

Case No. 71941

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**In the Supreme Court of Nevada**

ROSE, LLC,

Appellant,

*vs.*

TREASURE ISLAND, LLC,

Respondent.

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Elizabeth A. Brown  
Clerk of Supreme Court

**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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**APPELLANT'S APPENDIX  
VOLUME 5  
PAGES 1001-1108**

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**CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX**

<b>Tab</b>	<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Pages</b>
01	Complaint	05/28/15	1	1–4
02	Defendant’s Answer and Counterclaim	07/06/15	1	5–12
03	Treasure Island’s Answer to Counter-claim	07/25/15	1	13–15
04	Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation	08/27/15	1	16–26
05	Defendant’s Opposition to Plaintiff’s Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation	09/14/15	1	27–72
06	Reply in Support of Motion for Confirmation	09/21/15	1	73–75
07	Errata to Reply in Support of Motion for Confirmation	09/22/15	1	76–81
08	Transcript of Proceedings: Hearing on Motion Re Payment/Acceptance of Rents	10/15/15	1	82–87
09	Notice of Entry of Order Granting in Part Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation	11/04/15	1	88–92
10	Defendant’s First Amended Counter-claim	11/16/15	1	93–100
11	Treasure Island’s Answer to First Amended Counterclaim	11/30/15	1	101–103
12	Trial Brief	06/29/16	1	104–233
13	Defendant/Counterclaimant’s Trial Brief	06/30/16	1 2	234–250 251–500

			3	501–555
14	Certificate of Service for Defendant/Counterclaimant’s Trial Brief	06/30/16	3	556–557
15	Joint Pretrial Memorandum	09/06/16	3	558–568
16	Defendant/Counterclaimant Limited Pre-Trial Memorandum	10/05/16	3	569–582
17	Transcript of Proceedings: Bench Trial – Day 1	10/06/16	3 4	583–750 751–783
18	Transcript of Proceedings: Bench Trial – Day 2	10/07/16	4	784–927
19	Civil Order to Statistically Close Case	10/12/16	4	928
20	Notice of Entry of Findings of Fact and Conclusions of Law	11/07/16	4	929–946
21	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	11/18/16	4	947–963
22	Opposition to Motion for Reconsideration	12/06/16	4	964–976
23	Notice of Appeal	12/07/16	4	977–998
24	Case Appeal Statement	12/07/16	4 5	999–1000 1001–1003
25	Reply in Support of Rose, LLC’s Motion for Reconsideration, to Amend Findings of Fact, to Amend the Judgment, or, in the Alternative, for a New Trial	12/07/16	5	1004–1014
26	Transcript of Proceedings: Hearing on Defendants’ Motions for Stay of Execution and Reconsideration to Amend Findings of Fact	12/08/16	5	1015–1025
27	Transcript of Proceedings: Continued Hearing on Defendants’ Motions for Stay	12/14/16	5	1026–1037

	of Execution and Reconsideration to Amend Findings of Fact			
28	Notice of Entry of Order Denying Motion for Reconsideration	12/16/16	5	1038–1042
29	Notice of Entry of Judgment	12/22/16	5	1043–1047
30	Notice of Entry of Order and Judgment Granting Treasure Island’s Motion for Attorneys Fees in the Amount of \$126,000 Against Rose, LLC	01/11/17	5	1048–1052
31	Notice of Entry of Final Judgment	01/11/17	5	1053–1057
32	Amended Notice of Appeal	01/17/17	5	1058–1103
33	Amended Case Appeal Statement	01/17/17	5	1104–1108

**ALPHABETICAL TABLE OF CONTENTS TO APPENDIX**

<b>Tab</b>	<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Pages</b>
33	Amended Case Appeal Statement	01/17/17	5	1104–1108
32	Amended Notice of Appeal	01/17/17	5	1058–1103
24	Case Appeal Statement	12/07/16	4	999–1000
			5	1001–1003
14	Certificate of Service for Defendant/Counterclaimant’s Trial Brief	06/30/16	3	556–557
19	Civil Order to Statistically Close Case	10/12/16	4	928
01	Complaint	05/28/15	1	1–4
16	Defendant/Counterclaimant Limited Pre-Trial Memorandum	10/05/16	3	569–582
13	Defendant/Counterclaimant’s Trial Brief	06/30/16	1	234–250
			2	251–500
			3	501–555
02	Defendant’s Answer and Counterclaim	07/06/15	1	5–12
10	Defendant’s First Amended Counterclaim	11/16/15	1	93–100
05	Defendant’s Opposition to Plaintiff’s Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation	09/14/15	1	27–72
07	Errata to Reply in Support of Motion for Confirmation	09/22/15	1	76–81
15	Joint Pretrial Memorandum	09/06/16	3	558–568
04	Motion for Confirmation that Treasure Island May Collect Rent During the Pendency of the Litigation	08/27/15	1	16–26

21	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	11/18/16	4	947–963
23	Notice of Appeal	12/07/16	4	977–998
31	Notice of Entry of Final Judgment	01/11/17	5	1053–1057
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12	Trial Brief	11/16	1	104–233

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

Retained Counsel

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

N/A

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

Complaint filed May 28, 2015

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

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

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

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

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

...



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

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

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

This case does not involve child custody or visitation.

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

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

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

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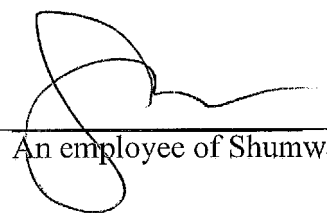
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CERTIFICATE OF SERVICE

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

  
An employee of Shumway Van

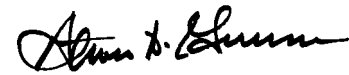
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25

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**RPLY**

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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

v.

ROSE, LLC, a Nevada limited liability  
company,

Defendant

Case No.: A-15-719105-B

Dept. No.: XI

**REPLY IN SUPPORT OF ROSE,  
LLC'S MOTION FOR  
RECONSIDERATION, TO AMEND  
FINDINGS OF FACT, TO AMEND  
THE JUDGMENT, OR, IN THE  
ALTERNATIVE, FOR A NEW TRIAL**

ROSE, LLC, a Nevada limited liability  
company,

Counterclaimant

v.

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Counterdefendant

**Hearing Date:** December 8, 2016**Hearing Time:** 8:30 a.m.**I. INTRODUCTION<sup>1</sup>**

In its Opposition, Treasure Island, LLC ("TI") either did not understand the basis for Rose, LLC's ("Rose") present Motion before the Court, or it is attempting, once again, to distract this

<sup>1</sup> For reference, this Reply utilizes the same Exhibits presented at Trial.

