q Okay. Tell me about your contact with Treasure
9 Island then.

10 A I was in touch with Najam Khan. I was interested in
11 the current space that Señor Frog's occupies. Najam told me
12 that the space, they were negotiating with another company out
13 of Chicago, and that he would be back in touch with me if that
14 fell through, which it did.

15 Q Okay. And so he contacted you. Do you remember
16 about when?

17 A I don't remember.

18 Q At that point in time -- at what point in time did
19 you meet with Mr. Ruffin?

20 A Approximately a month after that Mr. Ruffin actually
21 met with one of my representatives with Najam where our group
22 presented the idea.

23 Q Okay. And how many times have you met with
24 Mr. Ruffin?

25 A Several, maybe -- maybe more than 10.

1 Q When you met with Mr. Ruffin, and you presented the
2 Señor Frog's concept; is that correct?

3 A One of my representatives met with Mr. Ruffin and
4 Mr. Krouham.

5 Q When was it that they agreed to enter into a contract
6 with you and Señor Frog's?

7 A Right then. I mean, Mr. Ruffin loved the idea.
8 Within 10 minutes he said he thought it was a great concept. I
9 guess he used to own a hotel in Nassau, Bahamas that was next
10 to a Señor Frog's, and he was very quick to say, yes.

11 Q Okay. What was your relationship with Señor Frog's?

12 A I had no relationship with them.

13 Q Okay. When you started this venture then, what was
14 your relationship with them in order to go forward with this
15 venture?

16 A Well, I went to Cancun, met with David Krouham. It
17 was clear to me that this was a concept that Treasure Island
18 wanted. So we pursued our agreement with David Krouham and his
19 partners to bring them to Treasure Island.

20 Q Okay. Were you partners with them?

21 A Well, our company Rose was a partner with them in
22 Señor Frog's Las Vegas.

23 Q Okay. And what was the agreement as far as the build
24 out, the construction and the running of the operation?

25 A I think it was a little bit more complicated than

1 that. Our expertise was real estate. Their expertise was
2 running restaurants. So we had lots of experience in building
3 out retail space. So we were in charge of that. So.

4 Q And --

5 A They were in charge of the restaurant.

6 Q Okay. So you agreed to build it out, to get
7 everything built out. There was a timetable. Were you ever --
8 did you search around for contractors in Las Vegas in order to
9 build out this property?

10 A I did.

11 Q And did you ever agree to somebody?

12 A Well, we were told by Treasure Island that they
13 strongly wanted us to use Austin Construction.

14 Q Okay. Do you know if Austin does any work for
15 anybody else?

16 A They do.

17 Q Okay. So did you enter into a contract with Austin?

18 A Señor Frog's Las Vegas entered into a contract with
19 Austin.

20 Q Okay. And that was the entity that -- Señor Frog's
21 Las Vegas is the entity that constructed the project?

22 A Right.

23 Q And the owners of Señor Frog's Las Vegas were whom?

24 A Rose LLC and I believe David Krouham and some of his
25 partners individually.

1 Q Okay. What was the original construction cost -- the
2 original construction contract?

3 A The amount?

4 Q Yes.

5 A 3.4 million.

6 Q And how much did you end up having to pay for that?

7 A Roughly 6.6 million.

8 Q Okay. Why the excess?

9 A Well, it's my -- in all the construction that I've
10 been involved in, contractors make a lot of money in what they
11 call change orders, and in this particular case, there were --
12 you know, the contractor hit us with massive amounts of change
13 orders.

14 Q And there was a -- and we'll get to this in a minute,
15 but there were issues with regard to the payment of that
16 amount, correct?

17 A Correct.

18 Q And has that matter been resolved?

19 A It has been resolved.

20 Q And you dealt with Austin directly?

21 A That is correct?

22 Q And that was a mediation that occurred last week,
23 correct?

24 A That is correct.

25 Q In the course of that mediation, did you ever receive

1 information with regard to Treasure Island's discussions with
2 Austin?

3 A Yes.

4 Q What were you told?

5 A I was told secondhand that there was a --

6 MR. SHEEHAN: Objection. Hearsay, Your Honor.

7 THE COURT: Sustained.

8 BY MR. VAN:

9 Q Okay. Did you receive during the course of that
10 discussion -- or in the course of that mediation, were you
11 presented with information that Treasure Island was discussing
12 that arbitration with Austin?

13 MR. SHEEHAN: Same --

14 THE WITNESS: Yes.

15 MR. SHEEHAN: -- objection, Your Honor. It's
16 obviously --

17 THE COURT: Sustained.

18 BY MR. VAN:

19 Q Okay. Is it fair to say that you have expertise in
20 the real estate market?

21 A Yes.

22 Q And is it fair to say you have expertise in running a
23 restaurant?

24 A No.

25 Q Is that the reason why you partnered up with -- why

1 you partnered up with David Krouham to establish Señor Frog's
2 Las Vegas?

3 A Correct.

4 Q All right.

5 THE COURT: Before you go to the next subject, this
6 is probably a good place for me to break.

7 MR. VAN: Okay.

8 THE COURT: This is not a requested break. That
9 means that the witness may if he chooses discuss anything he
10 wants with his counsel, and the privilege will remain.

11 MR. SHEEHAN: What time do you --

12 THE COURT: How do I know that? How do I know that?

13 MR. VAN: I don't know that one.

14 MR. SHEEHAN: What time does the Court plan on going
15 till tonight?

16 THE COURT: We'll break by 5. My hope is we'll be
17 done with the witnesses before then. We'll see. I anticipate
18 this meeting to be a half hour. So if you want to go to
19 Starbucks, leave the building, you can. Walk around. Have a
20 nice time. It's a beautiful day outside.

21 MR. SHEEHAN: But if we're back here in 20 minutes,
22 that'll be safe.

23 THE COURT: 30 you'll be safe.

24 MR. VAN: Okay.

25 THE COURT: Remember, it's Hardesty.

1 MR. VAN: We're not going to start for 30 more
2 minutes. Got it.

3 THE COURT: Yeah. You guys be back here at 3:30.

4 MR. VAN: I was just going to say that.

5 THE COURT: My meeting is at 3. So I've got to get
6 up to 17 --

7 MR. VAN: Got it.

8 THE COURT: -- get through their special security and
9 back.

10 MR. VAN: Got it. Thank you, Your Honor.

11 (Proceedings recessed 2:51 p.m. to 4:25 p.m.)

12 THE COURT: So I blew that estimate.

13 MR. VAN: Hey, I haven't moved.

14 THE COURT: Yeah, and I don't believe that for a
15 minute.

16 You can sit down, sir.

17 THE WITNESS: Thank you.

18 MR. VAN: Sorry about that, my sarcasm.

19 THE COURT: It's all right.

20 MR. VAN: I have a shirt that says sarcasm is my
21 second language.

22 THE COURT: Uh-huh.

23 MR. VAN: I got it as a gift from my wife. Seems
24 appropriate. Are we back on?

25 THE COURT: We are.

1 BY MR. VAN:

2 Q Okay. Mr. Dragul, so we talked about the time that
3 you met with Mr. Ruffin. Is there a point in time that you
4 went to him with a concept called the Shrimp Bucket?

5 A David Krouham and I met with Najam Khan and Phil
6 Ruffin about a concept that David has called the Shrimp Bucket;
7 that is correct.

8 Q Okay. And when you went in there, did you provide
9 them all the information with it?

10 A Pictures, drawings, everything, menu.

11 Q Whatever happened with that proposal?

12 A Not much happened until we were informed that
13 Treasure Island was opening up the Seafood Shack, which eerily
14 looks exactly like the Shrimp Bucket.

15 Q Okay. So you were doing business with them. You
16 were providing them information. You were trying to -- let me
17 ask you this. How much time do you spend on the road?

18 A I'm in hotels 180 nights a year.

19 Q Okay. Virtually half the year?

20 A Every other day I'm on a plane.

21 Q Okay. And what's your job? Why is it that you're on
22 the road that much?

23 A We own real estate in 22 different markets. My core
24 business is identifying real estate to buy. So I'm out looking
25 at real estate and making acquisition agreements.

1 Q Okay. So you were involved or were you involved or
2 was it Ms. -- what does Ms. Gold do for you, Elizabeth Gold?

3 A She's our in-house counsel, but she's head of our
4 leasing operation. She is involved in -- her team transacts
5 30 -- 350 lease transactions a year on our own company's
6 behalf.

7 Q Now, in the original lease, we talked about Susan --
8 how do you say that?

9 A Markusch.

10 Q Markusch. What does she do for your company?

11 A She's my controller.

12 Q Why do you have her listed as the person to get
13 notice in the event of default?

14 A I'm not there most of the time. I mean, I'm rarely
15 in the office.

16 Q Okay. So --

17 A Because she's there.

18 Q Does she have signing authority, check signing
19 authority?

20 A Yes.

21 Q If you could look at Exhibit 1 real quickly.

22 A Okay.

23 Q Go to page 22 and Paragraph 19.6. Is it your
24 understanding that any notice required under this lease had to
25 be in writing?

1 A Yes.

2 Q And it had to go to the designated parties?

3 A That is correct.

4 Q At the designated location?

5 A Correct.

6 Q All right. If you can read -- right before it says
7 Treasure Island down there, in parens, it says: Each of the
8 parties shall be entitled to specify a different address and/or
9 contact person by giving notice as aforementioned?

10 A Correct.

11 Q Okay. Did you ever give notice that with regard to
12 issues concerning -- did you ever have a written statement
13 that -- where you said take Susan Markusch off and put me on?

14 A Never. In my 29 years of doing business, I've never
15 ever replaced the person that is designated ever. Susan's been
16 with me almost 20 years.

17 Q Is she the one that's always there?

18 A Always.

19 Q Okay. Now, you've heard testimony with regard to
20 this communication that you had with Mr. Anthony, and -- let me
21 strike that. If you can look at Paragraph 19.9.

22 A Okay.

23 Q And it indicates here that: No supplement or
24 modification or waiver shall be binding unless it is executed
25 in writing by both parties. Are you familiar of any writing

1 that you signed changing who that contact person would be?

2 A There is no writing.

3 Q Okay. Now, you heard Mr. Anthony testify about this
4 accommodation?

5 A Correct.

6 Q Do you remember that? Do you remember that
7 testimony?

8 A I remember his testimony, correct.

9 Q Okay. In 2012, in approximately May -- sorry --
10 September 2012, can you explain to me what was going on at that
11 point in time, and did you have any conversations with him?

12 A I remember the conversation completely different. We
13 were doing construction to -- or involved in the planning, the
14 construction, the bidding, et cetera, et cetera.

15 Q Okay. And what happened? Did you have a
16 conversation with Mr. Anthony with regard to having him contact
17 you?

18 A My recollection is that it was an accommodation for
19 Treasure Island, that Treasure Island had been getting
20 direction from lots of different people, like David Krouham,
21 Primo Alexander -- or Alex -- I can't remember his last name --
22 David's partner, their manager, the construction people, the
23 architect, maybe even some people on my team, and the
24 conversation I remember is who do we talk to. That --

25 Q So Treasure Island called you up and said, look,

1 we've got too many --

2 A Too many cooks in the kitchen.

3 Q Too many chiefs steering this boat. What do we do?

4 Where do we go?

5 A Right.

6 Q And what did you say to him?

7 A I said, Call me. Call me.

8 Q So with regard to the --

9 A E-mail me.

10 Q -- construction issue --

11 A That's what I do.

12 Q Yeah. So with regard to the construction issue, go
13 ahead. Did you ever intend at any point in time for that to
14 say, hey, with regard to everything else on the planet, call me
15 and get rid of Susan?

16 A No, that's ridiculous, never.

17 Q Okay. Let me ask you if you could turn to
18 Exhibit 28.

19 A Okay.

20 Q Actually, strike that. Let me see if I can turn to
21 Exhibit 8 first.

22 A Okay.

23 Q Now, this is a letter that has to do with
24 construction cost, correct?

25 A Correct.

1 Q And have you ever seen this letter before?

2 A Yes.

3 Q Okay. In this letter, it's addressed to Susan
4 Markusch and Operadora Anderson, correct -- excuse me. It's
5 addressed to Susan Markusch, and it CCs Operadora Anderson?

6 A That is correct.

7 Q And it's signed by Brad Anthony?

8 A That is correct.

9 Q This letter then would comply with the terms of the
10 underlying lease?

11 A Yes.

12 Q Is this how you understood the correspondence would
13 take place with regard to economic issues and other issues?

14 A 100 percent.

15 Q You can now go to Exhibit 19.

16 A Okay.

17 Q The second page of that exhibit there's an e-mail
18 from you to Brad Anthony. Do you recognize that?

19 A Yes.

20 Q Okay. And in there, that first line, it says: We
21 appreciate his interest in working with us to make this work
22 for the next 28 years. Do you see that?

23 A I do.

24 Q What was your understanding with regard to the term
25 of the lease?

1 A We had the ability to be in the space 30 years.

2 Q Okay.

3 A And two years had burned off.

4 Q And how much investment did you have in that lease
5 space?

6 A A little over \$3 million.

7 Q Okay. So 3 million, is that what you said?

8 A A little over.

9 Q And then you ended up paying more as a result of
10 construction another 3 million --

11 A Correct.

12 Q -- correct?

13 A Correct.

14 Q Okay. So you're willing to make that kind of an
15 investment because you've got this long-term lease?

16 A Absolutely.

17 Q All right. Let's go to Exhibit 28.

18 A Okay.

19 Q Do you recognize this document?

20 A I do.

21 Q Now, on this document -- I want you to focus for a
22 second -- page 3, Paragraph 9 at the front, it says that: The
23 parties agree the lease is amended to include the following new
24 Section 20 for the benefit of Señor Frog's Las Vegas, a current
25 subtenant of tenant subtenant?

1 A Yes.

2 Q Okay. Of tenant. Sorry. And it's defined term as
3 subtenant. Did you understand that this amended lease applied
4 to -- to Señor Frog's?

5 A Correct.

6 Q Now, the original lease, you guys were partners.
7 That's why there was a notice provision in there?

8 A Correct.

9 Q And there was a point in time where you separated out
10 that partnership, correct?

11 A Correct.

12 Q Was it before this sublease? Before, same time or
13 after?

14 A Same time.

15 Q Okay. So at the same time you're separating out,
16 you've got this sublease that's in there?

17 A Exhibit 5 was a result of the -- let's see here. It
18 was a result of our agreement with David.

19 Q Exhibit 5?

20 A I'm sorry. Fifth amendment.

21 Q Okay. Sorry.

22 A Okay.

23 Q All right. So the fifth amendment, Exhibit 28, the
24 purpose for that was because you were separating a little bit?

25 A We were doing the real estate. He was doing the

1 restaurant.

2 Q But as a result of that, you were going to take the
3 landlord role. He was going to take the tenant role?

4 A Correct.

5 Q Okay. And let's go to Paragraph 11. Now, it says:
6 The parties agree that for purposes of Section 19.6 -- now,
7 Section 19.6 is the provision that allows you to change
8 the address -- excuse me -- the address or the contact person,
9 correct?

10 A And/or.

11 Q And/or the contact person?

12 A Correct.

13 Q So in this one did you -- you changed your address,
14 correct?

15 A We moved our offices.

16 Q You didn't change the contact person?

17 A We did not.

18 Q Okay. And that's why it's not in here because you
19 didn't change it?

20 A Correct.

21 Q All right. And then you also added additionally that
22 there would be notices sent to Ronald Fieldstone and Susan
23 Trench. Do you remember that?

24 A I do.

25 Q Do you remember those negotiations?

1 A I do.

2 Q Tell me about those negotiations.

3 A Well, David Krouham and I had come to this agreement.
4 The number one issue or stumbling block as to consummating our
5 deal was -- really for both of us, I think we wanted to look
6 out for each other and make sure that neither of us would be
7 blindsided in any way. Both of us had an opportunity to get
8 notice and cure.

9 And Ronald Fieldstone, David's attorney, was staunch.
10 This deal would never happen unless Treasure Island was party
11 to and agreed to give notice and allow David to have the
12 opportunity to cure.

13 Q So David would have the right to cure in the event
14 that you defaulted?

15 A That is correct.

16 Q Okay. And that was one of the express terms in this
17 amendment 5?

18 A That is correct.

19 Q All right.

20 A And I might also go on to say that after our
21 experience with the Shrimp Bucket we were worried.

22 Q What do you mean worried and why?

23 A Well, I think they stole the concept from us.

24 Q Okay. Do you remember about May of 2015?

25 A I do.

1 Q Tell me what was going on with you in May of 2015.

2 A Well, I have a sister who's been seriously ill since
3 she was 6 months old. She's now 55, 56.

4 Q Seriously ill how?

5 A She was born with what's called a Dandy-Walker cyst
6 in the back of her head at the top of her spinal cord. When
7 she was 6 months old, she had the majority of her cerebellum
8 removed, which created issues like fluid on the brain,
9 dexterity, balance, things she's been fighting with her entire
10 life, and as time has gone on, she's become more impaired, and
11 it came to a head right about this time. She was in the
12 hospital having a procedure done, and that was number one
13 issue.

14 Q What's number two issue?

15 A Number two issue is I have a brother who -- crazy as
16 it may seem -- he has a spinal cord issue and was having a
17 procedure done at the very same time.

18 Q In a hospital?

19 A Same hospital, correct. And in addition to that, my
20 parents are in their 80s, and I was the guy who directed
21 traffic, helped in the hospital, helped at home, made sure
22 everything was going smoothly for everybody. My dad, you know,
23 has a little memory problem. So he was a physician for his
24 livelihood but really was not able to help. So it was a 24/7
25 totally encompassing time for me.

1 Q So how --

2 A To be -- to help my family.

3 Q And how often were you in the office?

4 A I was not.

5 Q Okay. I'm going to try to be as specific as I can on
6 some dates. May 14th is a Thursday.

7 A Uh-huh.

8 Q That's the date that the alleged notice of default
9 was sent to you contrary to the original contract. Did you
10 receive it on that day?

11 A I was not in the office.

12 Q Friday the --

13 A I believe I was in the office on the 14th. I did not
14 receive it that day.

15 Q Okay. On Friday the 15th --

16 MR. SHEEHAN: I'm sorry. I missed that answer. Did
17 you say you were or were not in the office?

18 THE WITNESS: I was not in the office. On the 14th I
19 did not receive.

20 BY MR. VAN:

21 Q Okay. Friday the 15th of May is the day that it was
22 allegedly delivered to your office. Were you in the office
23 that day?

24 A I was not.

25 Q How do you know that?

1 A The Super Bowl of our industry is the International
2 Convention of Shopping Centers which takes place on a national
3 basis every year this exact same week in Las Vegas. It has for
4 25 years. The convention started that weekend, and the
5 majority of my staff was out of the office preparing, you know,
6 for -- to be away for the next six days, five days. So there
7 was almost nobody there. I wasn't there. I know it vividly.

8 Q How many people -- excuse me. How many days does
9 that take did you say?

10 A It's a five-day convention.

11 Q Okay. So you were preparing for that?

12 A Correct.

13 Q How much does that impact your business?

14 A It's 40 percent or more of our annual business.

15 Q Is that -- is generated at that convention?

16 A That is correct.

17 Q Not something you can miss?

18 A Absolutely not. We'd be out of business.

19 Q Even with your family in peril?

20 A Now, you know what, if I could, it was -- it was an
21 absolute tropical storm to the huge magnitude in my life. You
22 know, between my family that was sick and in the hospital, my
23 parents, this convention that was happening, I was barely home
24 during the night, and, you know, in this world of -- of tough
25 business and, you know, gambling and, you know, the conventions

1 and all this, I believe that there's some things that are much
2 more important than business, and in my world, in May of '15,
3 it was my family.

4 Q Okay.

5 A I was not focused on anything else.

6 Q All right. So your family and the ICSC the show --

7 A Correct.

8 Q -- those are two things that you had priorities with.
9 Saturday the 16th, did you come to Las Vegas? Did you come
10 Friday night or Saturday morning?

11 A I came Saturday.

12 Q Okay. And how long were you here?

13 A Till Wednesday night, the following Wednesday night.

14 Q Okay. When you're here, is it full bore 24/7?

15 A Full-bore, 24/7. We started -- we started 7 a.m.
16 every day with breakfast meetings. We had meetings every half
17 hour to 45 minutes all day long, including dinner, and even
18 meetings after dinner. The day ends about 2 in the morning.

19 Q So you're operating on four, five hours of sleep?

20 A At the most.

21 Q Okay. During that time, during that two-day period,
22 the Saturday, Sunday, did you have occasion to converse with
23 people from Treasure Island?

24 A I did.

25 Q Who did you talk with?

1 A I talked to Najam Khan a couple times, talked to
2 Michelle Knoll at least once.

3 Q Now, Najam Khan, does he have your cell phone number?

4 A He does.

5 Q What about Brad Anthony?

6 A He does. I believe so. I think I've talked to him
7 on my cell.

8 Q You've given people at Treasure Island your cell
9 phone number?

10 A Absolutely. It's the way to get a hold of me.

11 Q Okay. So Monday, Tuesday and Wednesday you are here
12 in Las Vegas, and you talked with Treasure Island people as
13 well as many other people?

14 A Yeah, I mean we throw -- we threw on Sunday the
15 17th -- I remember the day vividly because it's my wife's
16 birthday -- we threw a 450-person party at Señor Frog's in
17 Treasure Island.

18 Q That's quite a birthday party for your wife.

19 A Yeah, I know. She loved it.

20 Q About 450 people?

21 A 450 people, right.

22 Q Okay.

23 A We throw this party with National Title Company and a
24 major law firm from Denver.

25 Q Okay. Now, so you're done Wednesday night. You're

1 back Thursday. Did you go to the office on Thursday?

2 A I did not.

3 Q Friday?

4 A Did not.

5 Q Recuperating? Decompressing?

6 A Yeah. I mean, you know, I barely talked to my wife
7 during that time, and we had a holiday weekend coming up.
8 There's really -- the standard practice is we go to the
9 convention till Wednesday. We come home Wednesday night.
10 Nobody is expected at work. You know, we are for all intents
11 and purposes closed.

12 Q Okay. So Saturday, Sunday --

13 A And so are most of the commercial real estate
14 companies in the country.

15 Q Okay. You're not --

16 A That are here.

17 Q You're not the Lone Ranger in that one?

18 A No, nobody works the rest of that week.

19 Q Okay. So the next Saturday, Sunday, and then Monday
20 is Memorial Day. Are you at the office?

21 A I'm not.

22 Q So the first time you get back to work after the --
23 on the 14th is the 26th?

24 A That's correct.

25 Q On the 28th, did you receive a copy of a letter, the

1 termination letter that we've referenced?

2 A I don't remember, but I think so.

3 Q How did you first -- your recollection, how do you
4 remember it on how you got notice?

5 A I got a phone call from David Krouham.

6 Q Do you remember if that was the 28th, 29th?

7 A You know, I think it was the 28th. You know, I'm
8 pretty sure it was the 28th. It might have been the 29th, but
9 I'm pretty sure it was the 28th.

10 Q As I understand your testimony here today, that's the
11 first time that you have a cognitive thought or a cognitive
12 understanding that there's a, one, default and two, now it's a
13 termination?

14 A That is correct.

15 Q Okay. What do you do to address that?

16 A Well, I mean, we immediately wired funds the next
17 day.

18 Q Okay. Let me ask if you can go to Exhibit 38.

19 A Okay.

20 Q Do you remember ever seeing that letter on or about
21 May 14th, 2015?

22 A No.

23 Q Is this the very reason why you have Susan Markusch
24 on the notice provisions?

25 A That is correct.

1 Q How many e-mails do you get on any given week?

2 A Anywhere from -- you know, it could be as many as
3 five -- I mean, I think I have 10,000 I haven't read from the
4 last two weeks on my BlackBerry. So 5, 6, 7000, somewhere in
5 there.

6 Q Still use a BlackBerry?

7 A I know. It's a dinosaur.

8 Q So based upon your understanding and the negotiated
9 terms of the lease, does this default letter meet the terms and
10 conditions of the notice provisions in the original lease?

11 A No.

12 Q What about the fifth amendment?

13 A No.

14 Q Because it should have gone to Ms. Markusch?

15 A It should gone to Ms. Markusch. It should have
16 copied Operadora. No, it doesn't meet the notice provision.

17 Q Let me ask you this.

18 A We put that in there very specifically so that
19 there's no screw up. There's no chance that this could happen,
20 and, in fact, you know, I think I made a mistake because, you
21 know, I was tending to my family, and I was in a very, very bad
22 place in my life with my brother and my sister, my parents.
23 So, you know, I just moved business aside. It was just not as
24 important as what I had going on in my private life.

25 And -- but as a -- the reason that David Krouham and

1 I and his attorneys and my attorneys fought so hard for that
2 notice provision was so that this exact situation would not
3 happen, so that David would have an opportunity to cure and not
4 be terminated.

5 Q Do you believe that David would have cured?

6 A In a minute.

7 Q And then he would've come back to you and said, hey,
8 you owe me some money?

9 A In a minute, no question.

10 Q Okay.

11 A He and I had a very -- we have a very good
12 relationship. We look after each other, no question.

13 Q Okay. Let me kind of ask about the elephant in the
14 room. Why didn't you pay?

15 A Yeah, no, I don't -- really, the question is, you
16 know, we run 82 shopping centers. We have thousands of
17 tenants. We have -- we pay thousands and thousands of bills
18 every month, including, you know, we receive money. We pay
19 money. You know what, the machine runs. I'm out traveling,
20 doing my thing. In this particular case I wasn't even thinking
21 about business.

22 I have a fairly sizable staff, and I don't have an
23 answer for it. I don't know. I don't know. I think it, you
24 know, my best explanation is occasionally something gets
25 overlooked, and that's what happened here.

1 Q Had appropriate notice been filed and had it gone to
2 your office attention Susan, do you believe it would've been
3 timely paid?

4 A A hundred percent.

5 Q Was there any reason economically --

6 A I think Brad Anthony and the Treasure Island thinks
7 that.

8 Q Is there any reason economically why you couldn't
9 have paid whatever amount was due?

10 A No. No, we had plenty of cash.

11 Q Now, you heard testimony today about the concept of
12 who -- so with regard to the monthly minimum rent --

13 A The thirty-three, two, fifty.

14 Q Yeah. You ever been late on that?

15 A Not one time.

16 Q Okay.

17 A In fact, we FedEx our payments so that we can never
18 be accused of being late. So we -- we send them overnight
19 mail, including the percentage rent.

20 Q Did you ever ask them if you could pay early?

21 A We tendered payment for the percentage rent early --
22 earlier this year, and it was returned to us. They would not
23 accept it early.

24 Q Okay. So there's no way you couldn't have, wouldn't
25 have paid?

1 A No way.

2 Q Under the terms of the original lease, it indicates
3 that you, the tenant, will determine the amount of percentage
4 rent that is due and make that payment. Is that what has
5 occurred?

6 A It's a yes-and-no answer, and the yes is we are on
7 the point-of-sale system that is operated by Treasure Island.
8 So they have access to all of the cash flow in and out of -- or
9 the money the cash registers keep track of in Señor Frog's. So
10 we tally up what we think the percentage rent is. We then call
11 Treasure Island or e-mail and say we think it's X. We're going
12 to send it, and then they come back a lot of times with a
13 different number, and it has a lot to do with the things that
14 we give away that are free or comps that they use from the
15 hotel.

16 Q So on a percentage, if you can give me a percentage,
17 what's the percentage number of times where you sent a number
18 over, and they said, yep, you're right?

19 A I have a guy that handles this for me. I believe in
20 a very strong way that it's 15, maybe 20 percent.

21 Q So usually you've got bean counters on both sides?

22 A Right. Arm wrestling.

23 Q Arm wrestling over a number, and then finally at some
24 point in time they come to a number?

25 A Right.

1 Q Everybody agrees to it. You write the check?

2 A Correct.

3 Q What happens if that process takes you outside of the
4 time frame?

5 A Well, we go ahead and send the check. We're not
6 going to be late. We've been late one time, and that's in May.
7 That's what happened. We're not late. I mean, we -- you know,
8 you can keep track of all of our FedEx receipts we've got. It
9 shows when they've been delivered. So to answer your question,
10 we send it, and then occasionally they'll call us and go, You
11 know what, you're short, or we're never over, but --

12 Q Okay. Now, if you could look at Exhibit 43.

13 A Okay.

14 Q I apologize. Exhibit 40.

15 A Okay.

16 Q Do you remember seeing that letter? Once you get to
17 it.

18 A Yes.

19 Q Tell me about that letter.

20 A It's a letter from Fennemore Craig terminating the
21 lease on behalf of Treasure Island.

22 Q When did you receive this letter?

23 A Like I said, I believe it was the -- hard copy I
24 think came on the 29th of May. I was alerted to it when David
25 Krouham called me.

1 Q And this is the letter that put you on notice for the
2 first time that there was an issue, correct?

3 A Correct.

4 Q And it's as a result of this letter -- what did you
5 do as a result of this letter?

6 A I told everybody to wire the money.

7 Q Okay. And the money was wired?

8 A The money was.

9 Q Did you try to call anybody?

10 A I believe I -- I believe I did. I can't remember.

11 Q Okay. And what happened with that wire transfer?

12 A It was rejected.

13 Q Did you --

14 A By Treasure Island. They would not accept the money.

15 Q Okay. When you got back the first rejection, what
16 did you do?

17 A We rewired the money again.

18 Q Okay. What happened to that wire?

19 A That wire was sent back as a rejection by Treasure
20 Island for a second time.

21 Q What did you do next?

22 A I got cashier's checks in the amount that was owed,
23 and we overnighted those to Treasure Island.

24 Q And when you did that, do you know who you sent them
25 to?

1 A Jerry Griffis, and with a copy of the correspondence
2 to Brad Anthony and Najam Khan.

3 Q So did you send it in one package, or send it in
4 three separate ones?

5 A Three separate.

6 Q Okay. Why did you do that?

7 A I didn't want to leave anything to chance.

8 Q All right.

9 A We're very detailed on how we run our operation.

10 THE COURT: Is this a good place to break?

11 MR. VAN: Sure.

12 THE COURT: Okay. Can you guys do 10 tomorrow?

13 MR. VAN: Your Honor, I can do whatever time you want
14 us to do.

15 MR. SHEEHAN: That's fine, Your Honor.

16 THE COURT: 10 it is.

17 Have a nice evening, sir.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: And I again apologize, Counsel, for how
20 long my meeting was upstairs. I didn't anticipate it taking so
21 long.

22 MR. SHEEHAN: No problem. Stuff happens.

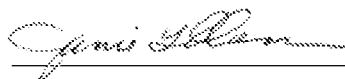
23 THE COURT: What?

24 MR. SHEEHAN: No problem. Stuff happens.

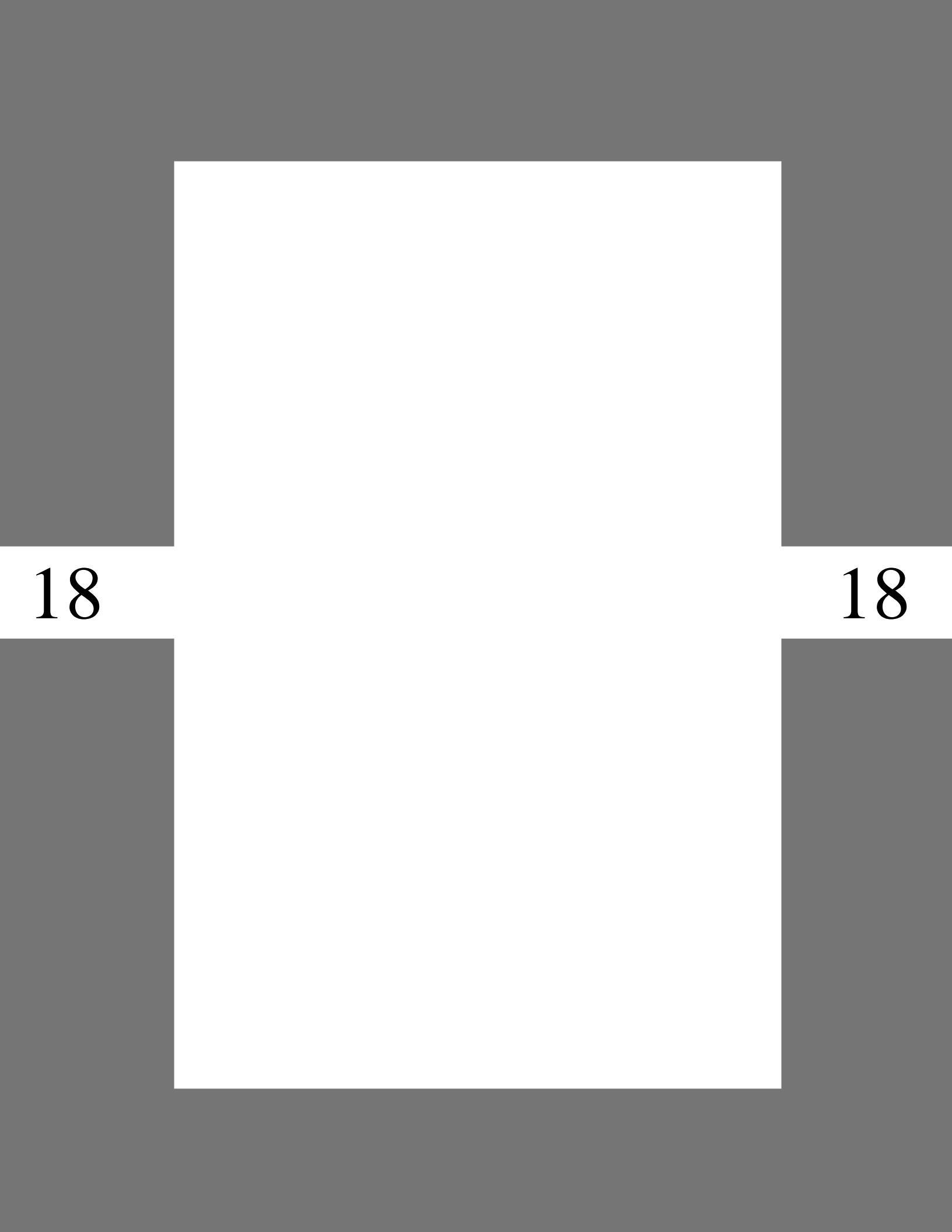
25 (Proceedings concluded for the evening 4:56 p.m.)

1 -oOo-

2 ATTEST: I do hereby certify that I have truly and correctly
3 transcribed the audio/video proceedings in the above-entitled
4 case.

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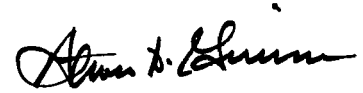
7 Janie L. Olsen
8 Transcriber
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TRAN



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

TREASURE ISLAND LLC,

Plaintiff,

vs.

ROSE LLC,

Defendant.

CASE NO. A-15-719105-B
DEPT NO. XI**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

BENCH TRIAL - DAY 2

THURSDAY, OCTOBER 7, 2016

APPEARANCES:

FOR TREASURE ISLAND LLC:

PATRICK J. SHEEHAN, ESQ.

FOR ROSE LLC:

MICHAEL C. VAN, ESQ.
SAMUEL MARSHALL, ESQ.RECORDED BY: JILL HAWKINS, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

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1 **LAS VEGAS, CLARK COUNTY, NEVADA, OCTOBER 7, 2016, 10:29 A.M.**

2 * * * * *

3 (Defense witness, Gary Dragul, sworn.)

4 THE CLERK: Please be seated. Please state and spell
5 your name for the record.

6 THE WITNESS: Gary Dragul. G-a-r-y, middle initial
7 J., last name is D as in David, r-a-g-u-l.

8 CONTINUED DIRECT EXAMINATION

9 BY MR. VAN:

10 Q Mr. Dragul, I'm going to ask you, do you remember me
11 asking you to go back and look at the payment history for the
12 payments that you made from June of 2014 till the present?

13 A Yes.

14 Q Did you do that?

15 A I did.

16 Q Did you cause to be made a spreadsheet with regard to
17 that?

18 A I did.

19 MR. VAN: Okay. May I approach, Your Honor?

20 THE COURT: You may.

21 BY MR. VAN:

22 Q Is that --

23 MR. SHEEHAN: Um --

24 THE COURT: What is it, Counsel?

25 MR. VAN: Sorry. I'm going to lay the foundation

 JD Reporting, Inc.

1 right now.

2 THE COURT: Have you shown it to counsel?

3 MR. VAN: I'm giving him -- sorry.

4 MR. SHEEHAN: It hasn't been produced as an exhibit.

5 It's brand new, but quite frankly we might have some on our
6 own. So if Mr. Van wants to --

7 THE COURT: How about we use it for demonstrative
8 purposes?

9 MR. VAN: It's only for demonstrative purposes.
10 That's it. Nothing else.

11 MR. SHEEHAN: Well, of course we don't have the
12 backup, but --

13 THE COURT: Well, no. You can ask questions. We'll
14 figure it out.

15 MR. SHEEHAN: That's fine. We'd ask this though --
16 we reserve the right to call Mr. Griffis then, who is a listed
17 witness for us after lunch because he's the counter on this
18 that has the --

19 THE COURT: That's fine. I haven't admitted it yet,
20 but, yes, I understand what you're saying.

21 BY MR. VAN:

22 Q Now, Mr. Dragul, could you review that. Is that the
23 document that you prepared?

24 A It is.

25 Q And with that document, you were involved in the

1 preparation of it?

2 A I was.

3 Q Okay. Did you work with your staff to validate the
4 information that's on this document?

5 A I did. This document was prepared to show when each
6 rent payment and each percentage rent payment was sent and
7 received. Every payment that we have ever made -- Rose to
8 Treasure Island -- has been made through Federal Express
9 overnight, next-day delivery, and the -- so it talks -- so
10 there's three things here. We have the check number, the date
11 of the check, what the amount was for, what it corresponds to
12 is the next column.

13 And then the next one -- which I believe is the most
14 important -- is the FedEx received record, which we're more
15 than happy to produce all those receipts, and if you go down
16 this column, it shows either -- like the first one, for
17 example, May 30th, 2014. The next one's June 1st. The next
18 one is July 31st. The next one is August 1st. The next
19 one is August 29th, meaning August 29th is for September
20 rent, which is due September 1st. The next one is received
21 October 1st. The next one is received November 3rd. The
22 next one is received November 3rd percentage rent and base
23 rent. The next one is received December 1st. The next one
24 is received December 1st. The next one is received January
25 2nd.

JD Reporting, Inc.

1 And then if you go into -- this is now in 2015. You
2 know, January 2nd, February 3rd, February 3rd, March
3 3rd --

4 Q Let me stop you right there. The February 3rd,
5 there's two on that day. One is base rent. One is percentage
6 rent, correct?

7 A One is base rent. One is percentage rent, and
8 actually the percentage rent that we sent was, I believe,
9 returned to us -- but I cannot remember -- by Treasure Island,
10 but the point here is that there are -- I see every single
11 payment made within the first day or two or three of the month.

12 And then we have the time that we are all discussing
13 now which is May percentage rent from January, February and
14 March due April 30th. That's in yellow, and then after that
15 you'll see the July rent was delivered on July the 2nd. The
16 April through June percentage rent was delivered on August
17 the 3rd. The August 15th -- August 15th rent was delivered
18 on August the 3rd. September 15th rent on September the 1st.
19 I don't understand what that means or what it is.

20 Q It's the year, I'm guessing the year 2015.

21 A Okay. Got it. Could be. I think you're correct.
22 And then October '15 rent on October 1st. July rent on --
23 July through September percentage rent of 168,000 delivered on
24 November the 2nd. November 2015 rent delivered on November
25 the 2nd, fourth attempt, February through March to deliver

1 percentage rent. This is our fourth attempt to pay this. It
2 was delivered on November the 9th. The first three attempts
3 were returned, and I believe that this was sent because the
4 Court had ruled that Treasure Island could now accept the
5 percentage rent, and the check did clear after the fourth
6 attempt.

7 Then there was a correction on the third quarter 2015
8 percentage rent.

9 Q What does that mean that there was a correction?

10 A There was a difference of opinion between Treasure
11 Island --

12 Q The arm wrestling that you spoke about?

13 A Exactly. Treasure Island thought that we owed them
14 more money than we did, and we sent the \$4,757 check to them,
15 which I believe was the amount we all agreed upon finally.

16 October 2015 percentage rent was sent on December
17 1st. The December 2015 rent was also received on December
18 1st, and then you roll into 2016, and they're either all on
19 the first day of the month or the last day of the prior month
20 with the exception of March, which was received on the second
21 day of the month. So what we've just described here is that in
22 every case the FedEx was received and signed for at Treasure
23 Island either the last day of the prior month, the first day of
24 the month it's due or in a very rare case the second or third
25 day, but in no event later than that.

1 Q So the fact that you placed them in the mail on the
2 right day, but it may have been a day or two getting to them?

3 A We didn't place it in the mail. We sent it FedEx.

4 Q I'm sorry. FedEx.

5 A Overnight delivery.

6 Q Yeah, overnight delivery.

7 A We wanted to make sure they got it in every case.

8 This was before our disagreement. That's how we pay our rent.

9 Q Okay. And I'm not going to go through the calendar,
10 but there are issues that it could've been the weekend. It
11 could've been --

12 A It could've been a holiday, correct.

13 Q Yeah, it could've been a holiday, a lot of different
14 issues.

15 A There are many times when the first day of the month
16 was a Saturday. So in the business world, you know, we could
17 have it delivered that Friday or that Monday.

18 Q Now, you're a landlord, correct?

19 A That is correct.

20 Q How do you feel about the third day of the month as
21 opposed to the first day? If everybody paid you on the third
22 day of the month, by the third day of the month, how would
23 that --

24 A My business would be incredible. We have a
25 collection department. When the rents are past the tenth day

1 of the month, we collect.

2 Q Okay. Now, you testified --

3 A Let me -- let me add one more thing. We have some
4 tenants like Kroger, Whole Foods, big national tenants that pay
5 us by wire transfer, ACH, on the first of the month or with
6 holidays and weekends the third, maybe the last day of the
7 prior month, but we have very, very few tenants that pay like
8 clockwork like we do.

9 Q All right. You testified yesterday that there's a
10 reason for Susan Markusch to be listed as the notice person?

11 A Correct.

12 Q And she's your controller, correct?

13 A That is correct.

14 Q All right. There's a sublease agreement between you
15 and Señor Frog's in this matter?

16 A Right.

17 Q And in that you list a gentleman named Ben Kahn as
18 the contact person. Now, who is Ben Kahn?

19 A Ben Kahn is our -- he is in charge of all of our
20 legal matters nationwide. He's an attorney.

21 Q Okay. He's an attorney. So why is it that you list
22 him when you're receiving payments, but Susan Markusch when
23 you're making payments?

24 A They're two different situations. One is with
25 Treasure Island I am the lessee. With Señor Frog's I am the

1 lessor. So Susan Markusch is in charge of making payments.
2 That's her job, 100 percent. When somebody owes me money or
3 owes our company money, I have them go to my legal team, which
4 is Ben Kahn because if they do not pay it's his job; it's his
5 responsibility to collect.

6 Q Okay.

7 A And to act legally on it.

8 Q And Ben Kahn doesn't have a signature authority over
9 your checkbook, correct?

10 A He does not.

11 Q All right. So the reason that you listed Susan on
12 the one versus Ben on the other is that one of them has to do
13 with your obligation to pay; the other one has to do with your
14 right to be paid?

15 A Somebody else's obligation to pay me.

16 Q Correct?

17 A Right.

18 Q Now, if you could turn for a second to Exhibit 42.

19 A I was going to add one more thing.

20 Q Oh, sure. Go ahead.

21 A Yesterday when Brad Anthony was describing the eight
22 late payments and the 13 late construction payments, I don't --
23 we don't see it. We don't have record of it. Now, we started
24 paying rent January -- I'm sorry -- June of 2014 when we made
25 our deal. Rose did. Rose took over the accounting and the

1 payments. So the purpose of this is we -- we -- we have no
2 idea what he was talking about.

3 Q Okay. Let's talk about that. So you took over in
4 January --

5 A June. I'm sorry.

6 Q -- I'm sorry, June of 2014. So before that the
7 payments were being paid by Señor Frog's?

8 A That's correct.

9 Q Okay. But since June of 2014, you've never been
10 late?

11 A Not one time -- well --

12 Q With the exception of this one incident?

13 A May 15th, right.

14 Q With that one exception?

15 A Right. And, you know, once again, as I testified
16 yesterday, you know, there are some things that are more
17 important than business to me in my life, and my family, and my
18 sister's well-being, my brother's well-being, and I just really
19 put every -- I just ignored --

20 Q It was a perfect storm?

21 A -- I made a mistake. I mean, you know, but I --
22 normally I'm described as a detail freak, and I -- the fact
23 that that happened is only because I had such a horrible time
24 with my family.

25 Q Okay. However, had notice been properly made to

1 Susan --

2 A It would've been handled, correct.

3 Q Okay. All right. If you can --

4 A Our system is set up so that Susan catches
5 everything. I mean, she has a team that works for her.
6 They're trained very well. We do this every day in our
7 business.

8 Q How many people work for Susan?

9 A Four.

10 Q Okay. Let me have you look at Exhibit 42.

11 A Okay.

12 Q Have you ever seen that letter before?

13 A Yes.

14 Q Did you sign that letter?

15 A I did.

16 Q All right. Now, behind that letter you will see
17 Federal Express verifications, one to Brad Anthony, and then a
18 fax transmittal to Najam Khan, another FedEx to Najam Khan,
19 correct?

20 A Correct.

21 Q So according to the lease, does this comply with the
22 notice requirements in the lease?

23 A It does.

24 Q Now, this was sent May 29th, 2015. Have you ever
25 received a response from Treasure Island with regard to this

1 letter?

2 A We have not.

3 Q So they've never even said -- never said anything?

4 A Correct. No response.

5 Q Response was --

6 A No communication, nothing.

7 Q Nothing, okay. In the second paragraph -- second to
8 last paragraph, it says that you contacted -- second to last
9 paragraph, page 2, it says: Treasure Island nevertheless
10 contacted Rose's subtenant directly on May 28th in an apparent
11 attempt to circumvent or assume the benefits that inure to Rose
12 under the sublease, correct? Is that what that says?

13 A That is correct.

14 Q What did you mean by that?

15 A Well, my contractual agreement is with Treasure
16 Island. Rose's contractual agreement is with Treasure Island.
17 Treasure Island is very well aware of the underlying agreement
18 that I have, the subagreement, the sublease with Operadora,
19 with Señor Frog's. They've been made aware of it. They saw
20 it. They looked at it, and I regard this as -- I believe the
21 legal term is interfering -- tortious interfering with my
22 ability to work with my -- my subtenant.

23 Q Okay. And part of this issue is that Operadora also
24 did not receive copy of the default notice?

25 A That is correct.

1 Q Okay.

2 A Operadora was not given notice, and I also may -- I
3 also need to say, you know, this -- this is a little bit of a
4 David and Goliath issue. You know, there are -- you know it
5 seems to me that Treasure Island feels like they can pay
6 attention and adhere to the legal agreements when they want to,
7 and when they don't want to, they don't need to, and they've
8 been pushing us around since we started the lease.

9 And, you know, there's a 9 million-dollar investment
10 here, which affects me and my family in a big way, David
11 Krouham and his family in a very big way. There are probably
12 50 people, 60 people that have families that work at Señor
13 Frog's.

14 There are people that moved from Cancun to the United
15 States to run this restaurant so that it would be as Treasure
16 Island wanted it, an authentic Mexican-themed restaurant. If
17 you walk in all the managers that run Señor Frog's are from
18 Cancun. They've worked for Señor Frog's in their other
19 operations around the United States and in the Caribbean. They
20 are very well-trained, but they are -- they're from Mexico, and
21 they -- they throw a -- they throw a great experience, and
22 these people will be out a job.

23 I mean, you know, Treasure Island seems very cavalier
24 about the people factor here, which is really a big deal. I
25 mean, there's a reason that, you know, their Saturday night

1 Latin nights are the biggest Saturday night party in the Latin
2 world in Vegas, you know. It's a very, very popular venue.

3 Q Okay. And I was going to ask you about that. So
4 when this all began, the Señor Frog's experience -- it's not
5 just a dining; it's an experience?

6 A It is an experience.

7 Q And so part of that, David Krouham and you were
8 involved in the process of bringing managers into the United
9 States?

10 A That is correct.

11 Q And so you're involved in visas and everything, all
12 the immigration stuff?

13 A And their families.

14 Q Yeah, exactly.

15 A You don't just move, you know, the one person. The
16 whole family moved.

17 Q Correct. And so you've had people here for five or
18 six years now. Now, how many employees do you believe are at
19 Señor Frog's right now?

20 A I think full-time employees are somewhere --

21 MR. SHEEHAN: I'm going to object. This is really
22 getting totally irrelevant.

23 THE COURT: Sustained. Can we move forward.

24 MR. VAN: Okay.

25 / / /

1 BY MR. VAN:

2 Q If you could go to Paragraph 7 of the original lease.

3 A Do you know what exhibit that would be?

4 Q I'm sorry. Exhibit 1, Paragraph 7.

5 A Okay. No. 7 or Paragraph 7?

6 Q No. 7. Sorry. And it talks about the use of the
7 property, and it says: A tenant may use the leased premises
8 for the purpose of conducting thereon the operation of a bar,
9 lounge, a restaurant and/or nightclub serving Mexican food and
10 international food, and that may feature live entertainment
11 and/or prerecorded music and disc jockeys, dancing bottle
12 service, live entertainment, and private events. Does that
13 describe Señor Frog's?

14 A Yes.

15 Q Was there any question in your mind or in
16 Mr. Ruffin's mind that Señor Frog's was going to be a joint
17 venture with you in this deal?

18 A No question in anybody's mind.

19 Q In fact, when it was presented to him, wasn't the
20 name Señor Frog's used?

21 A That's the concept he approved.

22 Q Okay. If you can go to the next page, 7.7, it says:
23 Tenant shall operate under the trade name Señor Frog's?

24 A Correct.

25 Q Now, Señor Frog's is an international brand, correct?

1 A That is correct.

2 Q But you are affiliated with the international
3 company? I mean you -- Rose is, not you, but Rose, that you
4 had the joint venture agreement with Señor Frog's -- with
5 Operadora?

6 A Well, our joint-venture agreement was with a single
7 purpose entity LLC called Señor Frog's Las Vegas, and the
8 individual owners of Operadora, which has a management
9 agreement to operate the business, those individuals are
10 partners in Señor Frog's Las Vegas.

11 Q Okay.

12 A LLC.

13 MR. VAN: Okay. We'll pass the witness, Your Honor.

14 THE COURT: Did we take a break, and I didn't know?

15 MR. MARSHALL: No, Your Honor.

16 THE COURT: Okay. It looked like all of you were
17 getting up and leaving. It's like I usually get to know when
18 the break is.

19 MR. SHEEHAN: Well, when Mr. Van took a break, we
20 decided we wanted one also.

21 THE COURT: Okay.

22 MR. VAN: No, I --

23 THE COURT: He's passed the witness. Your turn.

24 MR. VAN: -- passed the witness.

25 MR. SHEEHAN: Oh, you passed the witness.

1 THE COURT: He did.

2 (Colloquy off the record.)

3 MR. SHEEHAN: Can we have two minutes, Your Honor?

4 THE COURT: Can I ask a question while you're doing
5 your thing?

6 MR. SHEEHAN: Sure.

7 THE COURT: Sir, yesterday you told me that you
8 didn't remember it the same as Mr. Anthony about your
9 discussion about providing you notice and not including other
10 people. Can you tell me how you remember it.

11 THE WITNESS: That's for me?

12 THE COURT: Yes, sir.

13 THE WITNESS: I'm sorry. Can you ask me the question
14 again?

15 THE COURT: Absolutely. Yesterday you said you
16 didn't remember it about the same as Mr. Anthony did about the
17 conversation about providing notice to other people, that you
18 remembered it differently.

19 THE WITNESS: Right.

20 THE COURT: Can you tell me how you remember it.

21 THE WITNESS: Sure. The way I remembered it was that
22 it was an accommodation to Treasure Island. Treasure Island
23 was confused -- I think that's the right word -- confused about
24 who was in charge of the construction. This came about during
25 the construction phase of the restaurant, and Brad Anthony

1 said, you know, they're getting calls and questions from David
2 Krouham, and Primo who was the manager of the restaurant --
3 Alex Shore was his name, his real name, legal name -- from the
4 architect.

5 Treasure Island's a big place. They have lots of
6 departments. So one person would be calling the maintenance
7 department, and then another person would be calling for the
8 food area because the food area -- as discussed here, Señor
9 Frog's gets all their food from the Treasure Island commissary,
10 and then they'd be getting a phone call about marketing, and it
11 would be all from different people. So Brad Anthony said to
12 me, Who is in charge? We have too many cooks in the kitchen.
13 Who do I communicate with about these specific issues that are
14 coming up? And I said, Call me.

15 I regard it as an accommodation to help Treasure
16 Island make it more simple for them to give them one person --
17 one person in contact while this construction -- complicated
18 construction project was happening.

19 THE COURT: Okay.

20 MR. SHEEHAN: Thank you, Your Honor. I just didn't
21 know whether my client wanted to be here for this. Can I --

22 THE COURT: You can stall. I was sort of stalling
23 for you.

24 MR. SHEEHAN: Thank you. And you're doing a great
25 job.

1 (Pause in the proceedings.)

2 MR. SHEEHAN: Thank you for your indulgence.

3 THE COURT: Absolutely.

4 MR. SHEEHAN: Is this the last witness, Mr. Van?

5 MR. VAN: Yeah.

6 CROSS-EXAMINATION

7 BY MR. SHEEHAN:

8 Q All right. Mr. Dragul, let's look at Exhibit
9 1, please.

10 A Okay.

11 Q And this lease agreement is between Treasure Island
12 and Rose LLC, correct?

13 A Correct.

14 Q And turning to Paragraph 3B.

15 MR. VAN: I'm sorry. Where was it? Where are you
16 looking?

17 MR. SHEEHAN: Page 4, Paragraph 3B.

18 MR. VAN: Of which exhibit?

19 MR. SHEEHAN: Of Exhibit 1.

20 THE COURT: 1, the lease.

21 MR. SHEEHAN: The lease.

22 BY MR. SHEEHAN:

23 Q There was percentage rent due, correct?

24 A I'm sorry. Are you asking me what 3B says?

25 Q Well, I'm asking you, was there percentage rent due

1 pursuant to this lease from Rose to Treasure Island?

2 A That is correct.

3 Q Okay. And under 3C, Rose had the obligation to
4 provide an accounting and a check 30 days after each quarter,
5 correct?

6 A Correct.

7 Q By the way, Elizabeth Gold is the person -- first of
8 all, who is Elizabeth Gold?

9 A Elizabeth Gold is my in-house counsel.

10 Q Okay. And where is her office?

11 A In 5690 DTC Boulevard.

12 Q How close is it to yours?

13 A Oh, 50 feet.

14 Q And --

15 A Maybe a hundred feet.

16 Q Okay. And did she also, I take it, take part in
17 negotiating the sublease with Señor Frog's?

18 A She was involved with Ben Kahn and I believe another
19 attorney.

20 Q She signed all these agreements, correct?

21 A I believe she did. I can't remember. Do you want me
22 to look?

23 Q Sure.

24 A She did. All these are -- the lease she signed.

25 Q Okay.

1 A I don't know about the sublease.

2 Q There's only two officers of Rose, you and her?

3 A If -- okay.

4 Q I'm asking you. That's what you testified in your
5 deposition. That's why put it that way. I'm not just --

6 A Yeah, I believe so. I don't -- I don't know, but I
7 believe so.

8 Q She is an officer?

9 A She is. She signed as an officer.

10 Q So within 30 days after the calendar quarter which
11 ended March of 2015, so April 30th, did Rose comply with
12 Paragraph 3C of this document?