1 Court from the true issues in this case. This Court's Findings of Fact and Conclusions of Law (the  
2 "Decision") was based primarily an alleged conversation that took place between Brad Anthony  
3 ("Mr. Anthony"), general counsel for TI, and Gary Dragul ("Mr. Dragul"), president of Rose  
4 sometime between August 31, 2012 and September 19, 2012 (the "Alleged Oral Agreement"). The  
5 Court agreed with TI that the parties orally modified the written Lease that was executed on April  
6 13, 2011. What this Court failed to consider is that on April 30, 2014, Rose and TI executed the  
7 Fifth Amendment ("Fifth Amendment") to the Lease which revised and supplemented the notice  
8 provisions required under the Lease. In fact, this Court's Decision was nearly devoid of any  
9 mention of the Fifth Amendment. Rose's main basis for the present Motion before the Court is  
10 that this Court erred in finding that an Alleged Oral Agreement from 2012 somehow controlled a  
11 2014 written contract rejecting the more plausible explanation that TI failed to comply with  
12 unambiguous Lease terms and Mr. Anthony constructed the Alleged Oral Agreement to justify  
13 TI's breach to rationalize his professional mistake and mitigate his liability considering the  
14 evidence showed Rose did not receive notice of its missed payment until after the cure period had  
15 expired.

16 Also missing from this Court's decision is an explanation for TI's shift in its manner of  
17 noticing correspondence to Rose after the Fifth Amendment was executed. TI disclosed four (4)  
18 letters sent to Rose following the Fifth Amendment and prior to TI's May 14, 2015 default notice.  
19 More specifically, on June 12, 2014, Mikyung Kim sent a letter to Rose addressed solely to  
20 Andrew Solomon ("Mr. Solomon") and not directly to Mr. Dragul. The next correspondence  
21 disclosed by TI was again addressed to Mr. Solomon and makes no mention of Mr. Dragul. The  
22 next correspondence disclosed by TI is totally at odds with the Alleged Oral Agreement and nearly  
23 complies with the Lease and Fifth Amendment as copies were also sent to Operadora and its  
24 counsel. Finally, on January 15, 2015, Mr. Anthony sent a notice solely to Rose with attention to  
25 Mr. Dragul; however, in his deposition, Mr. Anthony testified that he believed he actually did  
26 carbon copy Operadora on this correspondence but omitted to indicate the same on the letter. After  
27 the Fifth Amendment and prior to May 14, 2015, not one letter sent by TI to Rose was sent directly  
28

1 to Mr. Dragul without copying Operadora. Therefore, if there was an Alleged Oral Agreement  
 2 regarding notice between Mr. Anthony and Mr. Dragul in 2012, that agreement was amended and  
 3 superseded in writing by the parties two (2) years later with the execution of the Fifth Amendment  
 4 as evidenced by the record. Therefore, the controlling document governing notice should have  
 5 been the Fifth Amendment.

6 Finally, this Court held "Rose cannot raise any claims regarding Treasure Island's failure  
 7 to notice Señor Frogs since that claim belongs to Señor Frogs."<sup>2</sup> The fact that Rose listed Señor  
 8 Frog's as an additional party to receive notice under the Lease and Fifth Amendment, and that  
 9 Señor Frog's is also the subtenant of Rose, does not mean TI's requirement to notice Señor Frog's  
 10 was not a bargained for term of the contract which was negotiated by Rose for the benefit of Rose.  
 11 Rose listed Señor Frog's as an additional party to receive notice because of the favorable terms  
 12 under the Sublease between Rose and Señor Frog's. Under Section 9(d) of the Sublease, Rose and  
 13 Señor Frog's acknowledge TI's requirement to notify Señor Frog's of any breach on the part of  
 14 Rose under the Lease.<sup>3</sup> In relevant part, the Sublease provides, "If [Señor Frog's] cures any alleged  
 15 default under the [Lease] on behalf of [Rose] and to the satisfaction of [TI]... [Rose] will be  
 16 responsible to repay [Señor Frog's] within thirty (30) days for any monetary amounts reasonably  
 17 expended to cure the alleged default...."<sup>4</sup> Additionally, the Sublease states, "If [Señor Frog's]  
 18 cures an alleged default under the [Lease]... more than four (4) times, then [Rose] will not object  
 19 to [Señor Frog's'] efforts to assume the [Lease]."<sup>5</sup> Having heavily negotiated these extremely  
 20 favorable terms of the Amended Sublease, Rose negotiated with TI to amend the notice provisions  
 21 under the Fifth Amendment to ensure Rose's rights under the Sublease were protected. Therefore,  
 22 regardless of whether there was an Alleged Oral Agreement between Mr. Anthony and Mr. Dragul  
 23 to orally modify the contract, TI accepted Rose's additional notice requirements in a new written  
 24 contract, the Fifth Amendment. TI's requirement to notify Operadora and its Florida counsel of  
 25 any breach on the part of Rose was not simply for the benefit of Señor Frog's; rather, Rose

26 <sup>2</sup> The Court's Findings of Fact and Conclusions of Law at Pg. 10, ll. 16-17.

27 <sup>3</sup> Exhibit 30.

28 <sup>4</sup> Id.

<sup>5</sup> Id.

1 negotiated for that specific language and requirement for its own benefit just as if it put its  
 2 accounting firm as an additional party to receive notice or even its bank. Considering Rose  
 3 bargained for TI's requirement to notify its subtenant of Rose's breach under the Lease, Rose  
 4 should have been permitted to raise claims that TI failed to follow such requirements.

5 Had TI properly notified the appropriate parties, either Señor Frog's or Rose would have  
 6 cured Rose's missed Percentage Rent payment and TI would not have been able to bring this case  
 7 before the Court. Furthermore, Rose would not have been forced to incur, and continue to incur,  
 8 substantial litigation fees defending its position, and this Court would not have terminated Rose's  
 9 extremely valuable asset and significant leasehold interest in the Premises. TI's failure to send its  
 10 May 14, 2015 default notice to Ms. Markusch, Operadora, and its counsel in Florida was a material  
 11 breach of the Lease and, as a result, this Court should have allowed Rose to raise TI's failure to  
 12 comply with the Lease as a defense to its failure to cure within ten (10) days from its receipt of  
 13 TI's May 14, 2015 default notice. Furthermore, had this Court not relied on the 2012 Alleged Oral  
 14 Agreement that somehow modified a subsequent writing executed two (2) years later, TI would  
 15 have no claim for substantial compliance, estoppel, waiver, or unclean hands. Therefore, in the  
 16 interest of equity and contract principles, Rose respectfully requests this Court reconsider its  
 17 finding in favor of TI and, instead, find in favor of Rose with respect to both TI's claims and Rose's  
 18 counterclaims.

## 19 **II. LEGAL ARGUMENT**

20 Regardless of whether this Court found Mr. Anthony to be more credible than Mr. Dragul  
 21 with respect to Mr. Anthony's self-serving testimony, it should have enforced the Lease and Fifth  
 22 Amendment as written. In doing so, TI would have no claim against Rose for substantial  
 23 compliance, estoppel, waiver, or unclean hands.

24 ...

25 ...

26 ...

27 ...