13 A I believe -- I mean, did they give them the
14 accounting?

15 Q And the rent?

16 A I don't know. The percentage rent as discussed here,
17 no.

18 Q And by the way, you testified earlier that prior to
19 2000 -- mid-2014, Señor Frog's LLC was making all those
20 payments?

21 A That is correct.

22 Q But Rose is part of Señor Frog's LLC, correct?

23 A Rose is an owner of Señor Frog's LLC, but Rose did
24 not -- my point was the actual making out the check and sending
25 it to Treasure Island, Rose did not take on that function.

1 That function was handled in Las Vegas by the restaurant, the
2 accounting people that worked at the restaurant.

3 Q But you would agree that they were late several
4 times?

5 A I would not agree to that. I don't know that.

6 Q You don't know one way or the other?

7 A No, I don't know that -- I can -- I can attest to
8 what we did at Rose, which is right here.

9 Q Okay.

10 A I was not in Las Vegas. I was not part of the
11 accounting team. To the best of my knowledge, I was not
12 notified by Treasure Island of late payments under the lease.

13 Q Let's turn behind to Exhibit 6 -- Exhibit 5, and I
14 don't want to belabor this point because the lateness in the
15 rent before this is really irrelevant, but because Mr. Van
16 brought this up, I did want to point this out to you.

17 A Yeah.

18 MR. SHEEHAN: May I approach the bench, Your Honor?

19 THE COURT: You may.

20 BY MR. SHEEHAN:

21 Q I've just handed you a package -- let me show it to
22 your counsel, too, first.

23 A Thanks.

24 MR. SHEEHAN: It's the exhibit plus the tracking
25 information to show that this was actually 2014, not -- I don't

1 know if Your Honor remembered --

2 THE COURT: I did.

3 MR. VAN: Your Honor, I'm going to object to this.
4 First of all, this has never been produced, one. Secondly, I
5 agree that there is a receipt that shows 2014, but that doesn't
6 mean that this letter was in that FedEx package.

7 THE COURT: I understand your position, but I have
8 testimony that's already been presented related to that issue.
9 These documents seem to follow up on that testimony.

10 MR. VAN: I'm just saying that there's -- while I
11 agree, Your Honor, what I'm saying is that there's a receipt
12 for a FedEx package.

13 THE COURT: I understand your position, Mr. Van.

14 MR. VAN: Okay. All right.

15 THE COURT: Thank you.

16 MR. SHEEHAN: And let me point out also, Your Honor,
17 this is --

18 THE COURT: I don't need you to point it out.

19 MR. SHEEHAN: Oh, no. I'm saying this --

20 THE COURT: But I do need you to mark it as an
21 exhibit.

22 MR. SHEEHAN: Please. Because I've got the check
23 also.

24 THE COURT: I need you to mark it as an exhibit.

25 MR. SHEEHAN: I'm sorry. What number are we up to?

1 60 --

2 THE CLERK: 66.

3 MR. SHEEHAN: 66. And the exhibit includes four
4 pages. The fourth page is the actual check that was paid for
5 the rent, but again this is in direct --

6 THE COURT: They should probably be different
7 exhibits.

8 MR. SHEEHAN: Okay.

9 THE COURT: With the check being separate.

10 MR. SHEEHAN: All right. Let's make the check
11 separate.

12 THE COURT: Because the check wouldn't have been
13 enclosed with the package.

14 MR. SHEEHAN: That is correct.

15 MR. VAN: The same objection to the admission of the
16 evidence -- or this exhibit, Your Honor.

17 THE COURT: What?

18 MR. VAN: I said I'm objecting to the admission.

19 THE COURT: I know. He hasn't offered them yet.

20 MR. VAN: Okay. Oh, sorry. I thought he had.

21 THE COURT: I had him mark them so we'd have a record
22 of what it was we were arguing about.

23 MR. VAN: Okay. Sorry.

24 BY MR. SHEEHAN:

25 Q This exhibit, now Exhibit 5 with the backup FedEx

1 showing that it was in 2014, Exhibit 67 --

2 THE COURT: Proposed exhibit.

3 BY MR. SHEEHAN:

4 Q -- this proposed exhibit --

5 THE COURT: Thank you.

6 BY MR. SHEEHAN:

7 Q -- have you seen this document before, sir?

8 A I don't know.

9 Q All right. But it is --

10 A I mean, I just -- it's the same as Exhibit 6?

11 Q Yeah.

12 A I just saw it now. I don't know if I've seen it.

13 Q But it was sent attention to you, correct?

14 A It says it was sent attention to me.

15 Q And it does talk about late percentage rent, correct?

16 A It says: As you may be aware, Señor Frog's has
17 failed to pay to meet its rental obligations specifically as --
18 specifically outlined -- did not pay the required -- percentage
19 rent under the terms and conditions -- lease of April 13th --
20 the total amount due -- the letter constitute notice.

21 Well, this is what confuses me. The percentage rent
22 is due the last day of the month following the prior quarter.

23 Q Right. So it would have been due January 30th,
24 correct?

25 A January 31st.

1 Q Okay. Well, it actually says -- if you look at
2 the -- it says 30 days.

3 A So the lease says 30 days after, okay.

4 Q Okay. So it would be due the 30th, and it hadn't
5 been paid. That's what the letter says at least?

6 A That's what the letter says.

7 Q And your own chart just showed that you had a 50 --
8 excuse me.

9 MR. SHEEHAN: And, Your Honor, again this is in
10 rebuttal to the evidence that they just presented that hadn't
11 been presented to me, and I can present a copy of the check
12 that was paid showing that it was late.

13 THE COURT: You sure can. The witness would be happy
14 to look at it. Whether I allow it to be admitted is a
15 different issue.

16 MR. SHEEHAN: Sure.

17 THE WITNESS: Okay.

18 BY MR. SHEEHAN:

19 Q And it was -- that was late, correct?

20 A Yes, this is great --

21 Q I --

22 A -- because I actually think that the important part
23 of this check is that it did come from Señor Frog's operating
24 account and was not directly from Rose, and it does show that
25 it was -- actually -- excuse me -- this letter is for January

1 31st, 2012, and this check is for February 6, 2014.

2 Q Okay. Thank you, sir.

3 A So what's the -- we have a two-year gap here.

4 Q Okay. Thanks.

5 A So what's the issue here?

6 Q You can go ahead and give me the documents back.

7 Thank you, sir. All right.

8 MR. VAN: Can I see that check? I mean, I don't --
9 these are all things I haven't seen before. So.

10 BY MR. SHEEHAN:

11 Q All right. But you do admit that Señor Frog's might
12 have been late on payments prior to Rose taking over?

13 A You know, I don't have the information in front of
14 me.

15 Q So if Mr. Anthony said that he reviewed the records
16 and testified that they were, you would have no reason -- no
17 specific knowledge to --

18 A The only reason is I haven't studied them. I
19 haven't, I mean, just like when you show me a letter dated 2012
20 and ask me for a corresponding check that is 2014, it seems
21 like maybe Treasure Island -- I'm not sure that they're talking
22 about the right default here, or you need a copy of a different
23 check.

24 Q Okay.

25 A That corresponds with the 2012 date.

1 Q All right. Let me ask you now to turn over to
2 page 16 of Exhibit 1.

3 A Yes.

4 Q All right. Now, I understand that Rose has issues
5 with respect to the notice and so on and so forth, but if the
6 notice was properly given, and Rose did not pay within the cure
7 period, Treasure Island did have the ability to terminate this
8 lease pursuant to the default remedies under Paragraph 15.2,
9 correct?

10 MR. VAN: Object to the form.

11 THE COURT: Overruled.

12 THE WITNESS: Under 15, 2.

13 BY MR. SHEEHAN:

14 Q 15, 2, and 15.2.1, the first sentence of 15.2.1.

15 A Let's see here.

16 Q You have to take those in combination.

17 A Landlord may terminate this lease. So it says:

18 If --

19 Q Read 15.2 first, sir.

20 A If -- Upon the occurrence of an event of default, in
21 addition to any other rights or remedies provided for herein or
22 at law or in equity without barring election of any remedy,
23 landlord at its sole option shall have the following rights:
24 Landlord may terminate this lease and --

25 Q Stop right there.

1 A -- and tenant -- well, you asked me about the whole
2 paragraph. So I'd like to read it all.

3 Q Sure.

4 THE COURT: Don't read it out loud then, sir.

5 THE WITNESS: I won't.

6 THE COURT: You can read it to yourself.

7 THE WITNESS: That's fine.

8 THE COURT: I need to break at 11:45 today.

9 MR. SHEEHAN: Sure.

10 THE COURT: And we'll break until 1:45 because I have
11 to go to the Family Court campus.

12 MR. SHEEHAN: That's fine.

13 MR. VAN: For another 30-minute meeting.

14 THE COURT: No, that meeting is an hour with a
15 45-minute trans.

16 MR. SHEEHAN: I don't see a clock in here. So I kind
17 of feel like I'm in a casino, but --

18 THE COURT: I'm just going to tell you when we're
19 leaving.

20 MR. SHEEHAN: That's fine. What time is it now?

21 THE COURT: 11:09.

22 MR. SHEEHAN: I'll be finished by then with the --

23 THE COURT: I never have hope.

24 MR. SHEEHAN: Mr. Van and I have been pretty brief.

25 THE COURT: That's true. You have.

1 BY MR. SHEEHAN:

2 Q So the question, it really --

3 A Excuse me one second.

4 Q -- has been answered at this point.

5 (Pause in the proceedings.)

6 MR. SHEEHAN: May I move on, Your Honor, to the next
7 question?

8 THE COURT: As soon as he's done reading. You asked
9 him to read, and he said he wanted to read. So I'll just sit
10 here and wait, too.

11 BY MR. SHEEHAN:

12 Q Are you ready for me to proceed forward, Mr. Dragul?

13 A Excuse me one second.

14 (Pause in the proceedings.)

15 THE WITNESS: Okay.

16 BY MR. SHEEHAN:

17 Q All right. And then turning to the last signature
18 page, we covered this briefly, but it's signed by Elizabeth
19 Gold, who is the Vice President, and also your in-house legal
20 counsel, correct?

21 A Correct.

22 Q And she is the one that actually participated in
23 drafting and negotiating this, correct?

24 A She did. She did participate.

25 Q Now let's turn over to Exhibit 8. Have you seen this

1 letter before, sir?

2 A I have.

3 Q Okay. And there was an issue about your -- Rose's
4 repayment of construction costs, correct?

5 A I'm sorry. There was an issue, is that what you're
6 asking me if this letter is about that?

7 Q Well, yes.

8 A This letter is from Treasure Island is saying that
9 it's come to their attention that Rose owes one million, one
10 hundred, six hundred and forty -- \$1,100,640 in construction
11 costs that we've incurred on the Señor Frog's project. They
12 said that contractors were beginning to lien Treasure Island
13 and that this is unacceptable, which by the way there were no
14 liens ever, and the contractor dispute was about overbilling.
15 It had nothing to do with Treasure Island.

16 Let's see. It is vital to our mutual ongoing
17 business relationship that they do not allow liens. There were
18 no liens ever filed against Treasure Island in regard to this
19 job. Treasure Island will not sit idly by and allow our
20 business or property to be damaged by this dispute, and will
21 view the establishment of any lien on the property --

22 Q Basically I'm just asking you was this letter about
23 construction-cost issue?

24 A It was about liens.

25 Q It actually starts off: It has come to Treasure

1 Island's attention that you owe 1,100,640 in construction costs
2 that you incurred. All right. Sir, do you recall a telephone
3 conversation that you had with Mr. Anthony following receipt of
4 this letter?

5 A I do not.

6 Q You never had a conversation with Mr. Anthony?

7 A No, I'm saying -- you asked me if I recall. I do not
8 recall having that conversation.

9 Q Okay.

10 A I might have. I mean, we're talking -- what was
11 this -- four years ago.

12 Q All right.

13 A Over four years ago.

14 Q Well, I thought just before the break you went
15 through the conversation with Your Honor?

16 A Well, I went through the conversation about -- it was
17 different. The conversation I went through with Your Honor was
18 having to do with who Treasure Island could work through with
19 regard to construction issues that come up on the job, like,
20 you know, if we needed the electrical department to come down
21 and work with us, or the heating and cooling department to help
22 us, or -- which was operated by Treasure Island, or we had to
23 work with Michelle Knoll on marketing, or there was an issue
24 about how the food was going to be delivered --

25 Q All right.

1 A -- from the commissary directly to Señor Frog's.
2 Treasure Island had a lot of people calling them, and I think
3 that it was more work than they wanted to do. So they were
4 asking us to help them with a main point of contact.

5 Q Did you have a conversation with Brad Anthony
6 following this letter?

7 A And I said I don't know. I don't remember.

8 Q All right. Do you notice on this document here it's
9 addressed to Rose LLC, attention Susan Markusch?

10 A Yes.

11 Q And then it's CC Operadora, correct?

12 A That is correct.

13 Q Now, let's take a look at the next letter behind Tab
14 9. Now, the letter behind Tab 9 does not have those things on
15 it, does it?

16 A Those things. What things?

17 Q The Markusch and the Operadora?

18 A Tab 9 does not have Susan Markusch, and it does not
19 have Operadora. It was not a proper notice.

20 Q Now, let's take a look at -- by the way, you said it
21 wasn't a proper notice. Did you -- when you got this document,
22 did you inform Treasure Island that it was not a proper notice?

23 A I don't remember.

24 Q Okay. Now let's take a look at this letter, and what
25 does the first sentence of this letter say, beginning with

1 several days ago? And you can just read the first sentence.

2 A Several days ago you requested that Treasure Island
3 postpone your repayment obligation of the two and a half
4 million dollar interest-free loan granted to you in accordance
5 with Section 3.4 of the lease agreement between Rose LLC, and
6 Treasure Island. This letter serves --

7 Q Okay. That's all right. That's just the first
8 sentence. All right. And this letter is addressed to you,
9 correct?

10 A It is.

11 Q All right. So does this refresh your memory that you
12 had a conversation with Brad Anthony following the August
13 31st letter, Exhibit 8?

14 A It doesn't.

15 Q But it certainly would appear that way?

16 MR. VAN: Objection, Your Honor.

17 THE COURT: Overruled.

18 THE WITNESS: It would appear that -- let's see. It
19 says: Postpone your repayment on the -- several days you
20 requested -- I don't know whether that was a conversation, or
21 it might have been an e-mail. It could've been a letter.

22 BY MR. SHEEHAN:

23 Q Well, let me put it to you differently. Is it
24 possible that the conversation that you testified about
25 yesterday and today with Brad Anthony occurred in between these

1 two letters?

2 A I really don't know when it occurred.

3 Q Well, turn behind Tab 10. Have you ever seen this
4 letter before?

5 A I'm sorry. What was your question?

6 Q Have you ever seen this letter before?

7 A I believe so.

8 Q All right. And basically it was in response to this
9 issue about your request to change the repayment of the
10 construction costs, and your in-house counsel Ms. Gold is
11 writing confirming --

12 A Well, if you go back to the prior exhibit you asked
13 me to look at, it talks about repayment of the two and a half
14 million dollar loan.

15 Q That's what I'm talking about. I'm sorry.

16 A Okay. And this is confirmation. It looks like --
17 let's see. We are in receipt of Treasure Island's LLC letter
18 dated September 19th confirming postponement until January
19 15th, 2013. So it looks like four months later the payment
20 obligation set forth in Section 3.4 of the lease is amended.
21 And so what's your -- what was your question?

22 Q So this is a letter in response to Mr. Anthony from
23 your in-house counsel, Ms. Gold, about the \$2.5 million
24 construction loan, correct?

25 A It looks to be that, correct.

1 Q And you directed --

2 A But it wasn't a construction loan, but whatever, no
3 big deal.

4 Q Do we want to go back to 3.4 and look at it?

5 A It's okay.

6 Q All right.

7 A I'm not trying to argue with you.

8 Q Okay. That's fine.

9 A I just want to be correct.

10 Q All right. Turning over to Tab No. 13, another issue
11 involving Latin night sent to you by Mr. Anthony, May of 2013,
12 and I won't go through all of these, but there's several in
13 here that you've reviewed and seen throughout the course of
14 this litigation in the last couple days, correct? And there's
15 no copy to Susan Markusch, and there's nothing to Operadora on
16 this letter, correct?

17 A Yeah, I think Señor Frog's -- I'm sorry -- I think
18 Treasure Island did not follow the notice provision under the
19 lease. I think that they were very sloppy about who they wrote
20 letters to, and whose attention they were to, and the notice
21 provision was very sloppy. Sometimes it was adhered to;
22 sometimes it wasn't on the part of Treasure Island.

23 Q Did you respond to Mr. Anthony that this letter is
24 inappropriate because it did not -- it wasn't sent to Susan
25 Markusch?

1 A I have no idea. I don't regard it as my job to make
2 sure that Treasure Island fulfills their business obligations.

3 Q Sir, as we sit here today, do you have any memory of
4 ever informing Treasure Island that any of these notices after
5 that August 31st, 2012, was sent to Operadora and Susan
6 Markusch? Do you have any memory of receiving any other
7 letters afterwards that weren't sent to Susan Markusch ever
8 telling Treasure Island from now on send it to Susan Markusch.
9 Don't send it to me?

10 A And I will say it again. I don't regard it as my
11 obligation to make sure that the --

12 MR. SHEEHAN: Your Honor, move to strike. It's
13 nonresponsive.

14 THE COURT: Granted.

15 Sir, the question to you is: Did you ever tell
16 Mr. Anthony you wanted him to go back to the original notice
17 after you told him you only wanted him to send them to you?

18 THE WITNESS: Well, first off I don't think my
19 testimony was that I wanted them to be sent to me. So I never
20 said that.

21 BY MR. SHEEHAN:

22 Q So I'll make the question very simple. Did you ever
23 after August 31st, 2012, after receiving any of these letters
24 from Treasure Island inform Treasure Island don't send them to
25 you, send them attention Susan Markusch? Yes or no?

1 A I don't remember.

2 Q As we sit here today, do you remember doing that?

3 A I just said I don't remember.

4 Q Let's turn behind Tab 21. All right. Now we're
5 talking about the fifth amendment and the rent issues and so on
6 and so forth, and the pirate show out back, but I just want to
7 know who is the correspondence between if you look at these
8 e-mails, and if you went through all the correspondence
9 regarding this in Exhibits 16 through 25? If you went through
10 16 to 25 you're welcome to quickly look through there, all I
11 want to know is who was the correspondence between, which
12 individuals? I'll represent to you that it was with Elizabeth
13 Gold, Gary Dragul (sic) and you basically.

14 A The e-mail correspondence?

15 Q Yes.

16 A Well, Exhibit 16 has some other people on it. It has
17 Najam Khan.

18 Q I understand. But Elizabeth Gold is on every one of
19 them, correct?

20 A Elizabeth Gold -- well, you just said to me there
21 was --

22 Q Right. I understand. I understand, sir, and I --

23 A But there's other people on here.

24 Q -- apologize. Okay.

25 A Do you want me to tell you the people or not?

1 Q Is Elizabeth Gold on every one of them?

2 A Let's see. 16, 17, 18, 19, 20, 21, she is.

3 Q By the way, is Elizabeth Gold at work today?

4 A Yes.

5 Q Did you speak to her this morning?

6 A I did speak to her this morning. I speak to her
7 every morning. We have ongoing business.

8 Q Do you speak to her several times a day?

9 A I do.

10 Q I assume by cell phone today?

11 A Yes.

12 Q And do you also e-mail back and forth?

13 MR. VAN: Objection. Relevance, Your Honor.

14 THE COURT: Overruled.

15 THE WITNESS: We do e-mail back and forth sometimes.
16 I mean, the phone is more efficient.

17 BY MR. SHEEHAN:

18 Q So behind Tab 21, that also shows that it was Gary
19 Dragul, Elizabeth Gold and Brad Anthony, and that was a pretty
20 important document, correct?

21 A Well, it's an e-mail. Let's see. You're correct
22 with respect to this being the fifth amendment as drafted. I
23 don't think we're going to agree to this. This is from Brad
24 Anthony to Elizabeth Gold with me copied, Brad saying to
25 Elizabeth that this is in regard to the fifth amendment. He

1 says, As agreed -- as drafted they don't think they'll agree to
2 it. The agreement was worked on laboriously and was focused
3 solely on rent reduction and the removal of show language. Due
4 to the dramatic reduction in rents, the use provision needed
5 modification or needed to be modified.

6 Q Sir, I guess the question only is: Is Elizabeth Gold
7 on there?

8 A Yes.

9 MR. VAN: Objection, Your Honor.

10 THE COURT: Overruled.

11 BY MR. SHEEHAN:

12 Q All right. Let's turn to the fifth amendment to the
13 lease agreement, which is behind Tab 28. Now, you talked about
14 Mr. Fieldstone being involved in this. Now, Mr. Fieldstone is
15 the person that talked with Elizabeth Gold to get Operadora's
16 side of things into this document, specifically that notice
17 provision. Am I summing up your testimony correct?

18 A No, I don't think I said that.

19 Q Okay. Tell me about that.

20 A Mr. Fieldstone was David Krouham's attorney, and
21 Operadora's counsel, and we -- I believe Ben Kahn was in --
22 worked directly with Susan Trench and Ronald Fieldstone. I
23 don't believe that Elizabeth Gold was involved in the drafting
24 of the fifth amendment.

25 Q Okay. But somebody on Rose's side was the one that

1 chose the language about where the notice would be sent to Rose
2 in this document, correct?

3 A I believe we moved our offices. So we told Ben Kahn
4 to update our -- the location of where the notice should be
5 sent based upon in the lease it says that we can change the
6 address and/or anybody that's noticed. It's in this -- in
7 subsequent amendment.

8 Q All right. Sir, under Paragraph 11, the part that
9 Mr. Kahn put in there, there is no reference to Susan Markusch,
10 is there? That's a yes or no question.

11 A No, but I --

12 Q All right. Thank you.

13 A Susan Markusch was in the (unintelligible).

14 Q All right. Now, let's go to Exhibit 30, the amended
15 sublease. Let's turn to Paragraph 6. Okay. By the way, I
16 think you testified that you felt it was important that
17 Treasure Island pay attention to the legal terms in its
18 agreements, correct?

19 A Absolutely.

20 Q So I assume it would be the same with Rose?

21 A All parties.

22 Q And you also heard the opening argument from your
23 counsel about Implied Covenant of Good Faith, and how everybody
24 has good-faith obligation in contracts. Are you familiar with
25 that?

1 A I am.

2 Q And you agree with that?

3 A Yes.

4 Q So Rose would be bound by the same thing?

5 A We're bound absolutely.

6 Q Let's take a look at Paragraph 6.

7 A Uh-huh.

8 Q Now, under Paragraph 6 --

9 MR. VAN: Your Honor, I'm going to object to this
10 line of questioning only because of relevance. This is a
11 subcontract between Rose and Señor Frog's. TI is not a party
12 to it. They're getting into questions of good faith and fair
13 dealing between the two parties.

14 THE COURT: Counsel, you started this process. So
15 I'm going to give him a little bit of latitude.

16 MR. VAN: Okay.

17 THE COURT: But not much.

18 BY MR. SHEEHAN:

19 Q Señor Frog's paid \$82,500 per month to Rose under
20 this lease, correct?

21 A It started out as 80, and then it has increases,
22 correct.

23 Q And Señor Frog's in fact paid January, February and
24 March, 82,500, correct?

25 A That is correct. What year? Sorry.

1 Q 2015.

2 A Okay. Yes.

3 Q And Rose's obligation to Treasure Island is roughly
4 \$80,000 per month?

5 A It's 32 -- thirty-three, two, fifty, plus percentage
6 rent. So the percentage rent goes up and down. It, you know,
7 could be -- could be around 80. It could be less. It could be
8 more.

9 Q During the deposition you told me that they were
10 basically an even --

11 A They're not that far off. Correct.

12 Q All right.

13 A Some months are better than others.

14 Q All right. Did you take the \$80,000 that you got
15 from Señor Frog's for each of these three months and pay it
16 over to Treasure Island by April 30th of 2015?

17 A No.

18 Q Sir, turning over to Paragraph 9D, page 7.

19 A On the same --

20 Q Yeah, same document, page 7, second sentence. Do you
21 see where it says: In the event that prime landlord notifies
22 landlord of any default under the prime lease and does not --

23 A I'm sorry. What paragraph?

24 Q Paragraph 9D, second sentence.

25 A Okay. Sorry.

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1 Q In the event that prime landlord notifies landlord of
2 any default under the prime lease and does not provide
3 simultaneous notice to subtenant, landlord will provide
4 subtenant with a copy of any prime landlord notice of default
5 under the prime lease within 24 hours. Do you see that?

6 MR. VAN: Objection, Your Honor. Now we're getting
7 into the issues as between --

8 THE COURT: Overruled.

9 BY MR. SHEEHAN:

10 Q Do you see that?

11 A I do.

12 Q So if Rose was provided a default notice by Treasure
13 Island that wasn't copied to Operadora, Rose had an obligation
14 to turn that default notice over to Operadora within 24 hours,
15 correct?

16 A This is exactly what David Krouham negotiated for.

17 Q Sir, does it say that?

18 THE COURT: Sir, the question is yes or no.

19 THE WITNESS: Yes.

20 BY MR. SHEEHAN:

21 Q Did Rose do that?

22 A I didn't receive default notice.

23 Q Okay. If Rose had received default notice, would it
24 have provided notice to --

25 A If it had, I assume under the lease that we would,

1 but we didn't.

2 Q To your knowledge as we sit here today, did Rose ever
3 provide Operadora notice of any of the defaults or any of the
4 default notices that were sent to you?

5 A I don't know.

6 Q As we sit here today, can you remember ever sending
7 one, or directing your staff to send one, or knowing that any
8 of your staff had sent one?

9 A I don't know.

10 Q I'll take that as a no.

11 A No, I think you should take it as I don't know
12 because I don't know.

13 THE COURT: Sir, please don't argue with counsel.

14 BY MR. SHEEHAN:

15 Q Okay. I'll ask you again. As we sit here today --

16 THE WITNESS: Sorry, Your Honor.

17 BY MR. SHEEHAN:

18 Q As we sit here today, do you remember ever sending on
19 any of the default or other notices that were sent to you to
20 Operadora?

21 MR. VAN: Objection. Argumentative.

22 THE COURT: Overruled.

23 Please answer.

24 THE WITNESS: I don't. I don't remember.

25 MR. SHEEHAN: All right.

1 THE COURT: Anything else?

2 MR. SHEEHAN: Pardon me?

3 THE COURT: Anything else with the witness?

4 MR. SHEEHAN: Oh, yeah, plenty more.

5 THE COURT: Okay.

6 MR. SHEEHAN: Sorry.

7 THE COURT: Go ahead.

8 BY MR. SHEEHAN:

9 Q Okay. Let's turn behind Tab 37. Have you seen this
10 document before, sir?

11 A I have not. Maybe I have. I can't remember.

12 Q This is also a default notice sent to you, correct?

13 MR. VAN: Object to the form, Your Honor. It's not a
14 default.

15 THE COURT: Overruled.

16 THE WITNESS: The letter says: Treasure Island
17 hereby informs you that you were either in default or about to
18 be in default under the lease agreement. I'm not sure which it
19 was.

20 BY MR. SHEEHAN:

21 Q All right. Did you provide this to Operadora?

22 A I don't know. This was --

23 Q Did you ever inform -- did you inform Mr. Anthony
24 when you received this letter to send this to Operadora?

25 A Well, under the notice provisions of amendment 5, he

1 was supposed to have noticed them --

2 MR. SHEEHAN: Objection -- I mean --

3 THE WITNESS: -- which is not on this letter.

4 MR. SHEEHAN: -- move to strike, Your Honor, as
5 nonresponsive again.

6 THE COURT: Granted.

7 BY MR. SHEEHAN:

8 Q Did you ever tell Brad Anthony after receiving this
9 letter that it needed to be sent to Operadora?

10 A I don't remember.

11 Q All right. Let's get to the crux here. Let's turn
12 behind Tab 38. Have you seen this letter before?

13 A I have.

14 Q When was the first time that you saw it?

15 A I don't know.

16 Q You were very careful in your testimony, both your
17 deposition and yesterday, to say that this is -- this is the
18 default notice that we're here about today, correct?

19 A Yes.

20 Q All right. And I'm going to try to be fair to you
21 here, and say that this is an important part of this thing, and
22 therefore it's very important that you be truthful about this.
23 You understand that?

24 A Yes.

25 Q Now, you were very careful in your deposition and

1 yesterday to say that you did not see this until you came back
2 following Memorial Day, correct?

3 A That's what -- that is correct.

4 Q That is what your testimony was yesterday?

5 A That is correct.

6 Q And do you stand by that testimony today?

7 A I do.

8 Q All right. You also testified yesterday that you
9 were not in the office on the Thursday and Friday following the
10 convention?

11 A I said to the best of my knowledge I was not in the
12 office on that Thursday and Friday; that is correct.

13 Q We can check the transcript. You said you weren't.
14 Were you or were you not?

15 A I believe I was not in the office. I was attending
16 to very sick family.

17 Q All right. Now, you said you hadn't seen this
18 document, but did somebody tell you about this document?

19 A I don't remember.

20 Q Sir, is it your sworn testimony that you don't
21 remember Elizabeth Gold telling you about this document on or
22 about May 14th or May 15th?

23 A That's my testimony.

24 Q Did she tell you about this document on May 14th?

25 A No, I don't -- I don't remember talking to Elizabeth

1 Gold about this document.

2 Q But she may have?

3 A I don't think so.

4 MR. VAN: Objection, Your Honor.

5 THE COURT: Overruled.

6 BY MR. SHEEHAN:

7 Q Isn't it true that when you got this document you and
8 Ms. Gold call up Brad Anthony and ask him for more time to pay
9 this obligation?

10 A I don't remember having that conversation with Brad
11 Anthony.

12 Q Not with Brad Anthony, with Elizabeth Gold?

13 A I don't remember having that conversation with
14 Elizabeth Gold.

15 Q Isn't it true that you tried to make a partial
16 payment? You directed your staff to make a partial payment of
17 less than the full amount due to cure this default?

18 A No, that's not -- that's not what I did.

19 Q Okay. Tell me what you did.

20 A I don't -- I was at ICSC convention. I didn't do
21 anything.

22 Q Okay.

23 A I think Susan Markusch did that on her -- made a
24 payment on her own.

25 Q All right. So Susan Markusch made a partial payment

1 following receipt of this document, correct?

2 A I don't know whether it was following, before, after.
3 You know, I'm not Susan Markusch. This is what she does for a
4 living. I don't know what happened with her.

5 Q Okay. But Susan Markusch did try to make a partial
6 payment of the outstanding amount due set forth in this letter
7 on or about May 15th?

8 A I don't believe that that was the day, but --

9 Q Pardon me. Between May 15th and May 17th?

10 A I don't believe that's true.

11 Q Okay. When was it true?

12 A I think that -- well, I was at ICSC convention from
13 Sunday, May 17th until the following Wednesday, and I believe
14 that it took place during that time.

15 Q All right. So Susan Markusch tried to make a partial
16 payment --

17 A I didn't find out about all this until I was back in
18 Denver. I have no idea.

19 Q Fair enough. Fair enough. All right. So Susan
20 Markusch tried to make a partial payment sometime between
21 May 17th and May 21st to cure this outstanding amount --

22 A I don't know if it was --

23 Q -- was that payment accepted?

24 A You said to cure. I have no idea.

25 Q All right. Was the --

1 A What the reason. The payment was not accepted.

2 Q All right. That's fine, sir. But you would agree
3 that the full amount of money that was due pursuant to that
4 default notice was not paid to Treasure Island by May 28th,
5 2015?

6 A The full amount was wired, I believe, on May 29th.

7 Q So the answer to my question is yes?

8 A I can't remember your question. Do you want to
9 rephrase it again?

10 Q You do admit that the amounts set forth in that
11 default notice were not paid to Treasure Island by May 28th,
12 2015?

13 A The amount sent forth on the May 14th, correct.

14 Q And by the way, I heard you say that if any moneys
15 aren't paid to you as a landlord by the 10th of the month, you
16 collect?

17 A Absolutely.

18 Q These moneys were due on April 30th?

19 A No, Mr. Sheehan, I also testified about --

20 Q Sir --

21 MR. SHEEHAN: Again nonresponsive, Your Honor.

22 THE COURT: Sustained.

23 BY MR. SHEEHAN:

24 Q The moneys that were set forth that were owed in the
25 May 14th letter were due on April 30th pursuant to the

1 terms of the lease, correct?

2 A That is correct.

3 Q Do you recall having any conversations with Elizabeth
4 Gold about the May 14th default notice while you were in the
5 convention here in Las Vegas?

6 A I do not.

7 Q Let's turn to behind Tab 42. But you certainly
8 talked with her every day during that convention?

9 A No, that's not true. At the convention we have 10
10 people here that all have 10 to 15 meetings a day, and we all
11 go in a lot of different directions. So during that time I did
12 not talk to her every day.

13 Q But you certainly talked to her sometimes?

14 A It was occasional --

15 Q All right.

16 A -- but not -- we had very specific --

17 Q All right.

18 A I'm just trying to help you understand why. It's not
19 like a normal workday.

20 Q No, no problem, sir. Okay. Behind Tab 42, this is a
21 letter that was written by you, correct?

22 A With the help of my legal counsel, correct.

23 Q And what does it say -- do you see where it says that
24 the May -- in the first paragraph, do you see where it says:
25 Treasure Island addressed and overnighted for delivery on

1 May 15th, 2015, the alleged breach notice to Gary Dragul on
2 behalf of Rose and copied Elizabeth Gold via e-mail?

3 A Let's see. I see that, correct.

4 Q So you wrote that, right?

5 A I did not write that.

6 Q Well, you signed the letter?

7 A I told you with the help of my legal counsel.

8 Q All right.

9 A Which is Elizabeth Gold and Ben Kahn.

10 Q All right. So Elizabeth Gold wrote this letter?

11 A I just told you who.

12 Q All right. And Elizabeth Gold, when she wrote the
13 letter, she said that the default notice was e-mailed to her?

14 A Elizabeth Gold and Ben Kahn were involved in writing
15 this letter. I don't -- it says that: Alleged breach --
16 notice Gary Dragul on behalf of -- and copy Elizabeth Gold via
17 e-mail. It must have happened.

18 Q It must have happened. She was e-mailed it, correct?

19 A What it says here.

20 Q And she did not write in here I never received that
21 e-mail, did she?

22 A In this first paragraph I don't see that.

23 Q In the letter that she wrote, she wrote that she was
24 copied via e-mail. She didn't write, I wasn't copied; I didn't
25 get the e-mail, did she?

1 A The letter says: Addressed --

2 Q Let me rephrase the question.

3 A -- and overnighted --

4 Q Any part in this letter does Elizabeth Gold write, I
5 didn't get the e-mail?

6 A Any part of this letter, I have to read it.

7 Q Certainly.

8 THE COURT: So once he answers, Counsel, we're going
9 to break.

10 MR. SHEEHAN: Sure. And you said 1:45?

11 THE COURT: It takes a half hour to get there and
12 back each way.

13 MR. SHEEHAN: It's all right. We'll be drinking
14 Miller Lite by 4:30.

15 THE COURT: You will. I'll be working.

16 MR. SHEEHAN: You are the hardest working person in
17 show business.

18 THE COURT: Well, if only.

19 THE WITNESS: You asked me that if there's any place
20 in here that Elizabeth Gold said that she did not get the
21 e-mail?

22 MR. SHEEHAN: Right.

23 THE WITNESS: I don't see that in here.

24 MR. SHEEHAN: Thank you, sir.

25 THE COURT: All right. So this is not a requested

1 break, sir. So you may speak with your counsel if you'd like,
2 and Mr. Sheehan may not inquire into it.

3 See you guys at 1:45.

4 THE WITNESS: Thank you, Your Honor.

5 (Proceedings recessed 11:43 a.m. to 1:45 p.m.)

6 THE COURT: Sir, you're under oath again, still up
7 here.

8 THE WITNESS: Thank you.

9 THE COURT: And again, sir, if you need a break for
10 something, you're allowed to ask. The lawyers aren't.

11 THE WITNESS: Perfect.

12 MR. VAN: The Court has made it abundantly clear
13 where the lawyers sit on the totem pole, Your Honor.

14 THE COURT: That's true, much lower than witnesses
15 and jurors.

16 MR. VAN: Exactly.

17 BY MR. SHEEHAN:

18 Q All right. Just for the record, sir, that payment
19 that Ms. Markusch made, or the e-mail for the partial payment,
20 that was sent out by FedEx on May 16th, correct?

21 A I don't know the date.

22 Q When you prepared the chart -- the chart that Mr. Van
23 provided you very first thing this morning, do you recall that
24 chart?

25 A I do. This is the chart about when the payments were

1 received by Treasure Island?

2 Q Yeah.

3 MR. SHEEHAN: Do you have an extra copy, sir?

4 MR. VAN: Yes.

5 MR. SHEEHAN: May I approach the witness, Your Honor?

6 THE COURT: You may.

7 MR. SHEEHAN: Have we even marked this as an exhibit,
8 or --

9 THE COURT: It was marked, but not admitted --

10 Or was it marked at all?

11 THE CLERK: It was demonstrative.

12 MR. VAN: It wasn't marked.

13 THE COURT: It was only a demonstrative. It hasn't
14 been marked. It should be marked as D1.

15 MR. SHEEHAN: Can we mark it as Exhibit 68, I believe
16 we're up to or --

17 THE COURT: I don't mark demonstrative exhibits in
18 the same way I do others.

19 MR. SHEEHAN: Oh, I'm sorry. Okay.

20 THE COURT: Remember, we were only going to make it
21 be demonstrative.

22 MR. SHEEHAN: Okay. However you want it, Your Honor.

23 THE COURT: That's my plan.

24 MR. SHEEHAN: That sounds great.

25 MR. VAN: Well, hold on. Hold on. If you're going

1 to do that, use the one that he's got as the exhibit, not --
2 But you can have that one.

3 THE COURT: What's the difference? What's the
4 difference?

5 MR. VAN: That one has a highlighted section.

6 THE WITNESS: I don't know where it is.

7 MR. VAN: It's a little clearer.

8 THE COURT: So he doesn't know where it is. We're
9 going to use this one.

10 MR. VAN: That's fine, works for me.

11 THE COURT: Great.

12 MR. MARSHALL: It's right here, Your Honor.

13 MR. VAN: It's prettier.

14 BY MR. SHEEHAN:

15 Q Showing you what's been marked as Demonstrative 1,
16 and there is yellow highlighting beginning with the entry after
17 5/1 that begins 5/29. Do you see that?

18 MR. SHEEHAN: Do you have a copy, Your Honor, or
19 would you like one?

20 THE WITNESS: I'm sorry. Can you --

21 THE COURT: I don't want one. It's not admitted.
22 I'll look at it when you guys use it in argument though.

23 THE WITNESS: Can you ask me the question again.

24 BY MR. SHEEHAN:

25 Q Do you see the yellow highlighted section there that

1 your attorney highlighted because that was the important
2 section apparently?

3 A Yeah.

4 Q All right. Now, when was this chart prepared?

5 A Earlier in the week. I think Monday or Tuesday.

6 Q Monday or Tuesday?

7 A Maybe last week, maybe.

8 Q Okay. It wasn't prepared last night?

9 A It was not prepared last night, no.

10 Q And who prepared the chart?

11 A The chart was prepared by some people on my
12 accounting team with me.

13 Q Okay. At your direction?

14 A Absolutely.

15 Q Okay. And your counsel highlighted the yellow
16 section, and what is the yellow section --

17 MR. VAN: Your Honor, let me just clarify. I didn't
18 highlight anything. I had nothing to do with the preparation
19 of this. So --

20 THE COURT: Sir, did you highlight it, or did
21 somebody else?

22 THE WITNESS: I did.

23 THE COURT: Okay.

24 BY MR. SHEEHAN:

25 Q Okay. Why did you highlight the yellow section?

1 A I highlighted the yellow section because it talked
2 about the time frame that the case is about.

3 Q Well, actually, the yellow section shows all the
4 checks that you made that were returned by Treasure Island,
5 correct?

6 A Let's see here. Where? Returned to sender -- FedEx
7 delivered -- Jerry Griffis returned to sender -- yes.

8 Q But we're missing -- this chart is missing one check
9 that was returned to sender, isn't it?

10 A Well, now I realize it is.

11 Q And it happens to be the May 16th check where you
12 tried to make partial payment after you got the May 14th
13 notice, after Rose got the May 14th notice; isn't that the
14 check that's missing?

15 A Well, I just found out about that. I didn't know
16 that when this was put together.

17 Q Well, why do you think whoever prepared this left
18 that check out?

19 A Well, the person's name is Anessa [phonetic]. She's
20 an hourly employee. I don't know.

21 Q Do you recall, like, four questions ago when I asked
22 you who prepared this chart, and you said you didn't know who
23 it was?

24 A No, I said I prepared this with my accounting.

25 Q And I asked you --

1 A With some of the people from my accounting team.

2 Q And I asked you who, and you said you couldn't -- you
3 didn't know?

4 A Well, I think it was Anessa.

5 Q All right. So when Anessa prepared this, the one
6 check that is most relevant to whether you got the notice is
7 missing from this chart?

8 A I don't know what the check has to do with notice.

9 Q For partial payment.

10 A I didn't know about the check, and I didn't -- I was
11 not given notice at that time.

12 Q That's right. Susan Markusch sent that out, correct?

13 A I believe Susan Markusch sent it out, correct.

14 Q On May 16th?

15 A I don't know the date. You're telling me that. I
16 didn't know that day.

17 Q All right. Would you have any reason -- at
18 lunchtime, like you guys, we pulled the Federal Express, and --

19 MR. SHEEHAN: Can I use this to refresh the witness's
20 memory?

21 THE COURT: You absolutely can.

22 MR. VAN: Can I have a copy of the check?

23 MR. SHEEHAN: There isn't -- you guys have it. It
24 was sent back to you.

25 MR. VAN: Oh, okay.

1 BY MR. SHEEHAN:

2 Q And if you can see, it was sent out on May 16th.

3 Do you see that under the tracking number there?

4 MR. SHEEHAN: May I approach the witness, Your Honor?

5 THE COURT: Yes.

6 THE WITNESS: I see. I see the ship date.

7 BY MR. SHEEHAN:

8 Q May 16th, correct?

9 A I see that.

10 Q Okay. All right.

11 MR. VAN: Can I -- where -- well, that's fine.

12 THE WITNESS: How do we know that the check was in
13 this FedEx?

14 BY MR. SHEEHAN:

15 Q All right. We don't. All's we know is that your
16 office sent a check on May 16th and the -- well, you
17 previously --

18 A I don't know that.

19 Q All right.

20 A May 16th was a Saturday.

21 Q All right.

22 A I don't know that.

23 Q That's fine. I don't want to argue back and forth.

24 All right. If, in fact, Rose did get the notice of default --

25 I want you to assume that for purposes of this question.

1 A Assume that Rose did get the notice?

2 Q Yes.

3 A Okay.

4 Q How is it fair for Rose to argue that because
5 Treasure Island didn't send the notice to Rose, Rose is somehow
6 off of it's --

7 THE COURT: Did you mean Operadora?

8 MR. SHEEHAN: Operadora.

9 THE COURT: Okay.

10 MR. SHEEHAN: Let's rephrase.

11 THE COURT: Just checking.

12 MR. SHEEHAN: That's a good idea.

13 BY MR. SHEEHAN:

14 Q Again, you understand the assumption that Rose in
15 fact got it?

16 A I'm trying to understand the assumption.

17 Q All right. How do you explain that Rose can argue
18 that because Treasure Island didn't send the notice to
19 Operadora, Rose can get out of its payment obligations when
20 Rose had the same obligation and didn't send a copy of the
21 notice?

22 MR. VAN: Objection, Your Honor. Calls for a legal
23 conclusion.

24 THE COURT: Overruled.

25 THE WITNESS: Do you just want my opinion?

1 MR. SHEEHAN: (Nodded head.)

2 THE WITNESS: Okay. So just so I understand, you're
3 asking me -- you said to make the assumption that Rose got
4 notice?

5 MR. SHEEHAN: Yes.

6 THE WITNESS: Then you're saying how can -- I'm not
7 clear about the second part of the question.

8 BY MR. SHEEHAN:

9 Q Go ahead. I think you were right.

10 A How can -- well, I didn't understand it. Can you say
11 it one more time.

12 Q If Rose had an obligation to send the notice to
13 Operadora --

14 A Under Rose's agreement with Operadora?

15 Q Yes. How can --

16 A Not under Rose's agreement with --

17 THE COURT: Sir, you've got to let him finish his
18 question, please.

19 THE WITNESS: I'm sorry, Your Honor.

20 BY MR. SHEEHAN:

21 Q If Rose received the notice, it had an obligation to
22 send that notice to Operadora, and failed to do so, how can
23 Rose argue that Operadora not getting the notice excuses the
24 nonpayment of rent?

25 MR. VAN: Objection. Now, it calls for a legal --

1 THE COURT: Overruled.

2 THE WITNESS: You're asking my opinion?

3 BY MR. SHEEHAN:

4 Q For the fourth time, yes.

5 A Well, I think they're -- they're two separate
6 agreements; one is the lease and the fifth amendment, and I had
7 my agreement with Operadora. I'm not an attorney. I don't
8 know. I don't have an answer for you.

9 Q It doesn't seem fair, does it?

10 MR. VAN: Objection.

11 THE COURT: I need a legal basis.

12 MR. VAN: Huh?

13 THE COURT: A legal basis?

14 MR. VAN: Oh, it calls for a legal conclusion.

15 THE COURT: Overruled.

16 THE WITNESS: I don't know.

17 BY MR. SHEEHAN:

18 Q I'm sorry. What's your answer?

19 A You said, It doesn't seem fair. I don't know what
20 you're asking. I don't -- I don't know.

21 Q On its face it doesn't seem fair; you would agree
22 with that?

23 A I don't -- I don't agree. I don't -- I don't know
24 what you're asking me.

25 MR. SHEEHAN: May I publish Mr. Dragul's deposition?

1 It is Exhibit --

2 THE COURT: We published it yesterday.

3 MR. SHEEHAN: Yeah, we did.

4 THE COURT: So we each have a copy of it. So he can
5 refer to it.

6 Sir, here's your deposition. Please remember it's in
7 what they call Min-U-Script form, which means it's really
8 small, four pages to one page.

9 THE WITNESS: Thank you.

10 BY MR. SHEEHAN:

11 Q Sir, do you recall earlier today -- or yesterday and
12 then earlier today stating that you were out of the office on
13 Thursday the -- I guess that would've been the 21st?

14 A Yes.

15 Q Can you turn to page 29. It's the bottom right-hand
16 corner.

17 A Okay.

18 Q Last question, Sir, when did you get back to the
19 office? It's line 22. I don't know exactly, but I think, you
20 know, I might personally have been at the end of the week.

21 A I'm sorry. What page?

22 Q 29.

23 A Okay.

24 Q Does that refresh your memory that you were, in fact,
25 in the office on the end of that week?

1 MR. VAN: Objection. Misstates prior testimony
2 and --

3 THE COURT: Overruled.

4 MR. VAN: -- deposition.

5 THE COURT: Overruled.

6 THE WITNESS: I think I was not there.

7 BY MR. SHEEHAN:

8 Q Sir, do you recall having your deposition taken on
9 November 18, 2015?

10 A I do.

11 Q As a matter of fact, with respect to that deposition,
12 you canceled three times, and then on the eve of the
13 deposition, we had to have an emergency motion to postpone the
14 deposition again, correct?

15 MR. VAN: Objection. Argumentative.

16 THE COURT: Overruled.

17 THE WITNESS: I was dealing with the same health
18 issues with my family.

19 BY MR. SHEEHAN:

20 Q But it came out in the deposition that you were
21 actually in Las Vegas two days before you took the deposition.
22 Do you recall that?

23 A I don't recall. But if you say so.

24 Q All right. Now, the deposition was taken November
25 18th, which is obviously closer in time to May 21st, 2015,

1 than today, correct?

2 A It is closer in time, correct.

3 Q So your memory would've been better then than it is
4 today?

5 A You know, Mr. Sheehan, I travel for a living. I'm in
6 and out of the office. That time was a very, very difficult
7 time for me. I had just finished four days of, you know,
8 20-hour days, 21-hour days, and that's -- you know, I don't
9 remember the events of much of that week or that month.

10 Q All right. Do you know whether or not you knew about
11 the notice -- May 14th notice being sent to your office by
12 May 21st?

13 A The first I heard about this is when David called me,
14 David Krouham.

15 Q Turn to page 39.

16 A Okay.

17 Q And on line 4, I asked you: Do you recall whether as
18 of May 21st you knew about the notice being sent about the
19 default and the rent, and you answered, I don't recall. Do you
20 see that there?

21 A So you asked me -- I'm sorry. Page -- what page is
22 it?

23 Q Page 39.

24 A Okay. One more time, what was your question?

25 Q When I asked you the question at the deposition, you

1 didn't say that you hadn't seen it until May 28th, did you?

2 A I am -- could you let me know where that is here?

3 Q Yes, it's page 39, lines 4 through 7.

4 A Let's see. Do you recall whether May 21st -- I don't
5 recall -- I think my answer was I don't recall.

6 Q Right. You didn't say that you hadn't seen it,
7 weren't aware of it until May 28th, did you?

8 A No.

9 Q All right.

10 A I said I don't recall.

11 Q All right. Did you know about -- and it's your
12 testimony that you didn't know about this notice until May 28,
13 correct?

14 A That is correct.

15 Q All right. And by the way -- let me ask again. Were
16 you made aware of the notice the day you returned to the
17 office?

18 A I think David Krouham called me on the 28th or 29th.
19 That's when I was made aware.

20 Q All right. Can you turn to page 55, please.

21 A Okay.

22 Q All right. By the way, we've already established
23 that it's possible somebody told you about the notice prior to
24 you getting -- prior to you seeing it, correct?

25 A I told you I didn't know about the notice.

1 Q All right. Let's turn to page 55, line 6. My
2 question, Have you seen this document before?

3 Your answer was, Oh, May 14th, there you go. So
4 that's the May 14th notice. So we're on the same page, okay?

5 A Yeah.

6 Q Have you seen this document before, sir?

7 Your answer, I have.

8 Question, And when did you first see it?

9 Answer, I have no idea.

10 You didn't answer then, but let me continue on.

11 Were you in Las Vegas when you saw it?

12 Answer, I don't know.

13 Question, Do you recall the circumstances of when you
14 saw it?

15 And your answer was -- go ahead and read that answer,
16 please.

17 A Circumstances, question mark. I mean, listen, we
18 missed paying the rent. We got the -- during the time when
19 this was sent, we were all gone. I believe that I didn't know
20 about this until the 26th of May when we were all back in the
21 office.

22 Q All right. You can stop right there. So during your
23 deposition, you said -- testified that you saw it on May 26th,
24 correct?

25 A See, I said, And I believe that I didn't know about

1 this until May 26th. I didn't say I saw it.

2 MR. VAN: And can he finish reading the rest of that
3 sentence? Because it's important that he reads the rest of
4 that sentence.

5 THE COURT: Counsel, you can ask him on redirect.

6 MR. VAN: Okay.

7 BY MR. SHEEHAN:

8 Q Well, I'll be fair. It says, I mean, I don't know
9 when the exact dates, but that's my opinion. That's what you
10 said, correct?

11 A There you go.

12 Q And then I asked, Did you send a copy of this to
13 Señor Frog's? And what was your answer?

14 A No.

15 Q And you do admit that at the time of that May 14th
16 letter you had not met your rental obligations as set forth in
17 that letter, correct?

18 A I told you that.

19 Q The answer's yes?

20 A Yes.

21 MR. SHEEHAN: No further questions, Your Honor.

22 THE COURT: Redirect.

23 REDIRECT EXAMINATION

24 BY MR. VAN:

25 Q Mr. Dragul, I'd like to direct your attention to

1 Exhibit 1. I'm sorry. I've got to find the right page down on
2 this one. Page 4, Paragraph 3, 1, B?

3 A Okay.

4 Q That's the percentage-rent issue, correct? That's
5 how you calculate --

6 A That paragraph.

7 Q That's how you calculate percentage rents?

8 A Correct.

9 Q Were you involved in that? You personally, were you
10 personally involved in the calculation of percentage rents?

11 A You mean on a monthly basis?

12 Q Yes.

13 A No.

14 Q Did you have people from your staff that did that?

15 A Yes.

16 Q And it's my understanding that there were oftentimes
17 some disagreements with the numbers?

18 A Correct.

19 Q And that both you and the landlord would get together
20 and figure out a number?

21 A Well, someone from my staff and the landlord.

22 Q Okay. And someone from their staff. It's not you
23 and Mr. Ruffin --

24 A Right.

25 Q -- sitting down and fighting over 25 cents. It

1 was --

2 A No. We would send them what we thought percentage
3 rent was, but once again we were required to be on their
4 point-of-sale system. So they had the same numbers we had.
5 The discrepancy had to do with free things that were given
6 away. If you walked in with a Groupon coupon, and you got a
7 50 percent off meal, we shouldn't pay percentage rent on a
8 hundred percent. We should pay percentage rent on 50. Things
9 like that, those were the discrepancies.

10 Q And the comps?

11 A The comps.

12 Q The values of comps?

13 A Correct.

14 Q The values of bottle sales, all of those issues?

15 A Anything that was free was supposed to be not on the
16 tally. Anything that we collected cash for we would pay
17 percentage rent for.

18 Q And to date -- that's not base rent; that's
19 additional rent, correct?

20 A That is correct.

21 Q Okay. And so --

22 A Base rent is a certain number set every month.

23 Q Yes.

24 A Percentage rent is a fluctuating number based upon
25 daily sales.

1 Q Okay.

2 A Monthly sales.

3 Q And you were able to get that worked out. In fact,
4 it's my understanding that currently there are no issues with
5 that, correct?

6 A No issues with?

7 Q Any past-due amounts on percentage rents?

8 A There's no past-due amounts on anything.

9 Q So from the inception --

10 A We've been a hundred percent paid in full. We tried
11 very hard to pay them in full for May the minute -- the minute
12 we realized the problem. I mean, we've never had outstanding
13 issues.

14 Q Okay.

15 A Balances.

16 Q I want to ask you also -- and I'm not going to
17 belabor this because this is a horse that's been beat many
18 times -- just very quickly, the obligations with regard to
19 notice, I think the question was asked to you, Did you ever
20 contact them and say, hey, your notice provisions are
21 inappropriate? When they were sending you stuff, did you ever
22 say, hey, wait a minute, you've got a problem here?

23 A No. I don't regard it as my job to make sure that
24 Treasure Island acts in accordance with the agreement they
25 signed.

1 Q The notices that you sent back or any notices that
2 you sent, do you believe that they were all compliant?

3 A Every one.

4 Q Okay. If you can look at Paragraph 19.6 of the first
5 exhibit.

6 THE COURT: 19.6?

7 MR. VAN: Yeah, Paragraph 19.6, page 22.

8 THE COURT: Okay. Thank you.

9 BY MR. VAN:

10 Q This has to do with the notices, but it also
11 identifies, one, who gets notice, and two, the types of
12 documents, any notice or other communication required to be
13 given. Now, when they're calling you up and saying, hey, we've
14 got a problem with the construction, is that something that is
15 required that you be given?

16 A No, I think that --

17 MR. SHEEHAN: Your Honor, I'm going to object. It
18 misstates the --

19 THE COURT: Overruled.

20 MR. SHEEHAN: It says required or permitted.

21 THE COURT: Overruled.

22 MR. VAN: Okay.

23 THE WITNESS: I think they're just -- no, I --

24 BY MR. VAN:

25 Q Okay. So if it's a required document, it certainly

1 must have those signatures?

2 A Oh, absolutely.

3 Q Okay. Now, all of these letters that we talked
4 about, about the construction of this, construction of that,
5 those were not required documents?

6 A No. The lease specifically talks about notices being
7 in writing.

8 Q Okay.

9 A And the noticed people are specific based on the
10 lease. No, to the extent that something that says we want to
11 let you know about X, that's not what this is referring to.