28

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

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

6           With respect to oral modifications of written contracts, the Supreme Court has repeatedly  
 7           stated that “[i]t has long been the policy in Nevada that absent some countervailing reason,  
 8           contracts will be construed from the written language and enforced as written.”<sup>6</sup> The Court has  
 9           also held that when a provision in a contract, such as a notice provision, is “clear on its face,” it  
 10          “must be interpreted [and enforced] as written.”<sup>7</sup> Additionally, “[w]here an agreement is  
 11          unambiguous, no extrinsic evidence is admissible to modify, vary, or contradict its language.”<sup>8</sup>  
 12          Moreover, “[t]he parol evidence rule does not permit the admission of evidence that would change  
 13          the contract terms when the terms of a written agreement are clear, definite, and unambiguous.  
 14          With respect to ambiguity, parol evidence is admissible to prove a separate oral agreement  
 15          regarding any matter not included in the contract or to clarify ambiguous terms so long as the  
 16          evidence does not contradict the terms of the written agreement.”<sup>9</sup> Finally, the “parol evidence  
 17          rule forbids the reception of evidence which would vary or contradict the contract, since all prior  
 18          negotiations and agreements are deemed to have been merged therein.”<sup>10</sup> In this case, TI never  
 19          argued that the Lease terms were ambiguous or otherwise unclear. Without a doubt, the notice  
 20          provisions in this case are clear on their face and should have been enforced as the Lease was  
 21          always very specific with respect to appropriate notice procedures.<sup>11</sup> Along with the requirements  
 22          for any notice to be in writing, Section 19.6 of the Lease outlines the methods and manner of proper  
 23          notice under the Lease<sup>12</sup>:

24          <sup>6</sup> Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 278, 21 P.3d 16, 20 (2001).

25          <sup>7</sup> 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          <sup>8</sup> County of Clark v. Bonanza No. 1, 96 Nev. 643, 652, 615 P.2d 939, 944 (1980).

27          <sup>9</sup> Ringle v. Bruton, 86 P.3d 1032, 120 Nev. 82 (2004).

28          <sup>10</sup> 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).

<sup>11</sup> Exhibit 1 at Section 19.6.

<sup>12</sup> Id.



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. 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.

1 Additionally, the Fifth Amendment's language is also clear and unambiguous and should  
 2 have been enforced. In relevant part, TI and Rose amended the notice provision of Section 19.6 to  
 3 reiterate TI's requirement to send Operadora a copy of any notice sent to Rose and added an  
 4 additional requirement that TI also send a copy of any such notice to Señor Frog's counsel in  
 5 Florida.<sup>13</sup> Section 11 of the Fifth Amendment specifically provides<sup>14</sup>:

6 The Parties agree that for purposes of Section 19.6 of the Lease, Tenant's notice address is  
 7 updated to 5690 DTC Boulevard, Suite 515, Greenwood Village, CO 80111, and that  
 8 copies of notices sent to Tenant per the Lease shall also be sent to Subtenant addressed to:  
 9 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.

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

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

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

24 Section 19.7 of the Lease specifically provides, "[t]his Lease constitutes the entire  
 25 agreement between the parties hereto pertaining to the subject matter hereof and supersedes all  
 26 prior assignments, understandings, negotiations, and discussions, whether oral or written."

27 <sup>13</sup> Exhibit 6 at Section 11.

28 <sup>14</sup> Id.

1 Furthermore, Section 19.9 states, “[n]o supplement, modification, waiver or termination or this  
2 Lease shall be binding unless executed in writing by both parties. No waiver of any of the  
3 provisions of this Lease shall be deemed or shall constitute a waiver of any other provisions  
4 (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise  
5 expressly provided.”

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

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

17 Putting aside the fact that Rose disputes there was ever an oral modification to the Lease  
18 in 2012, the Fifth Amendment modified the Lease in 2014 and any other Alleged Oral Agreement  
19 related thereto with respect to notice. As outlined above, Section 19.6 of the Lease provides, “each  
20 of the parties shall be entitled to specify a different address and/or contact person by giving notice  
21 as aforesaid.” Assuming for the sake of argument there was an oral modification to the Lease in  
22 2012, notwithstanding Sections 19.7 and 19.9 of the Lease as outlined above, and Section 19.6  
23 was modified as argued by TI, it was later modified in 2014 by the Fifth Amendment.

24 Similar to Section 19.7 of the Lease, Section 9(d)(c) of the Fifth Amendment specifically  
25 provides, “[t]his Agreement... constitutes the entire agreement of the parties hereto constituting  
26 its subject matter except as outlined herein.” Likewise, Section 9(d)(d) of the Fifth Amendment  
27 reiterates Section 19.9 of the Lease and provides, “[t]his Agreement... may not be modified except  
28

1 in writing signed by both parties or by their respective successors in interest.” Finally, as outlined  
2 above, the “parol evidence rule forbids the reception of evidence which would vary or contradict  
3 the contract, since all prior negotiations and agreements are deemed to have been merged  
4 therein.”<sup>15</sup> Therefore, regardless of whether there was an Alleged Oral Agreement between Mr.  
5 Anthony and Mr. Dragul, the Fifth Amendment specifically amended the notice provisions of the  
6 Lease and “consistut[ed] the entire agreement of the parties... concerning [notice].” Therefore,  
7 this Court should not have found in favor of TI in its Decision as TI’s entire argument relied on  
8 the Alleged Oral Agreement that was modified by a subsequent writing in 2014.

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

18 Rose’s intention for increasing TI’s notice requirements under the Lease with the Fifth  
19 Amendment was to avoid the exact scenario before the Court. Although it was also in Operadora’s  
20 best interest for it to receive notice of Rose’s breach in that it could keep the status quo and  
21 maintain its relationship and contract with Rose, the contractual obligations under the Fifth  
22 Amendment were between Rose and TI. TI agreed to notify Operadora and its counsel to which it  
23 somewhat complied following the Fifth Amendment; however, TI completely failed to comply  
24 with its notice obligations when the anticipated scenario meant to be avoided eventually occurred.  
25 Therefore, regardless of whether there was an Alleged Oral Agreement regarding notice in 2012,  
26 that agreement was overwritten by the Fifth Amendment in 2014.

27 <sup>15</sup> Grimsley v. Charles River Labs, at 31-32.  
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. Had this Court not relied on the 2012 Alleged Oral Agreement that it held somehow modified a subsequent writing executed two (2) years later, TI would have no claim for substantial compliance, estoppel, waiver, or unclean hands. This Court should reconsider its Decision and ultimately set aside the Lease termination considering 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. In doing so, TI would not be damaged in any regard and would 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 7<sup>th</sup> day of December, 2016.

SHUMWAY VAN

By: 

MICHAEL C. VAN, ESQ.

Nevada Bar No. 3876

SAMUEL A. MARSHALL, ESQ.

Nevada Bar No. 13718

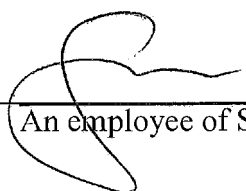
8985 S. Eastern Ave. Suite 100

Las Vegas, Nevada 89123

*Attorneys for Defendant/Counterclaimant*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that the foregoing **REPLY IN SUPPORT OF ROSE, LLC'S MOTION FOR RECONSIDERATION, TO AMEND FINDINGS OF FACT, TO AMEND THE JUDGMENT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON AN ORDER SHORTENING TIME** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7<sup>th</sup> day of December, 2016 to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet).