12 Q Okay. Exhibit 5, there was some reference to that
13 with regard to Jerry Griffis who is the person that signed that
14 one, and it says: As you're aware, Señor Frog's failed to meet
15 their rental obligations, and it was sent to you. Do you have
16 any idea why it was not appropriately sent to Susan Markusch?

17 A No, it should have been.

18 Q All right. Let's go -- now, the statement has
19 been --

20 A And Operadora.

21 Q And Operadora, correct. Now, if you look at
22 Exhibit 8, that's a document that actually does comply,
23 correct?

24 A Yes.

25 Q Now, testimony has been had that approximately the

1 1st of September, 2019 (sic), there was some discussion that
2 was held between -- that Mr. Anthony says that he had with you.
3 You've acknowledged a conversation, but you remember it very
4 differently. The Judge asked a question about it. Then
5 there's this letter, and this letter deals with construction
6 loan repayment. Is that a required obligation -- required
7 writing? Are they requiring you that you're in default or
8 anything, or are they saying, hey, look, we've got a problem
9 here, let's address it?

10 A I'm not an attorney. I don't know. I know that
11 this -- this, I think, was about concerns about liens.

12 Q Okay.

13 A On the property.

14 Q In fact, it says construction loan repayment, right?

15 A It does.

16 Q Okay. Now, you've said that you travel 180 days a
17 year?

18 A Correct.

19 Q How many days a year does Susan Markusch travel? For
20 business. Sorry. For business?

21 A She doesn't travel for business.

22 Q Is that part of the reason why her name's on there?
23 So she can stay home and man the henhouse?

24 A Absolutely.

25 Q Okay. Paragraph 13, the question was asked --

1 A Paragraph 13 of what?

2 Q Sorry. Exhibit 13.

3 A Okay.

4 Q The question was asked about whether essentially this
5 document was properly addressed to you as opposed to Susan, and
6 it has to do with security issues. Now, would Susan have
7 anything to do with the security issues at the Treasure Island
8 at the Señor Frog's?

9 A She would not.

10 Q Okay. So this actually complies with what you were
11 saying is, look, if there's issues with Señor Frog's, just let
12 me know, and I'll get to the right people at Señor Frog's to
13 make sure that they're properly addressed. Do you know if you
14 ever contacted anybody at Señor Frog's and said, hey, guys
15 we've got a problem with security; you need to make sure that
16 it's taken care of?

17 A Immediately.

18 Q Okay. Now, this letter --

19 A They also.

20 Q Okay.

21 A They were contacted by Treasure Island in person.

22 Q But they weren't sent a letter? Let me rephrase
23 that. We don't know if they were sent a letter?

24 A I don't know if they were sent a letter. This was
25 not copied to them.

1 Q Okay. And you said something. I just want to make
2 sure it's your position that you are not responsible for the --
3 to ensure that Treasure Island is compliant with the terms of
4 the lease. It's your obligation to make sure your business is
5 compliant?

6 A Yeah. Treasure Island, they're big boys. They have
7 a big business there. They have in-house accounting and
8 attorneys and, you know, they have lots and lots of
9 professional people. It's their job to mind their own
10 business, do their own business and make sure it's right.

11 Q Exhibit 28, Paragraph 11, again, another key issue in
12 this case. And I want you to kind of put your thumb on that
13 one, and then I want you to go back to the original lease,
14 Paragraph 19.6 on the notice issue. 19.6 says that: Each
15 party shall be entitled to specify a different address and/or
16 contact person; remember that?

17 A Yes.

18 Q Okay. Now, let's go back to the amendments to that
19 which says specifically in addressing 19.6 that you're changing
20 your address, correct?

21 A Correct.

22 Q Did you change your contact person?

23 A I did not.

24 Q If you wanted it to be changed to Gary Dragul, would
25 you have put it in this right here in this Paragraph 11 of this

1 particular amendment?

2 A Absolutely. Everything we do is in writing.

3 Q And had -- now, it's my understanding, and if you
4 turn to the next page, Phil Ruffin signed off on this, correct?

5 A That is correct.

6 Q And Brad Anthony was involved in the preparation of
7 this, correct?

8 A He represented Treasure Island.

9 Q Okay. So if he would've wanted that changed to Gary
10 Dragul, would it have been in that paragraph?

11 A Yes.

12 Q So according to the original lease, you can leave the
13 same contact person and change the address without having to
14 rename again?

15 A Yes, I think that -- that the word and/or.

16 Q All right. Let's talk about the sublease,
17 Paragraph 9D of the sublease which is Exhibit 30, and the first
18 sentence, Prime landlord -- which would be you in this case,
19 right?

20 A Correct.

21 Q -- is obligated to provide subtenant -- which would
22 be Señor Frog's?

23 A Yes.

24 Q -- with simultaneous notice of any landlord, which
25 would be Treasure Island -- I'm sorry prime landlord is --

1 A Prime landlord is Treasure Island.

2 Q -- Treasure Island -- sorry -- is obligated to
3 provide subtenant with simultaneous notice and any landlord
4 default under the prime lease as outlined in Exhibit D?

5 A Correct.

6 Q Okay. And they weren't -- Treasure Island didn't
7 notify them, correct, of the default -- excuse me -- of the
8 breach?

9 A Treasure Island did not provide notice.

10 Q Okay. Now, with regard to the --

11 A To Operadora.

12 Q To Operadora.

13 A As the subtenant.

14 Q With regard to the sublease issue, do you have any
15 issues with Señor Frog's with regard to this, meaning between
16 you and Señor Frog's?

17 A Never. We have no issue.

18 Q Okay.

19 A Things are going great.

20 Q And, in fact, that 9D is making a reference to the
21 fact that in that original lease there's an obligation to let
22 people know?

23 A Affirmative obligation.

24 Q Yes. And it's just referenced --

25 A Right.

1 Q -- in this sublease, correct?

2 A Correct.

3 Q All right. And then there's -- there's a provision
4 here that says: Within 24 hours an opportunity to cure, did
5 you let them know within 24 hours of when you became aware of
6 the default?

7 A While I was on the phone with David.

8 Q Okay.

9 A So --

10 Q Actually, he let you know?

11 A He let me know.

12 Q All right. If you had timely -- let's -- you know,
13 in a perfect world, you're sitting in your office because you
14 don't have ICSC, and somebody walks in and says, oh, my gosh,
15 we have this problem with Señor Frog's. There's a breach. We
16 need to get it cured. Would you have put them on notice --
17 Señor Frog's on notice, or would you have just cured?

18 A We would have just cured.

19 Q Okay. If you can go to Exhibit 37, here again is
20 another letter that's addressed to you with regard to
21 construction-loan repayments. Did you send this out to Señor
22 Frog's? Do you remember?

23 A I don't know.

24 Q Okay. Do you know if this was all cured?

25 A Yes.

1 Q Okay. Was it all --

2 A It was all cured.

3 Q Okay. Thank you.

4 A I think as of today there are two payments left on
5 the two and a half million.

6 Q Okay. Do you know --

7 A That's it, but they're not in default or anything.

8 Q No, but what you --

9 A They're just upcoming.

10 Q Yeah.

11 A Their next one is due on November 1, and the next one
12 after that is due on December 1, and then it's over.

13 Q And then that whole two and a half million dollars
14 will have been paid off?

15 A A hundred percent paid back.

16 Q Okay. So fully performed under that construction
17 loan issue?

18 A Correct.

19 Q All right. Now I want to go to the time issue
20 because much was made about your deposition and this Exhibit 38
21 and you've -- in your deposition you said, I don't know the
22 exact dates, but that's my opinion. In preparation for this
23 litigation, have you gone back and reviewed more documents than
24 you had at the time of your deposition?

25 A Yes.

1 Q Okay. Did those documents refresh your recollection
2 about what actually occurred?

3 A Yes.

4 Q How is it that you remember or how is it that you
5 came to recall that in fact David Krouham was the one that
6 called you up and put you on notice?

7 A Well, I remember the call, but I also had a -- you
8 know, I also reviewed what took place. So.

9 Q Okay. So you remember the call. That was the first
10 time. You just didn't know the date of the call?

11 A I didn't know the date of the call, correct.

12 Q And then by putting together the fact that David
13 Krouham first found out about it on the 28th --

14 A Right. That's why I thought I --

15 Q -- because that's when he got his notice --

16 A That's when I thought I got the call is when he got
17 it.

18 Q Okay.

19 A Because it was -- it was a, hey, what's-going-on
20 call.

21 Q Okay. And because he didn't know before that because
22 you hadn't put him on notice --

23 A Right. I did not put him on notice.

24 Q And Treasure Island had only put them on notice on
25 the 28th. The earliest that call could have been was the 28th?

1 A Correct. There's a chance it might have been the
2 29th, but I thought it was the 28th.

3 Q Okay.

4 A Because keep in mind I was at the hospital night and
5 day, and when I went to ICSC for three days, four days, I came
6 back and went to the hospital. You know --

7 Q I understand.

8 A -- my -- I had two family members that were, you
9 know, very, very sick. I mean, to this day, they're very, very
10 sick.

11 Q Now, there was -- you were provided with a document
12 showing a Federal Express packet.

13 A This? Is this it?

14 Q Yes.

15 MR. VAN: May I approach?

16 THE COURT: You may.

17 BY MR. VAN:

18 Q I'm not going to take this from you, but I'm going to
19 ask you questions. I want you to look through this, and I want
20 you to let me know -- I want you to let me know if there's any
21 way that you can tell based upon this document what was
22 included in that FedEx package?

23 A I cannot tell. There's no way.

24 Q Do you know if it was a partial payment?

25 A I don't know.

1 Q Do you know if there even was a partial payment made
2 that was rejected?

3 A Well, now I know.

4 Q But how do you know that?

5 A Because I was told in these proceedings.

6 Q Okay. Independent of anything that's been told in
7 these proceedings, have you ever seen that check?

8 A I have not.

9 Q Do you know if, in fact, it was ever made?

10 A I don't.

11 Q The only way that you could suggest that there was a
12 partial payment made is based upon the testimony of Mr. Sheehan
13 when he was cross-examining you?

14 A Correct.

15 MR. SHEEHAN: Objection, Your Honor. He --

16 THE COURT: Sustained.

17 MR. SHEEHAN: He testified himself --

18 THE COURT: It's sustained.

19 MR. SHEEHAN: -- that Susan Markusch had told him.

20 THE COURT: I sustained the objection.

21 Counsel doesn't testify, Mr. Van. Luckily, I
22 don't --

23 MR. VAN: Well, sometimes he was.

24 THE COURT: Mr. Van.

25 MR. VAN: Okay. Fair enough.

1 THE COURT: Do we need to take a break?

2 BY MR. VAN:

3 Q Based upon the questioning, is there any other -- do
4 you have any other -- based upon his question, do you have any
5 other --

6 A Listen --

7 Q -- independent recollection?

8 A This is what I think happened is that I think that,
9 you know, we're off at ICSC. Susan Markusch is trying to
10 figure out -- she's got hundreds of payments that her team
11 makes every month. I think she came across a missed payment.
12 We're at ICSC, and she took it upon herself to send a check.
13 That's what I think happened.

14 Q Ms. Markusch did not get a copy of the -- a copy of
15 the notice of default, correct?

16 MR. SHEEHAN: Objection. Calls for speculation, Your
17 Honor.

18 THE COURT: Sustained.

19 BY MR. VAN:

20 Q Okay. You've seen the letter. Was the letter
21 addressed to Ms. Markusch?

22 A The notice -- the notice of default from Treasure
23 Island?

24 Q Yes.

25 A It was not addressed to Ms. Markusch.

1 Q Okay. Do you know if she ever received a copy of
2 that prior to the day that she sent this payment out?

3 A I don't know. But -- I don't know.

4 THE COURT: We don't want you to guess or speculate,
5 sir.

6 BY MR. VAN:

7 Q In your testimony, based upon a question asked by
8 Mr. Sheehan, you said that if you're not paid by the 10th, you
9 start to collect. What does that mean? Do you immediately
10 start litigation?

11 A With my own tenants?

12 Q With your own tenants. I apologize. With your own
13 tenants?

14 A If we're not paid on the 10th, we proceed with an FED
15 action per the lease.

16 Q Okay. And what do you do? What do you do? Do you
17 call people up? You say, hey, here's where we are?

18 MR. SHEEHAN: I'm sorry. What --

19 THE COURT: What's an FED action?

20 BY MR. VAN:

21 Q Okay. What's an FED action?

22 A It's a legal -- in Colorado, it's an action where we
23 hire an attorney, and we start an eviction process.

24 THE COURT: Okay.

25 / / /

1 BY MR. VAN:

2 Q Okay. And that's after you've given them notice to
3 cure?

4 A If the lease calls for notice, we give them notice.
5 If the lease does not call for notice, we don't give them
6 notice, but every lease has a right to cure in our world.

7 Q So if someone were to call you up and say -- exact
8 same situation -- say you know what, something happened, I was
9 out of town, I didn't get the notice, I'd like to cure, what is
10 your standard procedure?

11 A They have the right to cure, but they have to pay the
12 penalties and interest.

13 Q Okay. And whatever that is is spelled out in the
14 lease?

15 A That is correct.

16 Q And in this lease, do you have a penalties and
17 interest provision?

18 A I believe there is. Just off the top of my head, I
19 believe that there is an interest provision.

20 Q Okay.

21 A I believe, but I'm not totally sure.

22 Q Okay. But currently based on everyone's testimony --

23 A There's a notice provision that was not adhered to.

24 Q Okay.

25 MR. SHEEHAN: Your Honor, nonresponsive.

1 THE COURT: Overruled.

2 BY MR. VAN:

3 Q There was a question, I just want to clarify that you
4 were asked a question. Did Elizabeth Gold -- or excuse me --
5 Elizabeth Gold didn't say she didn't get an e-mail to you; is
6 that correct?

7 A I'm sorry.

8 Q I know. The question was very difficult.
9 Mr. Sheehan said, Elizabeth Gold didn't say that she didn't get
10 an e-mail?

11 A To me?

12 Q To you. Did she ever say -- did she ever say to you
13 at the time that this was all going down, I didn't get an
14 e-mail?

15 A No.

16 Q Okay. She wouldn't know if she hadn't gotten -- if
17 she didn't get an e-mail, she wouldn't have known?

18 A If she didn't get an e-mail, she wouldn't have known.

19 Q Okay. And how many people -- let me rephrase that.
20 How many key people do you have working at your office, would
21 you consider key?

22 A 15.

23 Q And how long have they all been with you?

24 A Average 10 years, in excess of 10 years, some are
25 close to 20.

1 Q Okay. And they're --

2 A Nobody less than 10.

3 Q They're good at their jobs?

4 A You know what, they're really good at their jobs. I
5 have really fantastic people. I don't micromanage them.
6 They -- I believe they can -- they're great at what they do.
7 That's why they've been with me so long.

8 Q And they allow you to not be in your office because
9 you can --

10 A Correct. I can rely on them.

11 Q Okay. In fact, you haven't been in your office for
12 the last three days. Is your office still functioning?

13 A Yeah, we closed two real estate deals today.

14 Q Did you have anything to do with those other than
15 phone calls?

16 A Well, other than they're now my real estate?

17 Q Yes.

18 A No.

19 Q Okay. When you come to ICSC, what's entailed while
20 you're here?

21 A The ICSC convention is all about meeting lenders,
22 tenants and other buyers and brokers, other buyers and sellers
23 and brokers all in the shopping center world. So from the
24 minute that we land in Las Vegas, every one of the people that
25 come here have very specific meetings that have been set up

1 prior to showing up at ICSC. Everybody is meeting from 7 in
2 the morning till 2 in the morning, on the half hour, every 45
3 minutes. We all see probably, you know, it could be as many as
4 50 to 75 people a day.

5 And then we have this big party at Señor Frog's on
6 Sunday night where we have 450 people that are very targeted
7 that come to us. So we're all in the same room meeting people
8 at the same time, but it's -- I mean, most of the three days we
9 all don't see much of each other.

10 Q How many people do you think that your company
11 interacts with at ICSC during that five-day period?

12 A One on one, easily 3 to 500, and in addition to the
13 party which has 450 people at it.

14 Q Okay. If you can turn to your deposition, page 29,
15 line 22 through 25 and then the first page of the following
16 page, page 30.

17 A Okay.

18 Q I'd like you to read that just to yourself.

19 A Which line?

20 Q The question is: So when did you get back to the
21 office? And then your answer, if you can just read that --
22 well, just read it out loud.

23 A So when it -- so is it line 19?

24 Q You'll start at line 23.

25 A 23. So when did you get back to the office? And my

1 answer is: I don't know exactly, but I think, you know, I
2 might personally have been in at the end of that week, but the
3 majority of the staff is not because of ICSC.

4 Q Okay. Now, you recall that testimony. Is your
5 testimony consistent with what's set forth in your deposition?

6 A Yes.

7 Q Is there anything else you'd like to add to that?

8 A You know, I would like to add that it's an
9 opportunity. There's a few things. One is that the staff that
10 goes to ICSC is exhausted. So they're not expected to come to
11 work. It's an opportunity for them to go be with their family
12 for a few days because they just weren't with them; that's
13 number one.

14 Number two, it gives everybody a well needed holiday,
15 long holiday weekend so they can add a few days, and so
16 we're -- you know, every year we're not around during that
17 time, totally not around. So.

18 Q Okay. Susan Markusch is there though, correct?

19 A She is there.

20 Q And your accounting staff?

21 A Some of them, yes.

22 Q Those weren't at ICSC?

23 A Yeah, but we offer it really to everybody. So, you
24 know, Susan keeps incredibly long hours, and she's somebody
25 that I can count on. I mean, she's an unusual -- she's a very

1 special employee. You know, my guess is, you know, she goes
2 above and beyond.

3 Q Okay. If you can turn to your deposition, page 39,
4 line 4, the question is 4 through 7. Do you recall whether as
5 of May 21st you knew about the notice being sent about the
6 default in the rent? Your answer, I don't recall. Is that
7 what it states?

8 A Yes.

9 Q Is there anything you'd like to add with regard to
10 that or clarify that issue?

11 A Yeah, I don't recall where I was. I don't recall. I
12 mean, I had a lot going on in my life. I had -- you know, ICSC
13 had just ended. We had -- we had a really good show, but
14 really my focus was my family. The business priorities during
15 this entire month were really, really took a backseat to my
16 family. So.

17 Q All right. Now, let me go back -- I mean -- sorry --
18 move to page 55, lines 14 through 21. Do you recall the
19 circumstances of when you saw it? And it is referencing the
20 letter of -- the termination letter. Circumstances, I mean,
21 listen, I missed paying the rent. We got the -- during the
22 time when this was sent, we were gone, and I believe that I
23 didn't know about this until the 26th of May when we were all
24 back in the office, and we -- I mean, I don't know the exact
25 date, but that's my opinion.

1 Now, you have now said that you -- the first time you
2 saw that termination letter was on the 28th, correct?

3 A Well, when David Krouham called me.

4 Q Yes.

5 A Then I start hunting it down. See, we got back to
6 the office. I had thousands of e-mails. Everybody had
7 thousands of e-mails. We had mail. We had FedExes that hadn't
8 been opened. I mean, it was a -- you know, it's not like we
9 had one piece of paper sitting on our desk when we got back,
10 and we knew that that was the one, you know.

11 Q And --

12 A We were digging out.

13 Q And as you've been preparing for this, you had
14 conversations with David about when he received notice and when
15 he made the phone call, correct?

16 A He says it was the 28th.

17 Q Okay. Does that refresh your recollection of -- your
18 recollection is that the first time you heard it was from
19 David?

20 A Right.

21 Q And he's testified that was the 28th?

22 A That is correct.

23 Q Does that seem consistent with you with what was
24 going on?

25 A It does.

1 Q Okay. When you were sending payments to Treasure
2 Island, you sent them out Federal Express. You've made that
3 point clear.

4 A Every payment.

5 Q Okay. Do you remember if there -- is there a letter
6 that goes with that?

7 A I believe -- I believe there is. Susan Markusch
8 normally attaches a letter to the payment.

9 Q Okay. Do you know if her signature is on those
10 letters?

11 A I do.

12 Q And is her --

13 A It is.

14 MR. VAN: Okay. I have nothing further.

15 THE COURT: Anything else on cross-examination?

16 MR. SHEEHAN: Yes, please, Your Honor.

17 THE COURT: Absolutely.

18 RECROSS-EXAMINATION

19 BY MR. SHEEHAN:

20 Q You have repeatedly stated here today that the first
21 time you found out about the notice of default was from David
22 Krouham when he called you on May 28th, correct?

23 A Correct.

24 Q Can you please turn to your deposition at page 25,
25 please.

1 A Okay.

2 Q Let's turn to line 7. Do you see on line 7 where I
3 asked the question: You do recall the notice coming in saying
4 you were in default, question mark; do you see that?

5 A Let's see. Do you recall any notice coming in saying
6 you were in default? I was told we got a notice.

7 Q Okay. I --

8 MR. VAN: Your Honor, I just object. This is beyond
9 the scope of the --

10 THE COURT: Overruled.

11 MR. VAN: Okay.

12 THE WITNESS: I'm sorry. What are you asking me?

13 BY MR. SHEEHAN:

14 Q What was your answer?

15 A I was told we got a notice. I do not recall seeing
16 the notice that came in, just to be grammatically correct.

17 Q All right. So you were told that you got a notice.
18 All right. Now the next question says: Who told you that the
19 notice came in that you were in default? And what was your
20 answer?

21 A I said: I can't remember, somebody in my office.

22 Q So you specifically testified that somebody in your
23 office provided you a copy of that notice, correct?

24 A Let's see. I testified that, I do not recall a
25 notice -- seeing a notice that came in. I was just told that

1 we got a notice.

2 Q Sir?

3 A Isn't that what you are asking me?

4 Q No. My question is, did you testify that somebody at
5 your office told you about the notice?

6 A No.

7 Q All right. Let's look at the -- I'll ask you the
8 question again. Line 12, Who told you that the notice came in
9 that you were in default? Your answer, I can't remember,
10 somebody at my office.

11 MR. VAN: Your Honor, I --

12 BY MR. SHEEHAN:

13 Q Do you see line 14 where you answered that way?

14 MR. VAN: Well, I'm going to object because the
15 question -- the issue right now is -- there's two different
16 issues. One is when did the --

17 THE COURT: Don't make a speaking objection.

18 MR. VAN: Sorry. Objection is --

19 THE COURT: Don't make a speaking objection.

20 MR. VAN: It is vague and ambiguous, misstates
21 testimony and it is --

22 THE COURT: So are you saying that it's not
23 accurately representing the transcript?

24 MR. VAN: It's not accurately -- it's not accurately
25 representing the transcripts because --

1 THE COURT: You can -- you can do that on
2 re-redirect.

3 MR. VAN: Okay.

4 BY MR. SHEEHAN:

5 Q All right. I'm going to read the question one more
6 time because it says default. So I'll just read it one more
7 time. Who told you that the notice came in that you were in
8 default? And your answer was?

9 A I can't remember, somebody in my office.

10 THE COURT: Is that all?

11 MR. SHEEHAN: No, just a couple more.

12 BY MR. SHEEHAN:

13 Q Elizabeth Gold is an officer of the corporation,
14 correct?

15 A Of what corporation?

16 Q Rose.

17 A Rose is a limited liability company.

18 Q She signs as vice president. Limited liability
19 companies can have officers. She signed every document as --

20 A No, you asked me if she was an officer of the
21 corporation.

22 Q I'm sorry. Of Rose LLC?

23 A She is.

24 Q All right. Did you ever tell Elizabeth or Andrew
25 Solomon to ask Treasure Island for additional time to pay the

1 amounts that were owed under this default notice because Rose
2 did not have the money?

3 A No.

4 Q Would it surprise you to find out that Andrew Solomon
5 told Treasure -- asked Treasure -- told Treasure Island that
6 they didn't have the money and you needed additional time?

7 MR. VAN: Object. Calls for speculation.

8 THE WITNESS: I didn't know that.

9 THE COURT: Overruled.

10 THE WITNESS: No, I don't know that that happened?

11 BY MR. SHEEHAN:

12 Q Isn't it true that Rose didn't have the money to pay
13 at that time?

14 A No.

15 Q Did Elizabeth Gold tell that -- do you know whether
16 you ever told Elizabeth Gold to see if you could get an
17 extension because you didn't have the money?

18 A I did not.

19 Q And by the way, my questioning of you several times,
20 I asked you if you ever told Treasure Island that the notices
21 were incorrect, and you said, I don't know, but when Mr. Van
22 just asked you, you said, No, you never told them that; is that
23 fair? You never told Treasure Island that the notices were
24 incorrect after that first notice came out that they were all
25 going to you, that you never told Treasure Island don't send

1 them to me anymore, include Operadora and Susan Markusch?

2 MR. VAN: Objection. Misstates the prior testimony.

3 THE COURT: Overruled.

4 THE WITNESS: I think what I said was that it's not
5 my job to look out for Treasure Island's business practices.

6 BY MR. SHEEHAN:

7 Q Did you --

8 A The notices were incorrect.

9 Q Did you or did you not tell Treasure Island after
10 your conversation with Brad Anthony and the notices started
11 coming to you, send them to Operadora and Susan Markusch also?
12 Yes or no.

13 A Well, it's not that simple. The notice that you're
14 referring to had to do with construction issues that --

15 Q Any notices.

16 A I wouldn't tell them. It's in the lease. We
17 bargained for it in the lease. They agreed to do it.

18 Q All right. Turn to Exhibit 13, please. And this is
19 a notice that was sent to you, correct?

20 A Correct.

21 Q It was not sent to Susan Markusch, correct?

22 A It was not.

23 Q All right. Did you get this notice?

24 A I don't know.

25 Q Do you recall testifying just five minutes ago when

1 Mr. Van brought this up, and you said, Yes, I got this
2 moment -- this notice, and I immediately sent it to Señor
3 Frog's and had them cure the problem?

4 A I think Mr. Van asked me if I saw the notice. I have
5 seen this before.

6 Q Okay. Do you recall telling Mr. Van that upon
7 receipt of this notice you immediately sent it to Señor Frog's
8 and had them cure the problem?

9 A I immediately contacted Señor Frog's.

10 Q Okay.

11 A Unfortunately, on the telephone.

12 Q All right. And I believe you said that if you had
13 gotten the notice of default you wouldn't have sent it on to
14 Señor Frog's; you would've just cured it yourself?

15 A Well, I think the question was would I have cured it.
16 Absolutely I would have cured it.

17 Q Well, the question was more than that. He said,
18 would you have sent it onto Señor Frog's, and you said --

19 A If by --

20 Q -- you said, No, I would've just cured it, Mr. --

21 MR. VAN: Objection, Your Honor. One, argumentative.

22 MR. SHEEHAN: Well, we'll look at the transcript.

23 MR. VAN: Two --

24 THE COURT: Counsel, can we please let him answer the
25 question.

1 The witness is not answering. It's not argumentative
2 when a witness refuses to answer questions repeatedly, Mr. Van.

3 MR. VAN: No, the question is argumentative telling
4 him --

5 THE COURT: The question is not argumentative,
6 Mr. Van.

7 MR. VAN: Okay.

8 THE COURT: The witness is not responding.

9 THE WITNESS: If I had a legal obligation to give
10 them the notice, absolutely would have done it.

11 BY MR. SHEEHAN:

12 Q Did you have a legal obligation to give them notice?

13 A I did, but I didn't get notice.

14 Q What documents did you refer to before coming here
15 today to refresh your recollection?

16 MR. VAN: Objection. Vague and ambiguous as to what
17 topic.

18 BY MR. SHEEHAN:

19 Q Any topic?

20 THE COURT: Overruled.

21 THE WITNESS: I read my deposition. I read my
22 affidavit. I read the lease and exhibit and the amendment, the
23 fifth amendment.

24 BY MR. SHEEHAN:

25 Q Did you look at your calendar to see where you were

1 on Thursday and Friday the week after the ICSC?

2 A I did not.

3 MR. SHEEHAN: No further questions.

4 THE COURT: Anything else, Mr. Van?

5 MR. VAN: Yes, Your Honor.

6 FURTHER REDIRECT EXAMINATION

7 BY MR. VAN:

8 Q Mr. Dragul, in preparing for this today, did you look
9 at the exhibits, many of these exhibits that have been
10 presented?