  
An employee of Shumway Van**SHUMWAY • VAN**

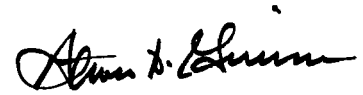
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26



CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

TREASURE ISLAND LLC

Plaintiff

vs.

ROSE LLC

Defendant

. . . . .

CASE NO. A-719105

DEPT. NO. XI

**Transcript of  
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**HEARING ON DEFENDANTS' MOTIONS FOR STAY OF  
EXECUTION AND RECONSIDERATION TO AMEND FINDINGS OF FACT**

THURSDAY, DECEMBER 8, 2016

APPEARANCES:

FOR THE PLAINTIFF:

PATRICK J. SHEEHAN, ESQ.

FOR THE DEFENDANTS:

MICHAEL C. VAN, ESQ.  
SAMUEL MARSHALL, ESQ.  
DANIEL R. POLSENBERG, ESQ.  
ABRAHAM SMITH, ESQ.

COURT RECORDER:

TRANSCRIPTION BY:

JILL HAWKINS  
District Court

FLORENCE HOYT  
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.



1 LAS VEGAS, NEVADA, THURSDAY, DECEMBER 8, 2016, 8:30 A.M.

2 (Court was called to order)

3 THE COURT: That takes me to page 12, TI versus  
4 Rose. Good morning.

5 MR. SHEEHAN: Good morning, Your Honor. Pat Sheehan  
6 on behalf of Treasure Island with Brad Anthony.

7 MR. POLSENBERG: Dan Polsenberg, Your Honor, for  
8 Rose LLC.

9 MR. SMITH: Abraham Smith for Rose LLC.

10 MR. MARSHALL: Sam Marshall for Rose.

11 MR. VAN: Michael Van for Rose.

12 THE COURT: Okay. Mr. Polsenberg, even though your  
13 name's not on the briefs, I'm guessing you're arguing this,  
14 since your here.

15 MR. POLSENBERG: Yes. Thank you, Your Honor.

16 This is, surprisingly, like the last case, a motion  
17 to alter and amend the findings of fact and motion for stay.

18 THE COURT: This case didn't last over a period of  
19 several years. This case went in a very compact, short --

20 MR. POLSENBERG: I'm not asking you to reopen it.

21 THE COURT: Great.

22 MR. POLSENBERG: But I am saying there's some  
23 problems with the findings of fact and conclusions of law. I  
24 know from appearing in front of you in the past that often  
25 when I move for reconsideration it's something you can

1 clarify. But I think in this case that may not be the result.  
2 While the findings of fact and conclusions of law mentioned  
3 the fifth amendment to the contract, they don't actually go  
4 into a legal analysis of how it operates. And it is my legal  
5 position that the fifth amendment renders any oral agreement,  
6 understanding, term that would have to be incorporated null  
7 and void. I think the law does, as well, notwithstanding the  
8 fifth amendment. But with that issue I think this is a very  
9 clear-cut case.

10 Second problem with the findings of fact and  
11 conclusions of law is I don't think they constitute a  
12 judgment. So we don't even have, I think -- or that I've seen  
13 yet; and I haven't been all the way through the file -- a  
14 judgment in the case. So while we're here on 59 and 52  
15 motions, we may be actually in a prejudgment phase, rather  
16 than a postjudgment phase.

17 THE COURT: Anything else?

18 MR. POLSENBERG: No. Thank you, Your Honor.

19 THE COURT: Okay, Mr. Sheehan.

20 MR. SHEEHAN: I don't know if I need to address  
21 anything specific, Your Honor. They didn't raise --

22 THE COURT: It's always good when Mr. Polsenberg  
23 comes that you make a record of anything you want to be  
24 included for the Supreme Court's consideration.

25 MR. SHEEHAN: They did not raise anything new that

1 wasn't raised at the trial. They didn't even raise anything  
2 with respect to most of our findings of fact and conclusions  
3 of law. There was a number of conclusions of law. They only  
4 addressed one. The one that they addressed they ignored the  
5 Supreme Court authority on the parol evidence rule.

6 And then as far as this judgment is concerned, we  
7 filed an entry of judgment on findings of fact and conclusions  
8 of law that was signed by the Judge. That's what the rule  
9 states. I believe that that constitutes the judgment.

10 But also it needs to be pointed out that they filed  
11 an appeal -- notice of appeal yesterday, so I don't know what  
12 -- late at night, so I didn't have a chance to thoroughly  
13 investigate that. I know Your Honor is familiar with that  
14 caselaw, but I don't know exactly what effect that has on  
15 today.

16 THE COURT: Well, the motions they're asking for are  
17 not impacted by the notice of appeal.

18 MR. POLSENBERG: Right.

19 THE COURT: But what I am concerned about is the  
20 question related to the judgment, because my recollection is  
21 this was primarily a dec relief case, and so there's not a  
22 monetary judgment that is attached to it.

23 MR. SHEEHAN: So I'm happy to call the -- you know,  
24 file a new notice of entry of judgment, if that's what Your  
25 Honor and Mr. Polsenberg would request. I don't think it's

1 necessary, but --

2 THE COURT: I'm trying to actually get it to pull  
3 up, but, unfortunately, my computer doesn't want it to pull up  
4 this morning.

5 MR. SHEEHAN: What was filed was notice of entry of  
6 findings of fact and conclusions of law.

7 MR. POLSENBERG: It's not the --

8 THE COURT: Actually, the findings themselves were  
9 filed, too.

10 MR. POLSENBERG: Yeah. It's not the notice I worry  
11 about. It's whether the findings of fact constitute a  
12 judgment.

13 THE COURT: Hold on a second. Let me get there.  
14 The word "judgment" does not appear. Typically if the word  
15 "judgment" does not separately appear, I have a separate  
16 judgment that is entered. So, Mr. Sheehan, I think you guys  
17 should submit a separate judgment on the dec relief issues.

18 MR. SHEEHAN: I would be happy to --

19 THE COURT: Can you run it by them just in case  
20 there's an issue with the language that they want to raise  
21 prior to me signing it.

22 MR. SHEEHAN: Yes.

23 THE COURT: Anything else?

24 MR. POLSENBERG: Just the motion for stay.

25 THE COURT: But if I don't have a judgment, the

1 motion for stay would be premature; right?

2 MR. POLSENBERG: No, I don't think so. You can  
3 order a stay once -- probably my notice of appeal is  
4 premature, but you can still order a stay that would be  
5 effective upon the entry of the judgment and my notice of  
6 appeal.

7 THE COURT: Okay. And then we've had some issues  
8 about a bond.

9 MR. POLSENBERG: We have. And --

10 THE COURT: He's not going to ask for 10 million.

11 MR. POLSENBERG: No. But I am going to ask for a  
12 nominal amount. And here -- but not just nominal for the sake  
13 of being nominal. I think the only issue where security would  
14 be necessary is for the difference between what Senor Frog's  
15 pays us and what we pay TI. And I don't think that's a very  
16 big amount, but we don't have that information in front of  
17 you. I think that especially since we don't have a judgment  
18 we should brief back and forth what the evidence is that  
19 supports what the bond amount should be, and we could come  
20 back on the 15th.

21 THE COURT: You okay with that?

22 MR. SHEEHAN: I don't believe that that's necessary,  
23 Your Honor, because, first of all, I don't agree with his  
24 premise. But also, he's the one that has that information.  
25 So -- you know, this issue has been fully brief here. The

1 bottom line is we have an amount of space that we know is not  
2 included in the lease. It's a simple calculation to say,  
3 okay, the percentage rate -- or, excuse me, per-square-foot  
4 rent that's being paid by -- the difference is this additional  
5 space. We can figure out what that space is. I did the  
6 calculation in the brief here, and that difference is  
7 approximately \$40,000 a month. If you take a two-year time  
8 frame for an appeal, you're looking at a million dollars.  
9 Then you also have to consider the fact that they're not going  
10 to pay the last month's percentage rent, which is about  
11 \$200,000, they're not going to pay the last month's rent,  
12 which is \$240,000. We're also not going to be able to rent  
13 that space to anybody else and take into it. So I think a  
14 million five is very, very conservative. And, Your Honor,  
15 keep in mind this is Rose LLC, whose only asset is this lease.  
16 So they're never going to pay us. So a million five, you  
17 know, that doesn't even include attorneys' fees and everything  
18 else, is a very conservative number that at a minimum it  
19 should be a million five.

20 THE COURT: Okay. Thank you.

21 Mr. Polsenberg, you've asked for additional briefing  
22 on the bond amount?

23 MR. POLSENBERG: I did.

24 THE COURT: I'm going to grant that request. I'm  
25 going to hear the amount of the bond that should be ordered

1 for the stay to take effect.

2 You want to come back on the 15th, Mr. Sheehan?

3 MR. SHEEHAN: I think that that's -- I'm  
4 unavailable. The 15th? That's Thursday; right?

5 THE COURT: It's the Thursday. I've got the 13th,  
6 the 15th, the 20th, and the 22nd available. You currently  
7 have a motion on the chambers calendar on the 23rd that I was  
8 going to move to whatever day you pick.

9 MR. POLSENBERG: I can't do the 20th and the 22nd.

10 THE COURT: Then I guess I've got the 13th and the  
11 15th available.

12 MR. SHEEHAN: The problem with those dates is they  
13 haven't even filed their opposition, and I granted them an  
14 extension yesterday on the attorneys' fees. So we can --

15 THE COURT: Okay. Then I won't move it up.

16 MR. SHEEHAN: We can still do the 23rd in chambers  
17 on the attorneys' fees, but as far as the stay, I can't do the  
18 15th, but I could do the 20th or the 22nd. The 13th might be  
19 too soon. On the other hand --

20 MR. POLSENBERG: I can't do the 20th and the 22nd.

21 MR. SHEEHAN: -- we need to get this done before --

22 THE COURT: Can you do the 14th?

23 MR. POLSENBERG: I hate to say I'm in Tallahassee  
24 and Gainesville.

25 THE COURT: That's a lovely location.

1 MR. SHEEHAN: The 14th and a quick briefing schedule  
2 is fine with us.

3 THE COURT: The 14th is a Wednesday. I could do you  
4 after I do my criminal guys, or I could do it at 8:30 before I  
5 do my criminal guys.

6 MR. POLSENBERG: I think I can do that.

7 MR. SHEEHAN: Okay. So let me -- the 14th is fine.  
8 We've just got to figure out the briefing schedule, then.

9 THE COURT: It's up to you guys. I don't care.

10 MR. POLSENBERG: Yeah. We'll work it out.

11 THE COURT: Just get it to me the day before. And  
12 when say day before I don't mean 8:00 o'clock at night the day  
13 before like somebody did today.

14 MR. POLSENBERG: I'm in another case where we happen  
15 to do it a lot.

16 MR. SHEEHAN: Let's see. What is -- today is the  
17 8th, so the 14th -- so I'm going to need, you know, two days  
18 to get my reply. And so if I have to get mine in by the 13th,  
19 that means you have to file yours by like the 10th, which --

20 MR. POLSENBERG: Well, I work Saturdays.

21 MR. SHEEHAN: That's Saturday, yeah. So the 9th.  
22 That means can you get it done by Friday, and then we'll do  
23 ours --

24 MR. POLSENBERG: I have something tomorrow.

25 THE COURT: Are you going to the pro bono lunch all



1 day?

2 MR. POLSENBERG: I have some friends flying in from  
3 Florida. I may be visiting with them.

4 MR. SHEEHAN: How about Monday at noon for them to  
5 give to us, and then we'll get ours Wednesday at noon for you.

6 THE COURT: Perfect.

7 MR. POLSENBERG: We're talking about I have to  
8 gather up accounting stuff.

9 THE COURT: Monday at noon sounds good for you.

10 MR. POLSENBERG: Boo rah. Thank you, Your Honor.

11 THE COURT: 'Bye. So we'll see you the 14th at 8:30  
12 before I see my criminal guys.

13 THE PROCEEDINGS CONCLUDED AT 9:01 A.M.

14 \* \* \* \* \*

15

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**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT**  
**Las Vegas, Nevada 89146**

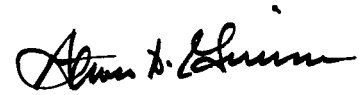
  
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FLORENCE M. HOYT, TRANSCRIBER

3/15/17

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DATE

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CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

TREASURE ISLAND LLC

Plaintiff

vs.

ROSE LLC

Defendant

. . . . .

CASE NO. A-719105

DEPT. NO. XI

**Transcript of  
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**CONTINUED HEARING ON DEFENDANTS' MOTIONS FOR STAY OF  
EXECUTION AND RECONSIDERATION TO AMEND FINDINGS OF FACT**

WEDNESDAY, DECEMBER 14, 2016

APPEARANCES:

FOR THE PLAINTIFF:

PATRICK J. SHEEHAN, ESQ.

FOR THE DEFENDANTS:

MICHAEL C. VAN, ESQ.  
SAMUEL MARSHALL, ESQ.  
DANIEL R. POLSENBERG, ESQ.  
ABRAHAM SMITH, ESQ.

COURT RECORDER:

TRANSCRIPTION BY:

JILL HAWKINS  
District Court

FLORENCE HOYT  
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

1 LAS VEGAS, NEVADA, WEDNESDAY, DECEMBER 14, 2016, 8:48 A.M.

2 (Court was called to order)

3 THE COURT: Good morning. I apologize for being  
4 late, counsel. I didn't realize Bonneville was down to one  
5 lane.

6 MR. SHEEHAN: No problem. There's a first for  
7 everything.

8 THE COURT: Okay. Come on, guys. Come on up.

9 Thank you for the supplemental briefing. Oh. We  
10 have some more people coming through, so hold on a second,  
11 guys.

12 So first, Mr. Polsenberg, on the supplemental brief  
13 that is the motion to seal I'm concerned that we should have a  
14 redaction, rather than sealing.