11 A In the past, yeah. Yes.

12 Q Did you talk to Mr. Krouham, try to tie all this
13 together?

14 A I did.

15 Q Let me go to your deposition, page 25 -- whoops. I'm
16 not even sure that's the right one -- page 25, the question was
17 asked about whether -- excuse me -- when you got notice.
18 Somebody told you from your office about the notice of default,
19 correct?

20 A (No audible response.)

21 Q And then your conversation with Mr. Krouham was about
22 the notice of termination; is that correct?

23 A The conversation with David Krouham was about notice
24 of termination, and when I got off that phone, I started
25 quizzing all of my employees. I got off the phone, and I

1 started -- I went -- I said, What happened here?

2 Q Okay.

3 A What's going on. I haven't seen anything.

4 Q And it was at that point in time that someone in your
5 office said, We got this notice. There's this notice of
6 default somehow somewhere?

7 A Correct.

8 Q And that was the first time was on the 28th that you
9 got notice?

10 A That's correct.

11 MR. VAN: Nothing further.

12 THE COURT: Anything else, Mr. Sheehan?

13 FURTHER RECROSS-EXAMINATION

14 BY MR. SHEEHAN:

15 Q Who at your office told you that they'd gotten the
16 notice prior?

17 A You know, I don't know who it was. It might -- I
18 don't know who it was. It was a -- I had a meeting. I was
19 very upset about it. I don't remember who it was.

20 MR. SHEEHAN: No further questions, Your Honor.

21 THE COURT: Anything further, Mr. Van?

22 MR. VAN: No, Your Honor.

23 THE COURT: Thank you, sir. You can step down.
24 Your next witness.

25 MR. VAN: Your Honor, we will rest.

1 THE COURT: Before you rest, can you make sure that
2 everything you want is in evidence. Remember, you marked some
3 additional documents this morning, both of you did, and I don't
4 know what happened with respect to those, if anything.

5 MR. VAN: I think the only one that I marked was the
6 demonstrative exhibit that you have identified separately.

7 And hold on let me give you a good one.

8 MR. SHEEHAN: I don't mind stipulating to the
9 additional three documents being admitted, Mr. Van. Does
10 that --

11 MR. VAN: I don't know which other ones we're talking
12 about.

13 THE CLERK: 66 and 67.

14 MR. MARSHALL: Can we look at those really fast.

15 THE CLERK: Those were not offered.

16 MR. SHEEHAN: I'll offer them as exhibits.

17 THE COURT: And what are their numbers?

18 THE CLERK: 66.

19 MR. VAN: 66.

20 THE CLERK: And 67.

21 THE COURT: Any objection to 66 and 67?

22 MR. VAN: Your Honor, this is the first time we've
23 seen either of these documents.

24 THE COURT: Actually, you saw them this morning.

25 MR. VAN: I saw -- fair enough.

1 MR. MARSHALL: We didn't have a copy, Your Honor.

2 MR. VAN: I did not get a copy at all today. This is
3 the first time I've seen them was today.

4 THE COURT: They handed you a copy this morning. I
5 saw them.

6 MR. VAN: I'm not -- no, he showed these to me.

7 MR. SHEEHAN: Mr. Van, are you objecting to the
8 admission of those?

9 MR. MARSHALL: We haven't --

10 MR. VAN: I haven't read them.

11 MR. SHEEHAN: Okay. Well, take your time and read
12 them.

13 MR. VAN: Okay. No, I didn't get a copy of them.
14 These are the only copies he had. He had two copies, one for
15 the witness, and one for her.

16 MR. SHEEHAN: It's okay.

17 (Colloquy off the record.)

18 MR. SHEEHAN: I'd also move for the introduction of
19 the Demonstrative Exhibit 1.

20 THE COURT: Okay. So do you want the Demonstrative
21 Exhibit 1 admitted for all purposes as opposed to just used for
22 demonstrative purposes?

23 MR. SHEEHAN: Yes, please.

24 THE COURT: Any objection to that?

25 MR. VAN: No, that's all right.

1 THE COURT: That'll be admitted for all purposes.
2 Well, give it a new number, in addition to D1, it is now
3 called?

4 THE CLERK: 68.

5 THE COURT: 68.

6 (Exhibit No. 68 admitted.)

7 THE COURT: Do you need the marshal to assist you by
8 making some copies of things, or do you think you all have
9 enough of everything?

10 MR. VAN: Well, I'd like a copy of it anyway, but --

11 THE COURT: Guys, we're going to go off the record
12 for a minute. You're going to figure out what you want copies
13 of, and then that way you can gossip among yourselves, and
14 we'll make -- if you want, you can have Dan make them. Just
15 ask him please.

16 (Proceedings recessed 2:47 p.m. to 2:50 p.m.)

17 THE COURT: Okay. Jill, are you ready?

18 MR. VAN: We're admitting 67 --

19 THE COURT: Hold on.

20 MR. VAN: Sorry.

21 THE COURT: Jill's got to get everything working
22 again.

23 Are you ready?

24 MR. VAN: We are agreeing to the admissibility of 67
25 and 68, the demonstrative -- 66 and 67 -- sorry -- the

1 demonstrative exhibit with all the backup that we provided
2 them.

3 THE COURT: Will you tell me what those numbers are,
4 Dulce, so I can write it down.

5 THE CLERK: Yes, Your Honor. The check is 66. The
6 letter for the attachment, 67. The summary with copies of
7 checks, 68.

8 THE COURT: Okay. Guys.

9 MR. SHEEHAN: Was there two demonstrative exhibits?
10 Just one, okay.

11 THE CLERK: No, just one.

12 (Colloquy off the record.)

13 THE CLERK: So 68.

14 MR. VAN: Okay. So 68, that was the demonstrative
15 one, but it is now 68.

16 MR. SHEEHAN: What is the demonstrative exhibit?

17 THE CLERK: It was this, and then we also now called
18 it --

19 MR. VAN: 68.

20 THE CLERK: -- 68 because you wanted to offer it.

21 MR. SHEEHAN: Oh. What about the one showing that
22 the 16th --

23 MR. VAN: This tracking number.

24 MR. SHEEHAN: -- the tracking number?

25 MR. VAN: That is attached to 67 as the backup.

1 MR. SHEEHAN: No. No. No. That's a different one.
2 The one that I just brought this afternoon.

3 Yes.

4 THE COURT: I don't know.

5 MR. SHEEHAN: This is it?

6 THE COURT: I'm staying out of this.

7 MR. SHEEHAN: I'm sorry. Thank you, Your Honor.

8 THE COURT: I'm waiting for people to have the
9 documents.

10 MR. SHEEHAN: This is the one.

11 THE COURT: Do we need copies of that now?

12 MR. VAN: No. No, I've got this one.

13 I'm going to object to this one. The problem with
14 this one is it -- well, if we go back on the record.

15 THE COURT: I've got to wait for Jill to be ready.

16 THE COURT RECORDER: I am on.

17 THE COURT: Oh, great.

18 Are you objecting to that? What's its number?

19 MR. VAN: 68. I'm objecting to 68. This is the
20 tracking number of these supposed check --

21 THE COURT: No. It's not.

22 MR. VAN: I lied. 69, this is demonstrative
23 Exhibit 1 then.

24 THE COURT: No.

25 MR. VAN: 2. Okay. You all are confusing me.

1 THE COURT: Okay. Would you like me to step away for
2 you guys to straighten this out?

3 MR. VAN: No. No, I'd rather you be here.

4 (Colloquy off the record.)

5 MR. VAN: Okay. Let me make sure that we're clear
6 then. Let's get it really clear for the record.

7 MR. SHEEHAN: It's all right. It's okay. We'll
8 withdraw it. I understand your objection. We'll withdraw.

9 MR. VAN: Okay. Fair enough.

10 So just to make sure, 66 is -- 66 is the copy of the
11 check. 67 is the January 31, 2012, with the backup that shows
12 it was 2014, and 68 is the spreadsheet with the backup. Okay.
13 There.

14 THE COURT: Are they all straightened out now?

15 MR. VAN: Yes.

16 MR. SHEEHAN: Your Honor --

17 THE COURT: 66, 67 and 68 are admitted pursuant to
18 stipulation.

19 (Exhibit No. 66, 67, 68 admitted.)

20 THE COURT: Was there anything else that the
21 defendants wanted to make sure was admitted before you rest?

22 MR. VAN: Your Honor, the only other issue I have is,
23 and this is a demonstrative issue, and I don't know how the
24 Court would like to handle this that I will be using at close.

25 THE COURT: Well, what I'll do is I'll have you walk

1 over and give a copy to Dulce before you start closing, but you
2 don't need to do it now if it's demonstrative.

3 MR. VAN: Okay. That's fair.

4 THE COURT: I do keep a record as a Court's exhibit,
5 but I don't need you to do it now.

6 MR. VAN: That would be it then, Your Honor.

7 THE COURT: All right. Do you have a rebuttal case?

8 MR. SHEEHAN: No.

9 THE COURT: All right. Evidence is closed. Would
10 anyone like to argue?

11 I may still have my chart from yours from yesterday.

12 MR. SHEEHAN: Well, the good news is I'm going to add
13 one more because I forgot one.

14 THE COURT: Okay.

15 MR. SHEEHAN: But I will explain it to you, and then
16 we'll add it in where I say.

17 (Closing argument for the plaintiff.)

18 MR. SHEEHAN: Your Honor, the evidence showed exactly
19 what I thought. There was no surprises here today from our
20 standpoint and yesterday, and the arguments are basically the
21 same, but furthered buttressed by the testimony. There are now
22 six reasons though, and if you would add a number six to that
23 little chart that I gave you, the six would be that Rose cannot
24 argue that the notice to Operadora was material. It's clearly
25 immaterial.

1 Mr. Dragul just got off the stand and said if -- that
2 he wouldn't have given the default notice to Operadora because
3 he would've just paid it. So it's immaterial. He didn't care
4 whether it was copied to Operadora or not, and again this
5 doesn't have to do with Operadora here today; that's number
6 one. We certainly understand.

7 We believe we have defenses to Operadora, but we
8 certainly understand that this decision is not binding on
9 Operadora, but that notice issue involving Operadora belongs to
10 Operadora. Rose cannot assert it. That was made for the
11 benefit of Operadora. That's under the law. That's under the
12 cases that we cited, that they have not cited any on.

13 But if Operadora could assert -- excuse me -- Rose
14 could assert Operadora's claim, it is precluded from doing so
15 in this case for numerous reasons. The first of which is
16 because Mr. Dragul cannot tell us, Send everything to me.
17 Don't send it to Operadora. Don't send it to Susan Markusch.
18 Send everything to me. I'll take care of it. He's got the
19 obligation to send it to Operadora. We do that, and then turn
20 around and say you didn't send it. That's under the Doctrines
21 of Waiver, Estoppel and Unclean Hands.

22 In addition, Rose cannot bring that up because it had
23 an independent duty to send any default notices to Operadora
24 and failed to do so. Under the Unclean Hand Doctrines, you
25 cannot not pay the rent, specifically tell us not to send,

1 carbon copy anyone but him, or just send it to him, not carbon
2 copy anyone, then fail to send the default notice to Operadora
3 under Rose's express obligation to do so and then try to use
4 the excuse that because Treasure Island did not copy Operadora
5 it can get out of its deliberate -- it can get out of its
6 deliberate breach of its rental obligations. Equity, unclean
7 hands all prevent this.

8 Further, even if Rose could assert Operadora's claim,
9 did not waive the claims, now to stop from bringing the claim
10 because it told Operadora -- because it told Treasure Island
11 just to send it to him. The allegation is still not applicable
12 because it's pretty clear, very clear Operadora had no plan to
13 cure the breach. We heard Mr. Krouham's testimony, but the
14 evidence shows otherwise.

15 This property was losing money hand over fist. You
16 saw that. It was hundreds of thousands of dollars behind on
17 its food bill. When Operadora found out about this, they did
18 not write a letter to Treasure Island. They did not file an
19 intervention into this case. They did not file their own
20 action. They simply wrote a letter -- made a phone call and
21 wrote a letter saying, We just want to confirm that if Rose is
22 terminated you plan to honor your obligation to negotiate
23 directly with us.

24 Mr. Krouham specifically testified in his deposition
25 on page 28 that that e-mail accurately reflected Operadora's

1 position, and you'll see that in the testimony if you go back.
2 He's absolutely affirmed that. You can see it in his
3 testimony. You can see it in his testimony here that he
4 absolutely affirmed that, and if you review that e-mail -- I
5 believe it's 50 -- you will see that Operadora had no plans to
6 make any cure on a realtime basis. They just wanted to make
7 sure that we would honor the right to negotiate directly with
8 them because at the time the property was doing terrible.

9 They wanted to actually negotiate a lower lease, but
10 something happened three or four months ago. Kahunaville, the
11 other restaurant, went out of business. Now apparently it's
12 getting better day by day, but as you heard him say -- when he
13 said, It's profitable, he said, It's getting -- he did not say,
14 yes. He said it's getting better day by day, but again
15 Operadora is really irrelevant to this, and indeed Operadora --
16 we can say whatever we want -- didn't have the money to pay the
17 food bill. I don't see how they were going to make the rent
18 payment.

19 But so that leaves the only really relevant issue in
20 this case. Was the notice to Rose effective? The evidence on
21 this point is so overwhelming after the testimony today. The
22 only claim they have is that Susan Markusch -- it was not sent
23 attention to Susan Markusch. Again, in the paragraph that they
24 drafted, Susan Markusch was taken out of the address. Now, I
25 understand their point so on and so forth, but the part that

1 they drafted -- ambiguity is construed against the drafter --
2 no Susan Markusch in the fifth amendment notice to Rose.

3 But even assuming Susan Markusch was in there, first
4 of all Mr. Dragul admitted on the stand that he told us send it
5 to him. Don't send it to Susan Markusch. That's what we did.
6 But what happened today? Mr. Dragul admitted Susan Markusch
7 got it. Susan Markusch got the notice and tried to pay a
8 partial rent. While he was in Las Vegas he said Susan Markusch
9 tried to pay partial rent.

10 We cited the case law that says actual notice is
11 sufficient. We cited the case law that said substantial
12 compliance with notice is sufficient, but here it's way more
13 than that. It's Mr. Dragul saying, Send it to me. Don't send
14 it to Susan Markusch. It's his testimony now saying Susan
15 Markusch got this.

16 But let's go one step further. Mr. Anthony took the
17 additional step of carbon copying Elizabeth Gold. That's the
18 officer. That's the only other officer. That's the person
19 that Mr. Dragul speaks to several times a day every morning.
20 That's the person who called Brad Anthony the next day and
21 said, Got your notice. We need additional time to pay the
22 rent. First of all, she wouldn't have done that without
23 Mr. Dragul. You know it. I know it. Everybody knows it, but
24 second of all, she's an officer, and she could act for Rose.

25 There's no doubt Rose got this notice. Where is

1 Ms. Gold? Where is Ms. Markusch? They couldn't come here
2 today because they knew that they would have to say, yes, we
3 got the notice. We told Mr. Dragul about it, but we didn't
4 have the money to pay. We tried to make a partial payment.
5 They wouldn't accept it.

6 But in any event, you've got Mr. Anthony's word
7 against nobody's. So we know that Ms. Gold called and said,
8 Gary wants more time. He has this problem with his brother.
9 He needs more time to pay. Can you give us an extension? Brad
10 said, No. They got the notice. Susan Markusch got the notice.
11 Make no mistake, Your Honor. The payment doesn't come on May
12 16th after the May 14th notice by Ms. Markusch without her
13 knowing about the notice.

14 Mr. Dragul said that on the 10th of the month if he
15 doesn't get his rent he begins eviction proceedings. That's
16 what we did. That's what we had the right to do. We waited
17 till the 14th. Mr. Dragul said if they didn't pay they'd evict
18 them. That's what we did. We gave them every opportunity.

19 Mr. Anthony provided a second copy of the notice to
20 Elizabeth Gold so that they would have the full opportunity.
21 They knew. Ms. Gold drafted the lease. Ms. Gold knew that if
22 they didn't pay in that 10 days they were subject to
23 termination. They didn't pay. The lease provides we could
24 terminate. We did terminate. With respect to Rose, we
25 understand. We're not going to kick out Señor Frog's. There

1 will be no employees lost.

2 And here's a couple other little points. When
3 Mr. Krouham called him and said, Hey, we've got this
4 termination notice, you know what Mr. Krouham said Mr. Dragul
5 said, Oh, we paid the rent on time, and they just wouldn't take
6 it. Not true, didn't pay the rent on time, and because he
7 didn't pay the rent on time the lease is terminated under the
8 clear law which is all set forth in our trial brief.

9 Thank you, Your Honor.

10 THE COURT: Mr. Van.

11 And if you want to use a demonstrative exhibit,
12 that's fine. Please show Mr. Sheehan before you show me, and
13 then we can mark it.

14 MR. SHEEHAN: Can I have an extra copy?

15 Thanks.

16 THE COURT: Do we need to make more copies, or are we
17 okay on the number of copies? I think the county can afford a
18 couple sheets of paper if that's what we're up to.

19 MR. VAN: Absolutely.

20 THE COURT: You're going to make me put these on,
21 huh.

22 THE CLERK: (Inaudible).

23 THE COURT: No, this is demonstrative, whatever
24 they're up to, D3, D4.

25 THE CLERK: D2.

1 THE COURT: Darn.

2 (Closing argument for the defense.)

3 MR. VAN: Your Honor, I hope you have the time when
4 you're reviewing this case prior to the ruling that you take --
5 go back and you look at the testimony because there's a lot of
6 things that were just said that just are not in the record.
7 They're just not there.

8 David Krouham, Gary Dragul, Phil Ruffin all met to
9 discuss a concept. They agreed that Señor Frog's would be the
10 tenant. It's spelled out particularly in the brief -- I mean
11 in the lease that they will be the tenant. It's very clear
12 that they would be the tenant, and in fact David and -- David
13 Krouham and Gary Dragul both say it's going to be a joint
14 venture. Ironically, Brad Anthony also testified that he knew
15 it was going to be a joint venture.

16 David Krouham, Gary Dragul both say that they were
17 leery about Treasure Island at first because they had never
18 done a venture with them, but secondly because of the concept
19 that they presented which was taken from them, the Shrimp Shack
20 versus the Seafood Bucket.

21 Your Honor, it's very important that we go through
22 the lease. And, Your Honor, I don't know how to delicately say
23 this. There are very few seasoned enough in here in this room
24 to know who Herb Jones was. When I first came to town, I was
25 working with Mr. Jones, and I asked him after I sat chair with

1 him in a trial I said, How do you become a good trial attorney,
2 and he said, If you have the facts, you argue the facts. If
3 you have the law, you argue the law, and then with a twinkle in
4 his eye he said, and if you don't have either one, you drag a
5 skunk through the courtroom and take them off the scent. I'm
6 trying to identify to you where the skunk has been drug through
7 the courtroom.

8 If you look at this contract or this lease agreement,
9 7.1 talks about a Mexican-style restaurant. It specifically
10 identifies the type of property that's going to be used. If
11 you look at 7.5, it identifies it even more. In 7.7 it says
12 that it's Señor Frog's. No one has disputed that Señor Frog's,
13 the joint venturer with Rose should therefore be entitled to
14 notice in the event that there is an issue.

15 If we get to -- then we move on to Paragraph 15.2.
16 Paragraph 15.2 talks about the event of default, and it says
17 that a default does not occur unless and until they have had an
18 opportunity to be put on notice and to cure, and everyone has
19 agreed with that.

20 Then we go to Paragraph 19.3. No parties by simply
21 changing a point at one -- or changing something in this deal
22 have waived any rights to enforce it. That's part of the
23 contract that was agreed to. Mr. Anthony testified that he was
24 part, has always been part of the drafting of all of these
25 documents. In fact, I was surprised to hear Mr. Sheehan say

1 that my clients drafted the fifth amendment when Mr. Anthony
2 said that he and Ms. Gold were the ones that prepared it, and
3 there's all those e-mails back and forth negotiating but
4 saying, Oh, no. No.

5 Now we've got to -- we're going to hold it against
6 you because there's an issue out there. And, in fact, under
7 the terms of the original agreement, which has never been
8 amended, we have the provision that says, We're not doing that.

9 Then we get to the very important Paragraph 19.6:
10 Any notice or other communication required or permitted to be
11 given by the party shall be in writing -- not may be, shall be
12 in writing -- and shall be deemed to have been given. Then it
13 identifies the ways. That says: Addressed to the following
14 addresses. And then it says: Each of the parties shall be
15 entitled to specify a different address and/or contact person
16 by giving notice of aforesaid. Each of them therefore have --
17 and then we have Treasure Island with Najam Khan. Well, what
18 if my clients had sent a notice over and addressed it to
19 someone else? Would that have been --

20 THE COURT: Head of housekeeping, TI?

21 MR. VAN: Exactly.

22 THE COURT: Yeah, okay.

23 MR. VAN: We've got a problem. Very important here
24 is we have Susan Markusch as listed in there as the person to
25 be put on notice.

1 Let's go then to Paragraph 19. Now, remember you can
2 always change the address or the contact person or both, but it
3 has to be in writing.

4 Let's go to Paragraph 19.7. This is the entire
5 agreement. There's nothing else out there. We're not playing
6 that game.

7 19.8, there's a severability clause. We're tying
8 this thing all together.

9 19.9: No modifications, waiver, termination of this
10 lease shall be binding unless executed in writing by both
11 parties. When asked the very specific question to Mr. Anthony,
12 Do you have a writing that changes the notice provision from
13 Susan Markusch to Gary Dragul, his answer was, No. I
14 appreciate his candor. I appreciate his honesty. That's a
15 huge issue, and it has to be signed by both parties. That's
16 what the agreement says. What they would have you believe is
17 that simply by saying, hey, we want to do this as an
18 accommodation, that's a problem.

19 19.9 -- I'm sorry, we addressed that.

20 And then there's four amendments that are kept in
21 place. Those four amendments just show that this was a fluid
22 relationship. Things were changing. Both parties were
23 agreeing to things.

24 Your Honor, then we go to the next agreement, the
25 fifth one, the fifth amendment to the lease, a critical

1 document. When I asked Mr. Anthony about were we going to
2 strictly enforce all the other provisions, he said, Yeah. We
3 couldn't -- my clients can't put a sports bar in there because
4 it's specifically prohibited, and there are certain things we
5 can't do, and we can do and we can't do.

6 Paragraph 9: The parties agree that the lease is
7 amended to include the following new sections for the benefit
8 of Señor Frog's. That's for their benefit, and what do we do?
9 We add a person to be named to make sure that we get enough
10 people to get notice on this because, remember, at the time
11 we're changing the structure about who will be paying. Any
12 lease payments that have all been cured previously to this date
13 were being paid directly by Señor Frog's. From this date
14 forward it's Rose, and what we have -- what is clear by
15 Exhibit 68, I believe, all of the payments from that day
16 forward have been made timely.

17 MR. SHEEHAN: I'm going to object to that, Your
18 Honor. We know one that wasn't.

19 THE COURT: The record speaks for itself.

20 MR. VAN: Again, when we get down -- again,
21 Paragraph 9, when it's talking -- and this is more -- Any
22 notices required or permitted to be given under this agreement
23 shall be in writing and personally delivered in each instance
24 addressed to the parties at the addresses listed in the first
25 paragraph of this agreement.

1 And then we get to the Paragraph 11. Paragraph 11
2 says that, okay: The parties agree for the purposes of
3 Paragraph 19.6, which is the notification provision in the
4 underlying lease, we're going to update the address, and we
5 give the new address. We don't change the person; the name of
6 the person has not been changed, and then it's very clear. It
7 says: And additionally, copies to the notices shall be sent --
8 shall be sent -- and also be sent to the subtenant -- shall and
9 also.

10 They wouldn't -- Treasure Island would have you
11 believe, hey, you know what, we don't have to do that anymore,
12 but if you read Paragraph 11: That copies of the notices sent
13 to the tenant per the lease shall also be sent to the
14 subtenant. Any problems that are out there have to be sent to
15 Operadora. It is not an exclusive. It is inclusive. They
16 have to be brought. Those notices were not sent.

17 Señor Frog's has a contractual and independent right
18 to notice, and a contractual and independent right to cure.
19 Well, why did they not do it? Here's the rationale. We were
20 having some struggles out there. So we decided in a telephone
21 conversation with Gary Dragul. Gary said, Hey, you know what,
22 if you're having issues, just send me the notices. I'll get
23 them to the right people to make sure that it's taken care of.
24 There's a Statute of Frauds issue, if you're -- and we've got
25 the severability issue, and we've got all of the issues in the

1 lease. So you can't do this. It has to be in writing.

2 Well, what did they say? This is an accommodation.
3 Your Honor, an accommodation does not relieve a legal
4 obligation. Even Brad Anthony when I asked him point-blank, I
5 said, Mr. Anthony, based upon this lease, what would govern,
6 and he said, The contract would govern. He at times has been
7 our best witness.

8 TI has said that the third party doesn't have any
9 rights. Operadora is not here, but if you read those
10 documents, notice shall also be sent to the subtenant who has
11 the right to cure. They would not commit to this sublease if
12 that weren't the case, and, in fact, testimony was very clear
13 that the attorney said, No, we want to be put on notice. Why?
14 To prevent the very issue as to why we're here. People wanted
15 to be put on notice so that they could cure.

16 The irony is if you listen to Mr. Krouham, and you
17 listen to Mr. Dragul, they don't have any issues between
18 themselves, and both of them said the same thing, Absolutely
19 would've cured. Mr. Sheehan brings up to say, well, that
20 particular venue was having a struggle; however, Mr. Krouham
21 said, I've got 44 other places I can pull that money from. We
22 have a big international business. We can pull from anywhere
23 to make sure that we're protected.

24 Both David Krouham and Gary Dragul testified that
25 counsel for Señor Frog's would not allow their client to sign

1 this agreement without notice to be sent to both of them, both
2 Operadora and to Rose. Each of the notice provisions in the
3 general lease and the fifth amendment were bargained-for terms
4 with duties to perform associated with those bargained-for
5 terms.

6 The sublease, however, includes a transfer issue with
7 regard to the payments, and we dealt with that. That issue is
8 an issue between Rose and Señor Frog's, and Mr. Dragul
9 addressed that. He said, Why in the world would you put the
10 notice provision to my attorney in the sublease and with regard
11 to my controller in the other? Well, the reason is the
12 controller pays when you're a tenant, and the attorney puts you
13 on notice if you haven't paid if you're the landlord.

14 Your Honor, the burden of proof requires two
15 concepts. One is the burden of production, and the second one
16 of persuasion. So let's look at what has not been produced.

17 No evidence evidencing a change in the requirements
18 under the notice provisions of the lease in Section 19.9,
19 there's not a written -- there's not a writing anywhere,
20 anywhere. There's nothing. There's not even a --

21 THE COURT: I have conflicting testimony. I have to
22 weigh it, judge credibility based on, don't I?

23 MR. VAN: You're absolutely -- well, no, Your Honor,
24 I don't even think you can go to that range because under the
25 terms of the agreement, it's very clear that it can't without a

1 writing. We don't even have a -- we don't even have an e-mail.
2 There are e-mails from Mr. Anthony that says, Hey, confirming
3 our prior conversation, and confirming this, confirming that,
4 confirm -- where's the one that says, hey, confirming our
5 agreement that we're exchanging you for Susan Markusch with
6 regard to the notice provisions? We've got all kinds of other
7 instances, but not that one.

8 That writing just candidly does not exist, and
9 Mr. Anthony admitted that to me, and I asked him. If you look
10 at Exhibit 16, he says it's an e-mail from him, To memorialize
11 the voice message I just left you. Yet, there's no
12 memorialization of this critical term of the contract. An
13 accommodation again does not relieve one of a legal obligation.

14 Brad Anthony said that he sent an e-mail to Elizabeth
15 Gold. That e-mail has never been produced. Why not? Well,
16 maybe it doesn't exist. Isn't that a critical issue? If he's
17 saying I sent this e-mail -- we've got plenty of other e-mails
18 that are redacted in here -- where's that one e-mail?

19 MR. SHEEHAN: Your Honor, I can't believe he's saying
20 that. We produced a copy to them this morning.

21 THE COURT: Counsel, you have a chance, and producing
22 it this morning's a little late, but you have a chance last.

23 Keep going, Mr. Van.

24 MR. VAN: Your Honor, with regard to that, this
25 morning there was an e-mail that they showed up. You're right.

1 It's well beyond the close of discovery, and just as a counter,
2 equally beyond the close of discovery, I have a copy -- a
3 screenshot of her computer screen that shows she never received
4 it. It's not evidence. You can't admit it.

5 Brad Anthony indicated that there was a telephone
6 call. Where are the records of that telephone call? Why not
7 just pull the records of that day, say, hey, on that day I
8 called that office, or on that day I called her on her cell
9 phone? Because he knew the cell phone. He knew the office
10 number. None of that has ever been -- has ever occurred, and
11 again we have e-mails that say, To memorialize my voice
12 message, where's that e-mail.

13 What about this whole, hey, you know what, we have
14 all of these breaches. What about those letters of breach?
15 They've never been there. We haven't seen any of those, 8, and
16 8 and 13, whatever, and then when you sit down and you dissect
17 that and you say, okay, it was --

18 And this is actually pretty congruent if you consider
19 the fact that Mr. Anthony said, It's due on the 1st, and
20 Mr. Dragul said we wrote the checks, and they went out on the
21 1st. Well, the mailbox rule, if it still applies -- I know it
22 used to -- would mean it would get there the 3rd or the 4th.
23 According to Mr. Anthony, they would be in breach. According
24 to the mailbox rule, they would not, but if you look at
25 Exhibit 68, you will see that all of those went out 1st, 2nd

1 and maybe at the latest the 3rd, but definitely within that
2 cure period.

3 Your Honor, there's that old adage from the old
4 movie, show me the money. The issue in this case is show me
5 the writing. Show me where it is that we have these issues.
6 Public policy abhors technical defaults and equity abhors for a
7 forfeiture.

8 Remember that when Rose actually became aware of the
9 default what did they do? Well, let's go through the
10 demonstrative exhibit. May 11th through the 13th, Mr. Dragul
11 was in the hospital with his family. May 14th, still at the
12 hospital, but apparently that's the date of the alleged default
13 notice. On the 15th, the alleged default notice is delivered
14 to Rose; however, no one is there. It's not addressed to
15 Susan. It's signed for by a receptionist. It does not include
16 Operadora, and Gary Dragul, whom it is addressed to, is at the
17 hospital.

18 Saturday, Sunday, they are in town. Monday, Tuesday,
19 Wednesday, they are in town, and the irony is they are meeting
20 with Treasure Island people who never say, hey, by the way
21 you're in default. You've got to make sure you get this thing
22 paid, and interestingly enough, we don't -- and their defense
23 to that would be, hey, look I don't have to mend their terms of
24 the contract, but they're asking us to do that exact thing by
25 saying, well wait a second, you're not -- they're asking us to

1 say, well, you didn't send the notice to the right person. If
2 we just abide by the terms of the contract, it's critical in
3 this case.

4 21st and 22nd, Mr. Dragul said, Look, this is the
5 time that everybody is away from their families for five days.
6 They're working 20-hour days. We give them a little
7 decompression time. Then we've got the Memorial Day weekend.
8 Then the issue comes up 26th, 27th. They are unburying 28th.
9 We have consistent testimony on the 28th.

10 What we know is this. The termination notice is sent
11 on that day, and on that day a complaint is filed the exact
12 same day despite the fact that in their pretrial brief they say
13 that they have to file it because of issues that they're having
14 with Rose. The alleged termination is then received on the
15 29th by Rose; however, during that time frame Mr. Krouham calls
16 up Mr. Dragul and said, What's going on, and on the 29th there
17 is a wire transfer that is sent out. It is returned.

18 The next day is a Saturday and a Sunday. On Monday
19 it is -- the wire transfer is rejected on the 2nd, and a second
20 wire transfer is sent. That wire transfer is rejected, and an
21 overnight package, a FedEx package goes out on the 3rd, and
22 that is rejected. So one of the things you have to look at is
23 the good faith of a party. Well, no one has suggested that
24 those payments weren't made for the full amount. If you're
25 looking at the \$119,000 checks, they were there. The money was

1 set to be wired.

2 Well, now they're saying, Well, they couldn't pay.
3 They did pay. They tried to pay. They would have an entirely
4 different argument if they said, you know what, we accepted
5 that check, or we accepted that wire transfer, and they said
6 the money wasn't there, but I don't know how you could do that
7 with a wire transfer, but if they said we got this check -- oh,
8 wait, it's a cashier's check -- their argument that they did
9 not have the ability to pay falls short because the money was
10 there. We have consistent testimony saying they were prepared
11 to cure.

12 Now, let's talk a little bit, Your Honor, about --
13 because one of the considerations that has to be made in this
14 case of course is equity because we're talking about what's the
15 right thing to do. You've got good faith and fair dealing.
16 What's the prejudice to Treasure Island if, in fact, the Court
17 rules in the favor of Rose and Señor Frog's? Absolutely
18 nothing.

19 They are current on all their payments. Any and all
20 prior issues have been cured. Any and all prior amounts have
21 been resolved with the exception of three things. One, there's
22 a payment that's due in November, but it's not in default.
23 It's due November 1st. There's a payment due December 1st.
24 It's not in default, and there is currently some accumulation
25 of percentage rent that will be due at some point in the

1 immediate future. With those exceptions, there is absolutely
2 no damage, no loss, no damage whatsoever.

3 And once this matter was brought to their attention,
4 attempts were made -- brought to the attention to Rose,
5 attempts were made to bring it current. Had notice been
6 proper, then both of the principals of Señor Frog's and Rose
7 have testified that they were ready, willing and able to cure,
8 but the only thing that they lacked at that point in time was
9 the notice.

10 Let's talk about prejudice to Señor Frog's and Rose.
11 They've invested over \$9 million in renovations. TI could step
12 into those renovations, change some signage and have a complete
13 venue that someone else has paid for. Señor Frog's and Rose
14 would lose a favorable 25 year lease that they negotiated at
15 the lower part of the market, and TI would be benefiting from
16 the fact that they've essentially taken advantage of this and
17 be able to lease it at a greater amount. Additionally, many of
18 the Señor Frog's employees would be losing their jobs together
19 with their families.

20 Now, there's an issue out there with the -- look at
21 the letter from the attorney. The attorney came in and said,
22 Look, at that point in time we're not talking about a
23 termination -- I mean we're not talking about a default issue.
24 We're talking about termination. If you read that letter, it
25 actually says, We need to know essentially if our employees are

1 going to show up on Monday. If they're going to be kicked out,
2 what are we going to do.

3 Secondly, it says, Hey, we understand Rose is trying
4 to work this thing out, and lastly, David Krouham said, I never
5 even saw that. That wasn't part of -- I never had the -- gave
6 them the authority to send that because we were working with
7 Rose to try to get that all fixed.

8 Your Honor, when you have a critical notice or
9 critical issue such as a claim for default, the right to cure
10 with a possible consequence of termination with millions and
11 millions of dollars on the line, with the livelihood of a
12 substantial number of employees, there must needs be sufficient
13 notice. That did not occur. The only explanation is that
14 there would have to be some type of an accommodation. There is
15 no writing, absolutely no writing.

16 Mr. Sheehan indicated that the only basis for all of
17 this is this concept of, hey, you know what, send it to me. We
18 have this oral discussion. Statute of Frauds and the contract
19 prohibit that. There is an independent duty to send notice to
20 Operadora under the terms of the contract. Under the terms of
21 the amendment as well it's a contractual right. It's something
22 they negotiated for. It's something that they had agreed to as
23 part of the consideration for that, for the continued payment
24 of those rents.

25 Then the statement was, Well, we've got this problem

1 because they were losing money. That particular store was
2 losing money for a period of time. What they don't say is --
3 if you look through all the amendments -- part of the reason
4 they were doing pretty good, and then they pulled out the
5 pirate show, and people weren't walking around in front of it
6 anymore, and so we're climbing up doing really well. TI just
7 makes a decision. It tanks a little bit, and it's starting to
8 come back up again. That's the reason for a lot of these
9 amendments. It was saying, look, we admit that we have a
10 problem here because originally, if you look at the original
11 lease, the pirate show is going to be part of the deal, and
12 Señor Frog's is going to be right next door to watching the
13 pirate show, which at the time was an important attraction in
14 Nevada in Las Vegas.

15 The best evidence of the fact that my clients were
16 interested in honoring this deal was the fact that immediately
17 upon this termination the money was sent, and it was sent in
18 full amount. David Krouham said: Look, that particular venue
19 may not have been able to pay that, doesn't matter. We have
20 money from other locations that we're protecting our brand.
21 This store was that important. It's on The Strip.

22 If you look at Exhibit 50, which again is the letter
23 from the attorney, remember that is in the discussion with
24 regard to the -- to the breach. That's in discussion with
25 regard to the termination. It was already terminated. This is

1 a reaction from an attorney saying, What do we do now? I need
2 to figure this out. Oh, by the way, as we further discussed,
3 Rose is disputing the default. So all along they've been
4 disputing that issue.

5 Again, I apologize for this. One of the issues that
6 was addressed was this concept of this was drafted by my
7 clients only. That's not the case. That has never been
8 amended in it, and there's a drafting provision in that -- in
9 the underlying lease.

10 Susan Markusch, let's talk about that for a minute.
11 It doesn't make sense if you think about this. She's out.
12 Everybody is out of the office. The notice is not addressed to
13 her. It shows up in the office on the 15th, and there's a
14 payment on the 16th from a letter that she never received. So
15 I asked point-blank. Mr. Dragul, what happened there? You
16 know what, I think based upon, you know, placing it all
17 together, the whirlwind that was going on, she realized that
18 there hadn't been a payment. She made a good-faith attempt to
19 make something. Did you agree? Did you tell her to do it?
20 No, I didn't.

21 More importantly, there's not a copy of the check.
22 We don't even know what there is out there. It may have been a
23 payment in full for all we know. There's just nothing there.
24 There is no evidence whatsoever.

25 But the way that they tried to justify the fact that

1 they didn't send notice the appropriate way is they said, Oh,
2 you know what, we sent it to Elizabeth Gold. Elizabeth Gold is
3 a transactional attorney that is in-house, and she is not named
4 as a party, the person who is to be contacted in the event of a
5 default. The irony of that is she was also at ICSC. She was
6 in the process of helping with these 300 clients that they're
7 addressing while they're in town. And when I asked the
8 question, How often does Susan Markusch travel? She doesn't.
9 She stays there. That's the purpose. She's there to make sure
10 that we don't have any problems.

11 And then the issue came up where Mr. Sheehan said,
12 Okay, on the 10th of the month my client -- or Rose immediately
13 starts eviction processes. That's not what he said. What he
14 said is on the 10th of the month, in the event we look at the
15 lease. We determine what there is in the lease, and then he
16 didn't -- the part that wasn't raised was when Mr. Dragul said,
17 But we have to determine if we have a notice requirement under
18 the terms of the lease, and we have to abide by that. They
19 don't just willy-nilly go out and start foreclosing on people.
20 They go back and find out who the contact person is, what they
21 need to do to make sure that they are properly dealt with, and
22 they abide strictly by the terms of the lease because that's
23 what they're going to do.

24 Your Honor, the other issue is we came back and we
25 said okay. Mr. Sheehan said we want to put Señor Frog's in

1 there, and we're going to -- we're going to negotiate a lease
2 with them. I asked Mr. Anthony point-blank on the stand --

3 MR. SHEEHAN: Objection, Your Honor. I objected at
4 the time, and you sustained it.

5 THE COURT: Yep. Let's keep going.

6 MR. VAN: I asked him at the time --

7 THE COURT: I told you we're not going to talk about
8 settlement negotiations, remember?

9 MR. VAN: No. No. No, that's not what I'm talking
10 about. I'm not talking about that. I'm not talking about
11 that. I asked him on the stand, would you negotiate under the
12 same terms? Would you give --

13 MR. SHEEHAN: That's what I objected to, and that's
14 what you sustained also.

15 THE COURT: Counsel, can we move on to a new area.

16 MR. VAN: Okay. Your Honor, now let's talk about the
17 concept of good faith and fair dealing. What is good faith?
18 What is good faith -- or is it good faith to not send notice to
19 the right parties? The definition of good faith is: When one
20 party performs a contract in a manner that is unfaithful to the
21 purpose of the contract and the justified expectations of the
22 other party are thus denied, damages may be awarded against the
23 party who does not act in good faith.

24 Well, let's talk about the good faith. Was it good
25 faith not to send notice to the right person, not to send

1 notice to the persons that were specifically identified in the
2 contract? Now, at some point in time, with certain letters
3 they did; with certain letters they didn't; with certain
4 letters, went to Gary Dragul; with certain letters, they went
5 to someone else at Mr. Dragul's office. There was absolute
6 inconsistency. The only thing consistent was the
7 inconsistency. Some things would go here. Some things would
8 go there.

9 Was it good faith to talk to Mr. Dragul over the
10 weekend at the ICSC and not tell him about the breach, and not
11 say, hey, you know what, we can -- you know, let me run
12 upstairs. Let me go get you a copy of the letter while we're
13 here. Let me hand it to you. You guys got to get this thing
14 fixed.

15 Was it good faith not to count -- for counsel,
16 Mr. Anthony, to not pick up the phone, call and say, hey, we
17 got a problem, Mr. Dragul, or because apparently they had this,
18 it's okay to amend the whole agreement with a phone call, but
19 it's not okay to just pick it up and say, hey, by the way we
20 got a problem? So we can pick it up to amend, but we're not
21 going to pick it up to fix.

22 Was it good faith not to specifically follow the
23 notice provisions in the original lease and the fifth
24 amendment? Was it good faith and fair dealing when all that
25 was occurring to not accept the payments that were offered?

1 Interestingly again, no one has ever contested that the amount
2 offered was not the exact amount owed.

3 Your Honor, one of the most telling statements in
4 this is when I asked Mr. Anthony, Are there any amounts due at
5 this point in time? And he said, Right now, no. If you look
6 at Exhibit 68, all of the payments from when my client, when
7 Rose took over in June of 2014, with the exception of this one,
8 every payment has been timely made. Every payment before June
9 of 2014 when it was Operadora that was doing it, any of those
10 payments have been cured, and no one has raised the issue, and
11 those are actually not even part of this litigation.

12 The only thing that's out there right now is this
13 simple issue. Was there proper notice consistent with the
14 terms of the contract, and as a result of that, as a result of
15 Mr. Anthony saying, Hey, by the way, we're going to change
16 this, and we're not -- they didn't tell anybody. They had an
17 opportunity with this fifth amendment to say we are changing
18 the contact person to Gary Dragul, and they didn't. My client
19 is assuming that Susan remains the contact person because there
20 is nothing out there to the contrary.

21 Therefore, Your Honor, we would request that this
22 Court find against the plaintiff Treasure Island and for the
23 counterclaimants Rose and Señor Frog's with regard to its
24 counterclaim.

25 THE COURT: Thank you, Mr. Van.

JD Reporting, Inc.

1 MR. SHEEHAN: May I offer just a very brief few more
2 comments, Your Honor?

3 THE COURT: Yeah.

4 (Rebuttal argument for the plaintiff.)

5 MR. SHEEHAN: This wasn't a technical default, Your
6 Honor. They failed to pay rent. That's the whole key,
7 120,000. You heard Mr. Dragul say that if somebody doesn't pay
8 their rent they begin eviction, FED, eviction, 10 days. That's
9 what landlords do.

10 Mr. Anthony versus Mrs. Gold. Mr. Anthony came here
11 and testified; Ms. Gold did not. Mr. Anthony testified that on
12 the 14th he sent it out. Talk about good faith, not only did
13 he send it to Mr. Dragul, as Mr. Dragul had asked, but he also
14 sent it to Elizabeth Gold. Ms. Gold called Mr. Anthony the
15 next day and said, We don't have enough money. We tried to
16 send a partial payment. Mr. Anthony said he wouldn't accept
17 that, that Treasure Island wouldn't accept it. That's what he
18 testified. Ms. Gold didn't come here today.

19 Mr. Van admits that Susan Markusch -- it looks clear
20 that Susan Markusch got the notice herself since she sent out a
21 check on the 16th. Mr. Dragul testified that --

22 MR. VAN: Your Honor --

23 MR. SHEEHAN: -- Ms. Markusch sent the --

24 MR. VAN: If he's going to say what I just said, I'd
25 like to make sure that it's very clear. I never said that. At

1 no point in time did I say that.

2 THE COURT: If I was the jury, I would say to the
3 jury, now, ladies and gentlemen, you will remember what the
4 evidence shows. Thank you.

5 MR. VAN: Thank you.

6 MR. SHEEHAN: Okay. But Mr. Dragul clearly said that
7 while he was at ICSC, Ms. Markusch made a partial payment. She
8 obviously wouldn't have made the partial payment without
9 Mr. Dragul asking her to do it. You know, Mr. Dragul was the
10 one that would've authorized that payment. In any event, she
11 got the notice; that's clear.

12 So the question isn't whether or not the notice --
13 the question is whether the notice is sufficient under the law.
14 This notice is clearly sufficient under the law because there's
15 actual notice. Actual notice complies with the law. There's
16 substantial compliance.

17 There's also a waiver when Mr. Dragul said, Send
18 everything to me. There's also estoppel. You cannot lead
19 Mr. Anthony to believe that send everything to him, and he does
20 send everything to him and then try to use it. There's unclean
21 hands -- or excuse me -- there's substantial compliance since
22 we sent it to Rose at the address that it says in the
23 amendment.

24 It's immaterial. It got to the right people. The
25 fact that Susan Markusch wasn't on there is immaterial.

1 There's actual notice, and most importantly -- or, no, in
2 addition, not most importantly, it's unclean hands. You can't
3 have an obligation to send a notice to Operadora yourself and
4 then complain that we didn't send it to Operadora.

5 Your Honor, the rent was late. The good faith, my
6 gosh, Mr. Anthony sends it to them, too. Credibility was
7 obvious today, and I know that Your Honor got that, but I want
8 to tell you one last thing. Mr. Dragul testified today and put
9 it in a letter, and he said: When we sent the notice to
10 Operadora, he wrote us back and said, You're contacting my
11 tenant. That's tortious interference.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 Anything else since you have a counterclaim?

15 MR. VAN: Yes, Your Honor, just very briefly.

16 MR. SHEEHAN: Does this have to do with the
17 counterclaim?

18 THE COURT: I don't know. We'll see.

19 MR. VAN: Well, it does, Your Honor.

20 (Closing argument for counterclaimant.)

21 MR. VAN: The counterclaim issue has to do with the
22 notice as well, and one of the things that's very critical in
23 this case is the notice, and that's what Mr. Sheehan said.
24 It's important to note that in 2012 is the alleged discussion
25 with regard to Mr. Anthony and Mr. Dragul. The fifth amendment

1 is in 2014, and it was at that time that anyone could have
2 amended the underlying lease by putting in a change contact
3 person. The lease allows for it.

4 The lease that Mr. Anthony drafted allows for it. It
5 says you can change your address, and/or you can change your
6 contact person. The underlying lease says it goes to this
7 address to Susan Markusch. The amendment says, We're just
8 changing our address. We're leaving the same person in there,
9 which is Susan Markusch. That was never changed, and that
10 notice is what's critical in this case.

11 Thank you, Your Honor.

12 THE COURT: Thank you.

13 Here the Court determines that the defendant cannot
14 raise Operadora's failure to be named as a CC as a defense
15 under the circumstances presented in this case.

16 The Court finds Mr. Anthony's testimony related to
17 Mr. Dragul's request to change the notice more credible than
18 Mr. Dragul's testimony related to the issue.

19 The notice of default on 5/14, and the notice of
20 termination dated on May 28th were served in substantial
21 compliance with the notice provisions of the lease given
22 Mr. Dragul's request to Mr. Anthony.

23 There is no evidence of the breach of the covenant of
24 good faith and fair dealing by the Treasure Island. For that
25 reason, I find for the plaintiff and against the defendants in

1 this matter.

2 Please prepare findings of fact and conclusions of
3 law.

4 MR. SHEEHAN: Thank you, Your Honor.

5 THE COURT: All right. Anything else?

6 MR. SHEEHAN: No.

7 MR. VAN: No.

8 THE COURT: Mr. Sheehan, your sheet from the
9 openings.

10 And Mr. Van's, did you get that one?

11 THE CLERK: (Inaudible).

12 THE COURT: Okay. So I think we're all done.

13 MR. SHEEHAN: Thank you.

14 THE COURT: Have a nice day. Have a good weekend.

15 MR. MARSHALL: Okay. You, too.

16 MR. VAN: Thank you, Judge.

17 (Proceedings concluded 3:47 p.m.)

18 -oOo-

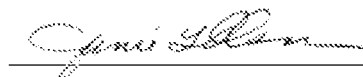
19 ATTEST: I do hereby certify that I have truly and correctly
20 transcribed the audio/video proceedings in the above-entitled
21 case.

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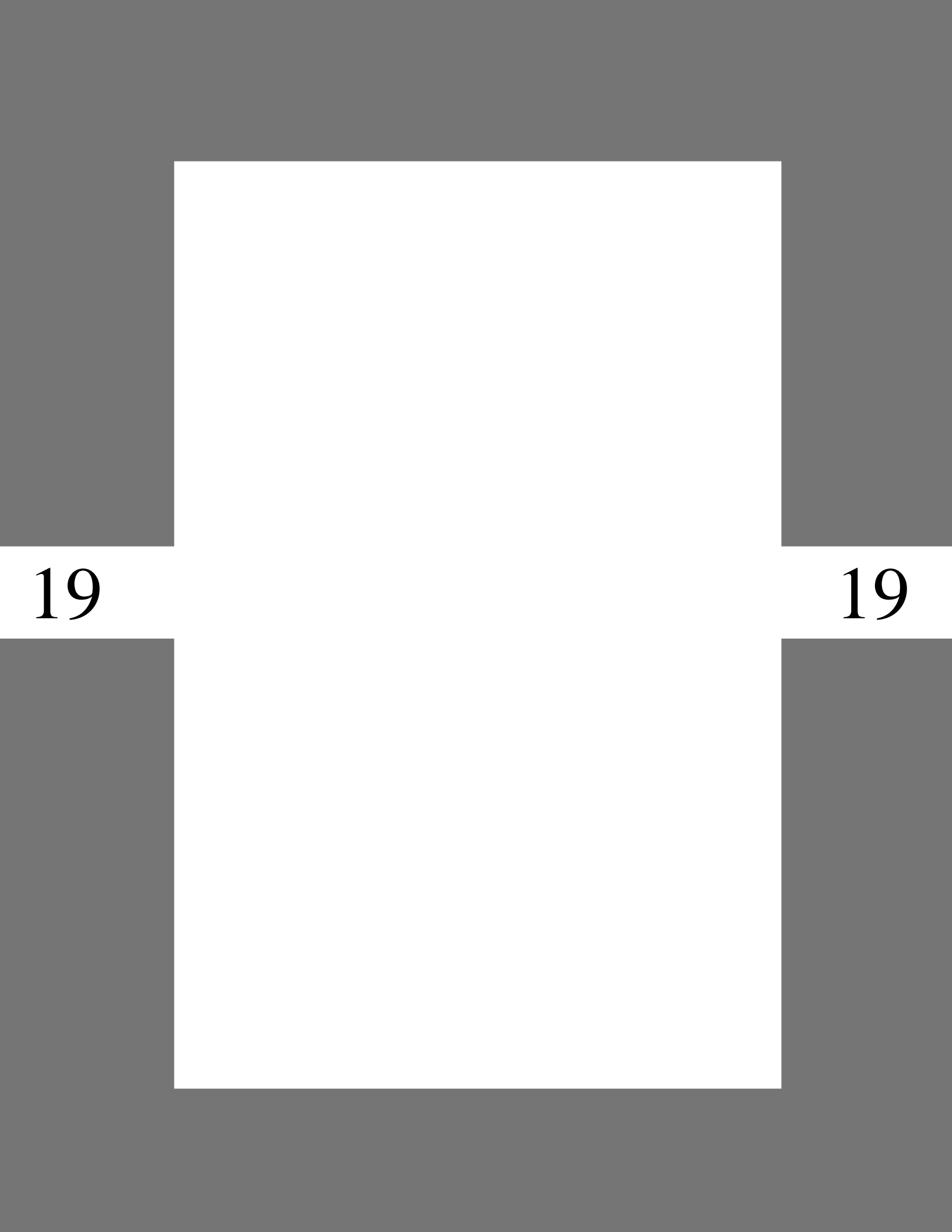
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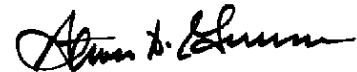


Janie L. Olsen
Transcriber



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CLERK OF THE COURT

OSCC

DISTRICT COURT
CLARK COUNTY, NEVADA

TREASURE ISLAND LLC,
PLAINTIFF(S)

CASE NO.: A-15-719105-B

VS.

DEPARTMENT 11

ROSE LLC, DEFENDANT(S)

CIVIL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,
IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to
statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Default Judgment
- ☐ Judgment on Arbitration
- ☐ Stipulated Judgment
- ☐ Summary Judgment
- ☐ Involuntary Dismissal
- ☐ Motion to Dismiss by Defendant(s)
- ☐ Stipulated Dismissal
- ☐ Voluntary Dismissal
- ☐ Transferred (before trial)
- ☐ Non-Jury – Disposed After Trial Starts
- X ☒ Non-Jury – Judgment Reached
- ☐ Jury – Disposed After Trial Starts
- ☐ Jury – Verdict Reached
- ☐ Other Manner of Disposition

DATED this 11th day of October, 2016.


 ELIZABETH GONZALEZ
 DISTRICT COURT JUDGE

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CLERK OF THE COURT

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CLERK OF THE COURT

1 NEO
2 FENNEMORE CRAIG, P.C.
3 Patrick J. Sheehan (Bar No. 3812)
4 John H. Mowbray (Bar No. 1140)
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

12 Plaintiff,

13 vs.

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

16 Defendant.

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

19 Counterclaimant,

20 vs.

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

24 Counterdefendant.

CASE NO.: A-15-719105-B

DEPT.: XI

NOTICE OF ENTRY OF FINDINGS OF
FACT AND CONCLUSIONS OF LAW

25 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

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

2 Dated this 7th day of November, 2016.

3 FENNEMORE CRAIG, P.C.

4
5 By: /s/ Patrick J. Sheehan

6 Patrick J. Sheehan (Bar No. 3812)

7 John H. Mowbray (Bar No. 1140)

8 1400 Bank of America Plaza

9 300 South Fourth St. 14th Floor

10 Las Vegas, NV 89101

11 *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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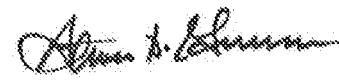
samuel@shumwayvan.com

/s/ Adam Miller

An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

**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,

Counterclaimant.

CASE NO.: A-15-719105-B

DEPT. NO.: XXIX

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. FINDINGS OF FACT.

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

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

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

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

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

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

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

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

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

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

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

26
27
28 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.

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

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

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

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

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

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

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

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

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

1 one², the communication was sent to Dragul and Operadora was not copied.

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

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

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

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

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

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

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

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

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

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

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

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

1 Island.

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

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

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

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

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

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

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

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

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

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

1 39. Señor Frogs is a subsidiary of Operadora.

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

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

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

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

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

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

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

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

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

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

22 50. The email states:

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

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

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

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

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

11 CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Dated this 4th day of November, 2016.

2
3 
4 District Court Judge JW

5 Submitted by:

6 FENNEMORE CRAIG, P.C.

7 By: 

8 Patrick J. Sheehan (Bar No. 3812)
9 John H. Mowbray (Bar No. 1140)
10 1400 Bank of America Plaza
11 300 South Fourth St. 14th Floor
12 Las Vegas, NV 89101
13 Attorneys for Treasure Island, LLC
14
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CERTIFICATE OF SERVICE

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

E-Service Master List**For Case****null - Treasure Island LLC, Plaintiff(s) vs. Rose LLC, Defendant(s)****Fennemore Craig Jones Vargas**


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An Employee of Fennemore Craig, P.C.