15 MR. POLSENBERG: That'd be fine.

16 THE COURT: Can you do a proposed redaction and  
17 circulate it.

18 MR. POLSENBERG: Certainly. That's a good idea.

19 THE COURT: I'm going to set that on my chambers  
20 calendar for the first Friday in January. And if we've gotten  
21 your redaction, I'll rule on it then. Because it didn't get a  
22 hearing date when you filed it.

23 MR. SHEEHAN: We have no objection to that, Your  
24 Honor.

25 THE COURT: I know. But I need a redaction, not a

1 full sealing.

2 MR. POLSENBERG: You know, I should have thought of  
3 that.

4 THE COURT: All right. Okay. So --

5 MR. MARSHALL: And, Your Honor, we submitted it with  
6 an unsigned verification. Would you like a signed  
7 verification?

8 THE COURT: That'd be lovely. I'll mark it as  
9 Court's Exhibit 1, if that's okay with everybody.

10 MR. MARSHALL: May I approach, Your Honor?

11 THE COURT: Does the verification need to be sealed?

12 MR. MARSHALL: I don't believe so.

13 THE COURT: I think the answer is yes.

14 MR. POLSENBERG: Yeah. You didn't see me nodding  
15 behind you.

16 THE COURT: No, this one doesn't, DAN. It's only  
17 got four lines. So this one doesn't. It's the other thing.  
18 So we'll just mark this as Court's 1.

19 You were right. He was wrong. We'll keep that in  
20 mind.

21 MR. POLSENBERG: She does like saying that.

22 THE COURT: It's been a long time since I've been  
23 able to say that. So, Mr. Polsenberg --

24 MR. POLSENBERG: I think it was last Thursday.

25 THE COURT: -- can somebody explain to me why loss

1 of use shouldn't be considered or the inability to lease the  
2 unleased space by Senor Frog's shouldn't be included in the  
3 bond.

4 MR. POLSENBERG: Here's why. Because I think this  
5 whole thing comes down to waste, which is why I -- even though  
6 -- I think there's some middle ground we can have here between  
7 not having to post anything and having to post the full  
8 ordinary amount of the bond. I think this is a very simple  
9 appeal. It's a simple issue. I don't think it will take  
10 long. We're either right, or they're right. I think they're  
11 relying on a technicality to break 25 years of a lease, and I  
12 don't think they have technically met the technicality. So if  
13 we have to post a bond and pay a 2 percent premium to the  
14 surety and a 2 percent charge to the letter of credit for  
15 every million dollars, we're talking 40,000 a year. So I have  
16 come up with a justification for an amount of a hundred or  
17 \$180,000, because the more we add onto the bond the more waste  
18 there's going to be. Plus they're going to have to pay -- if  
19 we prevail on appeal, they're going to have to pay our  
20 premium. So I think that's something -- and the cost of the  
21 letter of credit.

22 THE COURT: So are you taking the position that they  
23 can go ahead and lease that space that Senor Frog's is not  
24 currently leasing?

25 MR. POLSENBERG: No.

1 THE COURT: Okay.

2 MR. POLSENBERG: Not on a long-term lease. What I'm  
3 suggesting is that we maintain the status quo. We are dealing  
4 with a lease of real property here, so their argument in their  
5 brief yesterday about how we've conceded that we're only  
6 talking about money damages I don't think is appropriate, and  
7 I don't think I've ever made that concession. So, no, they  
8 can't come in and lease the upstairs and then we come in later  
9 and have to unwind all that. Because if we don't have a stay,  
10 I would file a lis pendens, which would allow me to unwind  
11 anything they do. So it's just going to be a mess if we don't  
12 get a stay. So I only think we're talking about the adequacy  
13 of the surety.

14 THE COURT: Okay.

15 MR. SHEEHAN: Your Honor, Rose LLC has nothing.  
16 They will not be able to pay anything. So we -- Mr.  
17 Polsenberg didn't answer your question you asked him, because  
18 there is no answer for that question about the upstairs space.  
19 It has to be taken into account. Mr. Polsenberg said  
20 ordinary. Yes, ordinary bond. We're not asking for anything  
21 unusual here. We are to be protected for the damages that we  
22 are going to be suffering as a result of this appeal. This  
23 appeal is going to be at least two years, Your Honor. We've  
24 got -- it's going to be six months before we even held a  
25 mediation. I've gone down this road a million times. They



1 give you the judge, you get the mediator, everybody  
2 reschedules --

3 THE COURT: It's a little better since you have the  
4 Appellate Court.

5 MR. POLSENBERG: And it is. And under the rule --

6 THE COURT: Well, but they only do certain things,  
7 and this case won't go to them.

8 MR. POLSENBERG: Yes, it will.

9 THE COURT: No, it --

10 MR. POLSENBERG: Under the new --

11 THE COURT: No. It's a Business Court case.

12 MR. POLSENBERG: Under the new Rule 17 Business  
13 Court cases that don't establish a new issue of law go to the  
14 Court of Appeals.

15 THE COURT: Okay.

16 MR. POLSENBERG: And I'm willing -- and if they're  
17 saying it's going to take six months to do a mediation, I'll  
18 file something with the Supreme Court that says that I don't  
19 want a mediation. I'll do it --

20 THE COURT: I think the mediation would be helpful  
21 for all the parties in this case. But that's a different  
22 issue.

23 MR. POLSENBERG: And I agree. And we've talked  
24 about doing a mediation, but I'm willing to do this appeal on  
25 an expedited basis, because I don't think it's an

1 extraordinary issue. I think we can get this one done in the  
2 Court of Appeals in a year.

3 MR. SHEEHAN: It's going to take at least two years,  
4 Your Honor. We've got Mr. Polsenberg on that side. We're  
5 going to have to bring in people. This is going to be hotly  
6 contested. There's going to be extensions. I've never done  
7 an appeal that hasn't been two years lately.

8 But anyways, so we've got --

9 THE COURT: I've never done one that was only two  
10 years.

11 MR. SHEEHAN: Yeah. Exactly. So, you know, I've  
12 got -- the items are on page 2, the five items. The loss of  
13 rent is \$1,208,620. I've got an affidavit from Matt Bare to  
14 support that number. Matt Bear is the number one real estate  
15 agent in town for this space. This is unbelievably great  
16 space, upstairs overlooking the Strip. And that's a  
17 conservative number. We didn't even count the patio when we  
18 did that. There's a 2,500-square-foot patio. We didn't even  
19 count that in there. You've got attorneys' fees to date a  
20 hundred fifty, you've got attorneys' fees for the appeal  
21 100,000. That's conservative. You've got the percentage  
22 rent. They're not going to pay the percentage rent if they  
23 lose, so we're going to lose that \$200,000. The total number  
24 comes to \$2,138,620. If we don't get that now, we'll never  
25 see it. Rose LLC has nothing. Under the law we're entitled

1 to a bond in that amount if the stay isn't granted, which --

2 THE COURT: Mr. Polsenberg, anything else?

3 MR. POLSENBERG: Yeah, two things. I'm so glad that  
4 Mr. Sheehan's done millions of appeals, because then he's got  
5 me. But I do think this is a case, and I have seen a few,  
6 that can be done on an expedited basis. I see this as one  
7 simple legal issue. We're going to ask to be in front of the  
8 Court of Appeals. We don't have a valid notice of appeal now,  
9 so we would fall under the new Rule 17. I think this -- I'm  
10 going to move this case as quickly as possible, because I  
11 think it is a simple issue.