21

21

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

8985 South Eastern Avenue, Suite 100

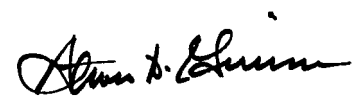
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Attorneys for Defendant/Counterclaimant

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.: 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**ROSE, LLC, a Nevada limited liability
company,

Counterclaimant

v.

TREASURE ISLAND, LLC, a Nevada
limited liability company,

Counterdefendant

Hearing Date: November 22, 2016


Hearing Time: 8:30 am

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.

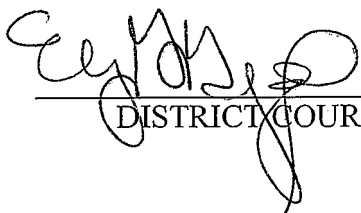
SHUMWAY VAN

By: 
 MICHAEL C. VAN, ESQ.
 Nevada Bar No. 3876
 SAMUEL A. MARSHALL, ESQ.
 Nevada Bar No. 13718
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Attorneys for Defendant/Counterclaimant

ORDER SHORTENING TIME

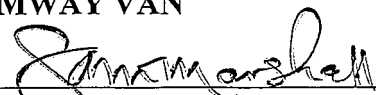
TO ALL INTERESTED PARTIES:

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 830 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
 JW

Submitted by:

SHUMWAY VAN

By: 
 MICHAEL C. VAN, ESQ. #3876
 SAMUEL A. MARSHALL, ESQ. #13718
 8985 South Eastern Avenue, Suite 100
 Las Vegas, Nevada 89123
Attorneys for Defendant/Counterclaimant

DECLARATION IN SUPPORT OF ORDER SHORTENING TIME

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

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

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

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

15 5. I declare under penalty of perjury under the laws of the State of Nevada (NRS
16 53.045), the foregoing is true and correct.¹

17 Dated this 16 day of November, 2016.



SAMUEL A. MARSHALL, ESQ.

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

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.

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

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

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

27 ⁶ Exhibit 8.

28 ⁷ The Court’s Findings of Fact and Conclusions of Law at ¶ 10.

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

3 This Court found, “Mr. Anthony’s testimony regarding Mr. Dragul’s request to change the
4 notice was much more credible than Mr. Dragul’s testimony related to the issue”⁹ and “[Mr.
5 Dragul] agreed that he did in fact tell Mr. Anthony to make all future communications to him”¹⁰;
6 however, Mr. Dragul never agreed to the same. While it may appear Mr. Anthony’s testimony
7 regarding this issue has merit considering all disclosed correspondence from TI to Rose after that
8 point, and prior to June 12, 2014, were sent only to Mr. Dragul and not to Operadora, TI has
9 produced no writing memorializing the Alleged Oral Agreement it alleges amended the Lease.
10 Regardless of whether Mr. Dragul made any such request, and he testified at trial that he did not¹¹,
11 the notice provisions of the Lease were amended by the Fifth Amendment on April 30, 2014,
12 almost two (2) years after the Alleged Oral Agreement.¹²

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

22 TI has disclosed four (4) letters sent to Rose following the Fifth Amendment and prior to
23 TI’s May 14, 2015 default notice. More specifically, on June 12, 2014, Mikyung Kim sent a letter
24

25 ⁸ Exhibit 9.

26 ⁹ Id at ¶12.

27 ¹⁰ Id at ¶11.

28 ¹¹ Trial Transcript at Pg. 38, ll. 18-20.

¹² Exhibit 28.

¹³ Id.

¹⁴ Id.

1 to Rose addressed solely to Andrew Solomon ("Mr. Solomon") and not directly to Mr. Dragul.¹⁵
 2 The next correspondence disclosed by TI was again addressed to Mr. Solomon and makes no
 3 mention of Mr. Dragul.¹⁶ The next correspondence disclosed by TI is totally at odds with the
 4 Alleged Oral Agreement and nearly complies with the Lease and Fifth Amendment as copies were
 5 also sent to Operadora and its counsel; however, this letter was sent to Rose with attention to Mr.
 6 Dragul rather than Ms. Markusch.¹⁷ Finally, on January 15, 2015, Mr. Anthony sent a notice solely
 7 to Rose with attention to Mr. Dragul¹⁸; however, in his deposition, Mr. Anthony testified that he
 8 believed he actually did carbon copy Operadora on this correspondence but omitted to indicate the
 9 same on the letter.¹⁹ After the Fifth Amendment and prior to May 14, 2015, not one letter sent by
 10 TI to Rose was sent directly to Mr. Dragul without copying Operadora. Therefore, if there was an
 11 Alleged Oral Agreement regarding notice between Mr. Anthony and Mr. Dragul in 2012, that
 12 agreement was amended and superseded in writing by the parties two (2) years later with the
 13 execution of the Fifth Amendment as evidenced by the record. Therefore, the controlling document
 14 governing notice should have been the Fifth Amendment.

15 In addition to relying on Mr. Anthony's testimony, this Court held "Rose cannot raise any
 16 claims regarding Treasure Island's failure to notice Señor Frogs since that claim belongs to Señor
 17 Frogs"²⁰; however, SFLV is not a party to the Lease at issue in this case and even though Rose
 18 bargained for the additional requirement that TI to not only notify Operadora but also its counsel
 19 in Florida, that bargained for term was a requirement of TI's under the Lease for the benefit of
 20 Rose. Under Section 9(d) of the Sublease, Rose and SFLV acknowledge TI's requirement to notify
 21 SFLV of any breach on the part of Rose under the Lease.²¹ In relevant part, the Sublease provides,
 22 "If [SFLV] cures any alleged default under the [Lease] on behalf of [Rose] and to the satisfaction
 23 of [TI]... [Rose] will be responsible to repay [SFLV] within thirty (30) days for any monetary
 24

25 ¹⁵ Exhibit 31.

26 ¹⁶ Exhibit 33.

27 ¹⁷ Exhibit 35.

28 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.

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

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

24 ...

25 ...

26 ...

27 ²² Id.

28 ²³ Id.

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

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 Lease³⁰:

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.

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 provides³²:

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 Kukulcan 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.

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 of 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.

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

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

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

27 ³³ Grimsley v. Charles River Labs. at 31-32.
 28

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

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

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

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

20 Under NRCP 59(a)(7), a new trial may be granted when “an error in law occur[ed] at the
 21 trial and objected to by the party making the motion.” As outlined above, the Parol Evidence Rule
 22 should have prohibited this Court from allowing an Alleged Oral Agreement to modify the express
 23 terms of the written Lease and the express provisions of both the Lease and Fifth Amendment
 24 prohibited the parties from entering any such agreement. Furthermore, any Alleged Oral
 25 Agreement was superseded by the Fifth Amendment which specifically addressed notice and
 26 outlined the requirements related thereto. Therefore, if this Court is unwilling to reconsider or
 27 amend its Decision and find in favor a Rose, a new trial should be granted.
 28

...

...

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: 

MICHAEL C. VAN, ESQ.

Nevada Bar No. 3876

SAMUEL A. MARSHALL, ESQ.

Nevada Bar No. 13718

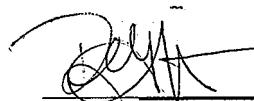
8985 S. Eastern Ave. Suite 100

Las Vegas, Nevada 89123

Attorneys for Defendant/Counterclaimant

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that the foregoing 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).

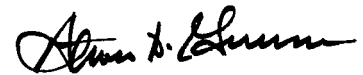


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CLERK OF THE COURT

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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.

ROSE, LLC, a Nevada limited liability company,

Counterclaimant,

vs.

TREASURE ISLAND, LLC, a Nevada limited liability company,

Counterdefendant.

CASE NO.: A-15-719105-B

DEPT.: XI

OPPOSITION TO MOTION FOR RECONSIDERATION

I. THE MOTION DOES NOT MEET THE STANDARD REQUIRED FOR RECONSIDERATION SINCE IT PRESENTS NO NEW ARGUMENTS OR EVIDENCE.

Rose's motion for reconsideration should be summarily denied since it does not present any substantially different evidence or raise any new arguments. *Masonry and Tile Contractors*

Ass'n of Southern Nevada v. Jolley Urga and Wirth Ltd. 941 P.2d 486, 489 113 Nev. 737 (Nev. 12297753.1/039472.0001)

1997). Further, it does not even address all but one of the numerous reasons (any one of which would be sufficient) the Court included in its conclusions of law granting judgment in Treasure Island's favor.

II. THE MOTION FOR RECONSIDERATION ONLY ADDRESSES ONE OF THE CONCLUSIONS OF LAW LEAVING NUMEROUS OTHER REASONS WHY TREASURE ISLAND WOULD PREVAIL EVEN IF THE ONE POINT RAISED IN THE MOTION FOR RECONSIDERATION HAD MERIT WHICH IT DOES NOT.

Before addressing the specific argument raised in the Motion for Reconsideration Treasure Island wants to note what is missing from the Motion for Reconsideration. No place in the Motion for Reconsideration is there any argument contesting any of the numerous reasons why Treasure Island was entitled to judgment in this matter, any one of which would have been sufficient for Treasure Island to prevail, except conclusion of law 2A concerning the oral modification. The conclusions of law state as follows:

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 discharged 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).

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

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

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

25 Estoppel is also applicable since the evidence showed that numerous notices were sent to
26 the attention of Mr. Dragul and not Ms. Markusch after the August 31, 2012 letter and
27 neither Dragul or Rose objected. See also, *Chequer, Inc. v. Plainters and Decorators*, 98
28 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 P.2d 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. 2d 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

1 provides the fifth reason why Rose's argument that the notice to it was ineffective has no
2 merit.

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

5 A. Rose cannot raise any claims regarding Treasure Island's failure to notice Señor
6 Frogs since that claim belongs to Señor Frogs. Señor Frogs is not a party to this case.
7 Instead, the issue only involves whether or not Treasure Island's termination of the Rose
8 Lease was effective. Any notice obligations to Señor Frogs were a separate obligation
9 that Treasure Island had to Señor Frogs and that is not an issue that could be raised by
10 Rose pursuant to established law. *Pierce v. Centry Ins.*, 421 N.E. 2d 1252 (App. Ct.
11 Mass. 1981). (Notice to the insured and notice to the mortgagee have discrete purposes,
12 however, and it is difficult to see how, as to the party who receives notice, a failure to
13 give notice to the other, can be anything but merely formal. . . . This quality of separate
14 obligations has been noted particularly, where, as in the instant case, the insurance policy
15 contains a so-called 'standard mortgage clause.' (Citations omitted.) Under that clause
16 'the result has been that the Courts have held that the agreement of the company with the
17 mortgagee being separate and divisible from that with the mortgagor. . .) *See also, e.g.,*
18 *Ellegood v. Am. States Ins. Co.*, 638 N.E.2d 1193, 1195 (Ill. App. Ct. 1994) ("[P]laintiff,
19 who admittedly received notice and failed to pay the premium, seeks to void defendant's
20 purported cancellation based on the fortuitous fact that defendant is unable to establish
21 that it notified the mortgagee. We agree . . . that this would result in an 'unjustified
22 windfall' to the insured."); *Bradley v. Assocs. Disc. Corp.*, 58 So. 2d 857, 859 (Fla. 1952)
23 (finding that a defect in the notice's content did not invalidate the notice where the defect
24 was relevant only to a third party); *cf. Bryce v. St. Paul Fire & Marine Ins. Co.*, 783 P.2d
25 246, 247 (Ariz. App. 1989) ("Appellee's failure to give timely notice of the cancellation
26 to the mortgagee [as required by statute] had no effect on the proper notice of
27 cancellation given appellant by the premium finance company."); *Allstate Ins. Co. v.*
28 *McCrae*, 384 S.E.2d 1, 2 (N.C. 1989) ("Only defective notification to the *insured* renders

1 cancellation of the policy ineffective and extends the liability of the insurer.").

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

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

10 D. Rose's failure to send the notice to Señor Frogs under its own obligation
11 precludes Rose from alleging that the notice was ineffective since Señor Frogs was not
12 carbon copied. This is true under the doctrine of materiality. If Rose felt that Treasure
13 Island's obligation to send the notice of default to Señor Frogs was a material term of its
14 (as opposed to Señor Frogs) contractual rights with Treasure Island then it clearly would
15 have sent the notice on to Señor Frogs pursuant to its own contractual obligation. Rose
16 not sending the notice to Señor Frogs pursuant to its own contractual obligations shows
17 that although the notice obligation from Treasure Island to Señor Frogs might have been
18 material to Señor Frogs, Rose did not believe it was material to it since it failed to send
19 on the notice to Señor Frogs pursuant to its own obligations.

20 E. The unclean hands doctrine also applies. First, since Rose received the rent from
21 its subtenant and did not turn those monies over to Treasure Island. The facts were clear
22 that the subtenant Operadora would pay Rose \$82,500 per month under the sublease and
23 Rose would in effect take those same monies and pay those over to the landlord.
24 Although the subtenant Señor Frogs paid Rose \$247,500 for January, February and
25 March of 2015 Rose did not take those monies and pay the landlord Treasure Island. It
26 cannot now complain that Treasure Island's failure to notice Señor Frogs somehow
27 excuses its non-performance under these circumstances. Similarly, the unclean hands
28 doctrine prevents Rose from arguing that Treasure Island's failure to carbon copy

1 Operadora on the May 14th Notice excuses Rose's non-performance since it had the same
2 obligation and failed to do so. Again Rose had clear contractual obligations to send any
3 default notices it received to Señor Frogs. The evidence is clear that Rose never sent any
4 notices it received from Treasure Island to Señor Frogs including the May 14th Notice.
5 Therefore it cannot now allege that it is somehow excused for its non-performance under
6 its contract with Treasure Island because Treasure Island did not carbon copy Operadora.

7 The unclean hands doctrine generally bars a party from receiving equitable relief
8 because of that party's own inequitable conduct. It precludes a party from attaining an
9 equitable remedy when that party's connection with the subject-matter or transaction in
10 litigation has been unconscientious, unjust, or marked by the want of good faith. *Park v.*
11 *Park*, 126 Nev. 745 (2010) ("the District Court found a connection between Appellant's
12 misconduct, breach of contract, and cause of action for unjust enrichment. ... substantial
13 evidence supports the District Court's decision to bar Appellant's unjust enrichment
14 claim under the unclean hands doctrine."). While unclean hands is generally regarded as
15 an argument that sounds in equity, the Ninth Circuit has recognized that "[t]he unclean
16 hands doctrine applies not only to equitable claims, but also to legal ones." *Adler v. Fed.*
17 *Republic of Nigeria*, 219 F.3d 869 (9th Cir. 2000). Here Rose's failure to pay the rent to
18 begin with after being paid the same by its subtenant coupled with its insistence that
19 Treasure Island not provide Operadora notice, and, perhaps most importantly, failing to
20 provide Operadora the default notice itself, despite its specific contractual obligation to
21 do so, caused all the harm to occur. If notice to Operadora was so important to Rose, it
22 should have sent the notice to Operadora itself. It follows logically that since Operadora
23 had already paid Rose the rent necessary to cover the quarterly rent that was due, Rose
24 did not want Operadora to know that Rose had not paid the rent to Treasure Island. In
25 any event, pursuant to the unclean hands doctrine, Rose is prevented from relying upon
26 the lack of notice to Operadora to excuse its default since its own actions were marked by
27 the want of good faith. It would be unjust to allow it to use Treasure Island's failure to
28 copy Señor Frogs to excuse its non-payment of rent under the circumstances of this case.

1 Based on the foregoing, the court concludes that Treasure Island's termination of Rose,
2 LLC's lease was effective and therefore, the lease is of no further force and effect.
3 Thus, even if the conclusion of law 2 (a) was removed Treasure Island still prevails.

4 **III. THE MOTION FOR RECONSIDERATION'S ONE ARGUMENT CONCERNING**
5 **PAROL EVIDENCE IS WITHOUT MERIT UNDER ESTABLISHED NEVADA**
6 **SUPREME COURT AUTHORITY.**

7 Rose's argument in this case, which it repeated in its motion for reconsideration, is that
8 pursuant to the lease any notices to Rose had to be sent to the attention Susan Markusch and
9 Treasure Island's May 14th default letter was sent to Gary Dragul with a copy to Elizabeth Gold
10 but not to the attention of Susan Markush. First, as was pointed out above it does not matter
11 whether the letter was sent attention to Susan Markush for numerous reasons including Rose had
12 actual notice and Ms. Markush herself received the notice.

13 Second, the Court correctly found that Mr. Dragul orally modified the provision requiring
14 the default notice to be sent attention Susan Markush during his conversation with Brad Anthony.
15 The evidence on this was overwhelming including Mr. Anthony's testimony, the fact that the very
16 next letter after the telephone conversation was sent attention Gary Dragul whereas the previous
17 letters had been sent attention Susan Markush and Mr. Dragul's own testimony. Although his
18 testimony was quite contradictory (as shown in the findings of fact he waffled back and forth on
19 whether the conversation had ever taken place in his deposition and trial testimony and to the
20 contents thereof), he begrudgingly admitted under questioning from your Honor that he did in fact
21 tell Mr. Anthony he should send everything directly to him rather than deal with Señor Frogs
22 personnel and other personnel from Rose. Specifically, when asked to describe the conversation
23 by the Court, Mr. Dragul offered the following response:

24 "The Witness: Sure. The way I remembered it was that it was an
25 accommodation to Treasure Island. Treasure Island was confused – I think that's
26 the right word – confused about who was in charge of the construction. This
27 came about during the construction phase of the restaurant, and Brad Anthony
28 said, you know, they're getting calls and questions from David Krouham (Señor
Frog's) and Primo (Señor Frog's) who is the manager of the restaurant – Alex
Shore was his name, his real name, legal name – from the architect.

Treasure Island's a big place. They have lots of departments. So one person
would be calling the maintenance department, and then another person would be
calling for the food area because the food area -- as discussed here, Señor Frog's

1 gets all their food from the Treasure Island commissary, and then they'd be
2 getting a phone call about marketing, and it would be from all different people.
3 So Brad Anthony said to me, who is in charge? We have too many cooks in the
4 kitchen. Who do I communicate with about these specific issues that are coming
5 up? And I said, call me."

6 Trial transcript at p. 18, lines 21-25 and p. 19 at lines 1-14.

7 He also testified:

8 Q. [by Mr. Van] So Treasure Island called you up and said, look, we've got too
9 many - -

10 A. [by Mr. Dragul] Too many cooks in the kitchen.

11 Q. Too many chefs rowing this boat. What do we do? Where do we go?

12 A. Right.

13 Q. And what did you say to him?

14 A. I said call me.

15 Q. So with regard - -

16 A. E-Mail me.

17 Id at page 180 line 25 and page 181 lines 1-9.

18 Although Mr. Dragul tried to state that his direction for Mr. Anthony to send the notices to
19 him and him alone was limited to construction issues this was clearly not the case. Mr. Anthony
20 testified this was with respect to all issues and the subsequent correspondence showed the same.
21 Indeed, the letter in question which led to the conversation between Dragul and Anthony had to
22 do with the repayment of a loan not any specific construction issues. Thus, the Court's findings of
23 fact properly concluded that Mr. Anthony was more credible on the subject.

24 As a result, there was an oral modification that any notices would be sent to Mr. Dragul
25 and him alone. Plaintiff's motion for reconsideration claims that even if the Court was right in
26 making that finding of fact (the motion for reconsideration does not really contest the finding of
27 fact) it should not have included conclusion of law 2a stating the parties orally modified the lease
28 when Mr. Dragul told Mr. Anthony to send all future correspondence to him only sometime
between August 31 and September 19, 2012. Specifically that since there was a merger clause in
the parties lease no oral modifications were allowed.

1 Apparently, Rose did not read the citations included in the conclusions of law sections 2a.
2 Those citations cite two Nevada Supreme Court cases holding that parties to a written contract
3 who agree to new terms may orally modify the contract. Further, that parol evidence can be
4 admitted to show any oral agreement modifying a contract. Also that the parties consent to the
5 modification can be implied from conduct consistent with the asserted modification and the
6 parties can orally modify a contract even where there is a merger clause stating any modification
7 must be in writing. See conclusion of law 2a above including the citations to *Jensen v. Jensen* 104
8 Nev. 95, 98 (Nev. 1988) and *Silver Dollar Club v. Cosgriff Neon Co.* 80 Nev. 108, 110, 389 P.2d
9 923, 924 (1964).

10 Thus, the conclusion of law was correct. This is not changed by the fifth amendment
11 either. The Court will note that in the fifth amendment the notice provision regarding Rose does
12 not include the notation that any notices must be sent to the attention Susan Markush. That part
13 was taken out. Thus, pursuant to the parties oral modification of the original agreement
14 substituting Dragul for Markush the fifth amendment would include Dragul if anyone from Rose.
15 That is the oral agreement to switch Markush to Dragul would merge into the fifth amendment
16 which no longer included Markush.

17 At that point if the notice had to be sent to anyone it was Mr. Dragul as he directed. As a
18 result, Rose's motion for reconsideration is without merit as to the one point that it actually did
19 raise.

20 **IV. BOTTOM LINE IS THE EVIDENCE WAS CLEAR THAT ROSE RECEIVED**
21 **ACTUAL NOTICE OF THE DEFAULT (INCLUDING NOT ONLY ITS**
22 **PRESIDENT, MR. DRAGUL, BUT ITS ONLY OTHER OFFICER AND**
23 **ATTORNEY ELIZABETH GOLD AS WELL AS MISS MARKUSCH) AND**
24 **CHOSE NOT TO PAY. ACCORDINGLY, TREASURE ISLAND HAD THE**
25 **RIGHT TO TERMINATE THE LEASE. ROSE'S MOTION FOR**
26 **RECONSIDERATION DOES NOT AND CANNOT CONTEST THESE FACTS**
27 **AND LAW.**

28 The Motion for Reconsideration does not address the most basic fact proven at trial. That
is, that Rose received a copy of the Notice of Default and chose not to pay the rent during the ten-
day cure period allowing Treasure Island to terminate the lease. Indeed, not only was it shown
that Rose received actual notice for the person Rose's president had asked the notice to be sent to

1 (Mr. Dragul), but also its only other officer and general counsel Ms. Gold as well as Ms.
2 Markusch. It is clear Ms. Gold got notice, she was emailed on the notice and called Mr. Anthony
3 within 24 hours of the notice being sent. This was Mr. Anthony's testimony and Rose, knowing
4 that Mr. Anthony was going to offer this testimony did not produce Ms. Gold to contradict Mr.
5 Anthony's testimony. Further, the May 29 response letter from Rose, which Ms. Gold helped
6 draft, mentioned that Ms. Gold had received a copy of the notice.

7 It is also clear Mr. Dragul himself received actual notice since he stated that he spoke with
8 Ms. Gold every morning and several times throughout the day. Obviously, Ms. Gold would have
9 mentioned the default notice and her phone call to Mr. Anthony (during which she asked for
10 additional time to pay the rent) during one of her calls with Mr. Dragul. In addition Mr. Dragul
11 (although offering contradictory testimony on the subject) admitted in his deposition that he saw
12 the document when he returned to the office which was no later than May 26, 2015 or within the
13 ten-day time frame. See his deposition exhibit 54 at page 55. Therefore, since Mr. Dragul
14 specifically asked the notice to be sent to him, the notice was sent to him and Rose received the
15 notice, the notice was clearly sufficient even if it was not sent attention Miss Markusch.

16 However, it should further be pointed out that Miss Markusch actually got the notice also.
17 The Court will remember at the trial Mr. Dragul admitted that shortly after the default notice was
18 sent Ms. Markusch attempted to make a partial payment of the overdue rent. That Treasure Island
19 then introduced a Fed Ex receipt showing Ms Markusch had sent Treasure Island a Fed Ex two
20 days after the default notice was sent. Obviously, Ms. Markusch received a copy of the notice and
21 tried to make the partial payment which was rejected by Treasure Island. Again, not only are
22 these facts crystal clear but Miss Markusch was not presented as a witness at trial to say she never
23 got the notice since she clearly did.

24 Thus, under the most basic facts (Rose received actual notice and chose not to pay)
25 Treasure Island was entitled to terminate the parties' agreement pursuant to the express terms of
26 the lease.

1 V. CONCLUSION.

2 For the above and foregoing reasons Treasure Island asks that the Court deny Rose's
3 motion for reconsideration.

4 Dated this 6 day of December, 2016.

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

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 12, 2016, service of the OPPOSITION TO 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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23

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MICHAEL C. VAN, ESQ.

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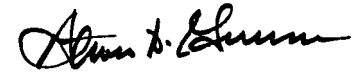
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Attorneys for Defendant/Counterclaimant

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.: XI

NOTICE OF APPEALROSE, LLC, a Nevada limited liability
company,

Counterclaimant

v.

TREASURE ISLAND, LLC, a Nevada
limited liability company,

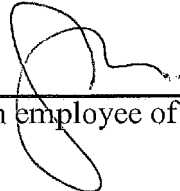
Counterdefendant

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;

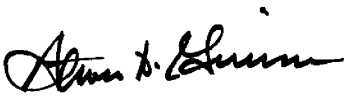
CERTIFICATE OF SERVICE

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

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

EXHIBIT A


CLERK OF THE COURT

1 NEO
2 FENNEMORE CRAIG, P.C.
3 Patrick J. Sheehan (Bar No. 3812)
4 John H. Mowbray (Bar No. 1140)
5 300 S. Fourth Street, Suite 1400
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10 *Attorneys for Treasure Island, LLC*

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

12 Plaintiff,

13 vs.

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

16 Defendant.

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

19 Counterclaimant,

20 vs.

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

24 Counterdefendant.

CASE NO.: A-15-719105-B

DEPT.: XI

NOTICE OF ENTRY OF FINDINGS OF
FACT AND CONCLUSIONS OF LAW

25 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

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

2 Dated this 7th day of November, 2016.

3 FENNEMORE CRAIG, P.C.

4
5 By: /s/ Patrick J. Sheehan

6 Patrick J. Sheehan (Bar No. 3812)
7 John H. Mowbray (Bar No. 1140)
8 1400 Bank of America Plaza
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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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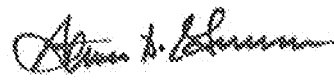
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/s/ Adam Miller
An Employee of Fennemore Craig, P.C.

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11/07/2016 11:08:24 AM



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.

ROSE, LLC, a Nevada limited liability company,

Counterclaimant,

v.

TREASURE ISLAND, LLC, a Nevada limited
liability company,

Counterclaimant.

CASE NO.: A-15-719105-B

DEPT. NO.: XXIX

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. FINDINGS OF FACT.

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

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

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

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

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

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

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

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

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

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

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

26
27
28 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.

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

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

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

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

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

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

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

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

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

1 one², the communication was sent to Dragul and Operadora was not copied.

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

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

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

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

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

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

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

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

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

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

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

27
28 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.

1 Island.

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

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

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

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

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

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

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

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

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

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

1 39. Señor Frogs is a subsidiary of Operadora.

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

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

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

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

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

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

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

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

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

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

22 50. The email states:

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

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

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

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

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

11 CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Dated this 4th day of November, 2016.

2
3 E. J. [Signature]
District Court Judge Jw

4 Submitted by:

5 FENNEMORE CRAIG, P.C.

6
7 By: [Signature]

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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)****Fennemore Craig Jones Vargas**


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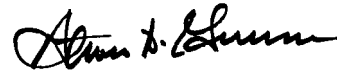
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CLERK OF THE COURT

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.: XI

CASE APPEAL STATEMENTROSE, LLC, a Nevada limited liability
company,

Counterclaimant

v.

TREASURE ISLAND, LLC, a Nevada
limited liability company,

Counterdefendant

1. Name of appellant filing this case appeal statement:

Defendant/Counterclaimant, Rose, LLC ("Rose")

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable Elizabeth Gonzalez

3. Identify each appellant and the name and address of counsel for each appellant:

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

Attorneys for Respondent, Treasure Island, LLC:

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

N/A

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

Retained counsel

...

...