12 The second one, Counsel also said that I didn't  
13 answer the question. I did answer the question. I understand  
14 what the ordinary situation is. And what I'm saying is under  
15 Nelson versus Heer I think we should have special  
16 consideration, because I think the bond premium and the cost  
17 of the letter of credit would be waste. And so I'm asking for  
18 something that is a middle ground to waste as little as  
19 possible. Thank you, Your Honor.

20 THE COURT: Thank you.

21 I'm not including the loss of use of the upstairs  
22 space as part of the bond. I am, however, including the other  
23 items that are delineated on page 2 of the brief. That totals  
24 \$930,000.

25 MR. POLSENBERG: Your Honor, can I post a bond that

1 would cover one year and then at the end of one year post a  
2 bond that would cover the next year? That would be a savings  
3 of at least 40,000 -- or more than 40,000.

4 THE COURT: Well --

5 MR. POLSENBERG: Maybe 20,000.

6 THE COURT: Yeah, it wouldn't be much, Mr.  
7 Polsenberg.

8 MR. POLSENBERG: Well, Your Honor, I don't know what  
9 you make, but to me 20,000 is a lot of money. And --

10 THE COURT: Well, I'm not talking about what I make.  
11 I'm talking about what I see in Business Court all the time.

12 MR. POLSENBERG: I understand that.

13 THE COURT: So the numbers that I'm currently  
14 dealing with are lower than most of the times I deal with.  
15 It's not that this isn't an important case for the parties  
16 that are involved, it's just if you're telling me you'd rather  
17 post a bond for \$850,000 for a year and then Mr. Sheehan asks  
18 me to increase it to nine hundred and fifty in a year, I don't  
19 have a problem with that.

20 MR. SHEEHAN: The bond is at 930,000; correct?

21 THE COURT: Yeah. But he's asking me to reduce it  
22 by the little bit of the stuff that is stuff that would not be  
23 for part of the year, for the full year. So he's saying set  
24 it at one year and then come in and -- and I've done that in  
25 other cases.

1 MR. POLSENBERG: And I've done that -- I used to do  
2 that all the time.

3 MR. SHEEHAN: This is way over overcomplicating  
4 things. Let's just set it at 930,000 and move on.

5 MR. POLSENBERG: It's not complicated.

6 THE COURT: So I'm going to set it at 850,000 for  
7 the first year. If at the conclusion of the first year the  
8 case has not resolved, Mr. Sheehan, and I don't think it will  
9 be, come ask me, and I will increase it to nine fifty.

10 MR. SHEEHAN: Your Honor, housekeeping matters. The  
11 judgment and the order denying motion for reconsideration, I  
12 sent them down yesterday, the two orders.

13 And, Mr. Polsenberg, did you have any comments on  
14 the judgment? I sent it over to you last week.

15 MR. POLSENBERG: Yeah. It's no good. The judgment  
16 is no good. You can't say in a judgment, judgment is entered  
17 under the terms and conditions --

18 THE COURT: That's true. You've got to actually  
19 quote from the paragraph, the last paragraph in the findings  
20 of fact and conclusions of law --

21 MR. SHEEHAN: I'll --

22 THE COURT: Here. I'm handing them back.

23 MR. POLSENBERG: Thank you, Your Honor.

24 MR. SHEEHAN: The order denying motion for  
25 reconsideration was granted, obviously.

1 THE COURT: The order denying motion for  
2 reconsideration I'm signing, and the other one I need you to  
3 actually quote the orders I entered in the findings of fact  
4 and conclusions of law.

5 MR. SHEEHAN: Will do.

6 THE COURT: So that when you send up -- and that's  
7 the document you're appealing from, yes, you can come get it  
8 -- it will all be clear. But I signed the one, didn't sign  
9 the other. Hopefully you will have a judgment soon, because  
10 Polsenberg wants you to get it later so he gets under the new  
11 rule.

12 MR. SHEEHAN: All right.

13 THE COURT: 'Bye.

14 MR. SHEEHAN: I will send it down this afternoon.

15 MR. POLSENBERG: All that matters is when I file my  
16 notice of appeal.

17 THE COURT: Goodbye, Mr. Polsenberg.

18 MR. POLSENBERG: Thank you, Your Honor. Have a nice  
19 holiday. Well, I'll see you tomorrow.

20 THE COURT: You'll see me tomorrow.

21 THE PROCEEDINGS CONCLUDED AT 8:59 A.M.

22 \* \* \* \* \*

23

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25

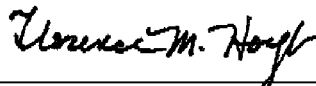
**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT**  
**Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

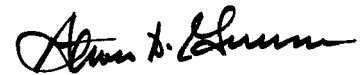
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DATE

28

28





CLERK OF THE COURT

1 NEO  
2 FENNEMORE CRAIG, P.C.  
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DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada limited  
liability company;

Plaintiff,

vs.

ROSE, LLC, a Nevada limited liability  
company;

Defendant.

ROSE, LLC, a Nevada limited liability  
company,

Counterclaimant,

vs.

TREASURE ISLAND, LLC, a Nevada limited  
liability company,

Counterdefendant.

CASE NO.: A-15-719105-B

DEPT.: XI

**NOTICE OF ENTRY OF ORDER**  
**DENYING MOTION FOR**  
**RECONSIDERATION**

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

1 matter on the 14<sup>th</sup> day of December, 2016, a copy of which is attached hereto.

2 Dated this 16<sup>th</sup> day of December, 2016.

3 FENNEMORE CRAIG, P.C.

4  
5 By: /s/ Patrick J. Sheehan  
6 Patrick J. Sheehan (Bar No. 3812)  
7 John H. Mowbray (Bar No. 1140)  
8 1400 Bank of America Plaza  
9 300 South Fourth St. 14<sup>th</sup> Floor  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on December 16, 2016, service of the NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

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

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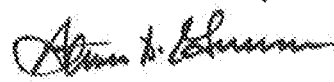
Sam Marshall

samuel@shumwayvan.com

/s/ Adam Miller

An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

1 **ORDER**  
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4 John H. Mowbray (Bar No. 1140)  
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9 Email: [psheehan@fclaw.com](mailto:psheehan@fclaw.com)  
10 *Attorney for Plaintiff, Treasure Island*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

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

12 **Plaintiff,**

13 **vs.**

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

16 **Defendant.**

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

19 **Counterclaimant,**

20 **vs.**

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

23 **Counterdefendant.**

**CASE NO.: A-15-719105-B**

**DEPT. NO.: XI**

**ORDER DENYING MOTION FOR  
RECONSIDERATION**

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

12-13-16P01:10 RCVD

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

2 Dated this 14<sup>th</sup> day of December, 2016.

3  
4   
DISTRICT COURT JUDGE

Jw

5  
6 Respectfully Submitted By:

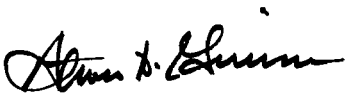
7  
8 PENNEMORE CRAIG, P.C.

9 By: 

10 Patrick J. Sheehan (Bar No. 3812)  
11 John H. Mowbray (Bar No. 1140)  
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13 300 South Fourth St. 14<sup>th</sup> Floor  
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CLERK OF THE COURT

1 **NEO**  
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3 Patrick J. Sheehan (Bar No. 3812)  
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10 *Attorneys for Treasure Island, LLC*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 TREASURE ISLAND, LLC, a Nevada limited  
14 liability company;  
15  
16 Plaintiff,  
17  
18 vs.  
19 ROSE, LLC, a Nevada limited liability  
20 company;  
21  
22 Defendant.  
23  
24 ROSE, LLC, a Nevada limited liability  
25 company,  
26  
27 Counterclaimant,  
28  
29 vs.  
30  
31 TREASURE ISLAND, LLC, a Nevada limited  
32 liability company,  
33  
34 Counterdefendant.

CASE NO.: A-15-719105-B  
  
DEPT.: XI

**NOTICE OF ENTRY OF JUDGMENT**

35 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:  
36  
37 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a  
38 JUDGMENT was entered in the above-referenced matter on the 21<sup>st</sup> day of December,

001043

001043

1 2016, a copy of which is attached hereto.

2 Dated this 22<sup>nd</sup> day of December, 2016.

3

FENNEMORE CRAIG, P.C.

4

5

By: /s/ Patrick J. Sheehan

6

Patrick J. Sheehan (Bar No. 3812)

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*Attorneys for Treasure Island, LLC*

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on December 22, 2016, service of the NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

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

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**Shumway Van**

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Rebekah Griffin

Sam Marshall

**Email**

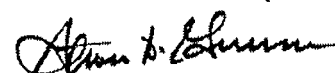
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/s/ Adam Miller  
An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

1 **JUDG**  
2 **FENNEMORE CRAIG, P.C.**  
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4 John H. Mowbray (Bar No. 1140)  
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10 *Attorney for Plaintiff, Treasure Island*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 TREASURE ISLAND, LLC, a Nevada  
14 limited liability company,

CASE NO.: A-15-719105-B

DEPT. NO.: XI

15 Plaintiff,

16 vs.

**JUDGMENT**

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

19 Defendant.

20 ROSE, LLC, a Nevada limited liability  
21 company,

22 Counterclaimant,

23 vs.

24 TREASURE ISLAND, LLC, a Nevada  
25 limited liability company,

26 Counterdefendant.

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

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

3 Dated this 20 day of December, 2016.

4  
5   
DISTRICT COURT JUDGE

Jw

6  
7 Respectfully Submitted By:

8 FENNEMORE CRAIG, P.C.

9  
10 By:  #13690

11 Patrick A. Sheehan (Bar No. 3812)

12 John H. Mowbray (Bar No. 1140)

13 1400 Bank of America Plaza

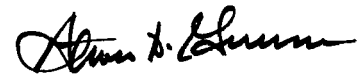
300 South Fourth St. 14<sup>th</sup> Floor

Las Vegas, NV 89101

Attorneys for Plaintiffs/Counterdefendants

30

30



CLERK OF THE COURT

1 NEO  
2 FENNEMORE CRAIG, P.C.  
3 Patrick J. Sheehan (Bar No. 3812)  
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10 *Attorneys for Treasure Island, LLC*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

13 Plaintiff,

14 vs.

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

17 Defendant.

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

20 Counterclaimant,

21 vs.

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

24 Counterdefendant.

CASE NO.: A-15-719105-B

DEPT.: XI

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

25 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

26 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ORDER  
27 AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS  
28

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

4 Dated this 11<sup>th</sup> day of January, 2017.

5 FENNEMORE CRAIG, P.C.

6  
7 By: /s/ Patrick J. Sheehan  
8 Patrick J. Sheehan (Bar No. 3812)  
9 John H. Mowbray (Bar No. 1140)  
10 1400 Bank of America Plaza  
11 300 South Fourth St. 14<sup>th</sup> Floor  
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13 *Attorneys for Treasure Island, LLC*  
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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 January 11, 2016, service of the NOTICE OF ENTRY OF ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS FEES IN THE AMOUNT OF \$126,000 AGAINST ROSE, LLC was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

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

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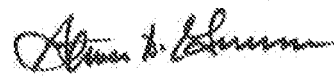
Sam Marshall

samuel@shumwayvan.com

/s/ Adam Miller

An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

1 **ORDER**  
2 **FENNEMORE CRAIG, P.C.**  
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10 *Attorney for Treasure Island, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

12 **Plaintiff,**

13 **vs.**

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

16 **Defendant.**

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

19 **Counterclaimant,**

20 **vs.**

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

23 **Counterdefendant.**

**CASE NO.: A-15-719105-B**

**DEPT. NO.: XI**

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


24 Plaintiff Treasure Island, LLC ("Treasure Island") having filed a motion for attorney's  
25 fees, the Court having reviewed the papers and pleadings filed on behalf of Treasure Island and  
26 Rose, LLC relating to the same and good cause appearing therefore the Court awards Treasure  
27 Island \$126,000 in attorney fees against Rose, LLC.  
28



1 The Court enters such an Order based on its findings that the lease agreement between the  
 2 parties contained an attorneys fees clause providing that the prevailing party in any dispute  
 3 concerning the lease would be entitled to their reasonable attorneys fees. The Court reviewed the  
 4 motion and the factors set forth by the Nevada Supreme Court in *Schouweiler v. ENC Company*,  
 5 101 Nev. 827, 834, 712 P2d 786, 790 (1985) and determined that the fees requested of \$126,000  
 6 were reasonable. Treasure Island's counsel had the qualities, skill, ability, training, education,  
 7 experience and standing necessary for the award of the fees. They spent the time required with  
 8 respect to the specific issues in this case. The litigation was important. The work actually  
 9 performed by Treasure Island's lawyers was given the proper attention and the final result was  
 10 successful.


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

13 Dated this 5th day of January, 2017.

14   
 15 DISTRICT COURT JUDGE  
 16 JW

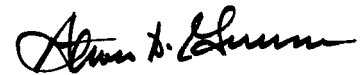
17 Respectfully Submitted By:

18 FENNEMORE CRAIG, P.C.

19 By:   
 20 Patrick J. Sheehan (Bar No. 3812)  
 21 John H. Mowbray (Bar No. 1140)  
 22 1400 Bank of America Plaza  
 23 300 South Fourth St. 14<sup>th</sup> Floor  
 24 Las Vegas, NV 89101  
 25 Attorneys for Treasure Island, LLC  
 26  
 27  
 28

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CLERK OF THE COURT

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8 Fax: (702) 692-8099  
9 Email: [psheehan@felaw.com](mailto:psheehan@felaw.com)  
10 *Attorneys for Treasure Island, LLC*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

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

**CASE NO.: A-15-719105-B**

12 Plaintiff,

**DEPT.: XI**

13 vs.

**NOTICE OF ENTRY OF FINAL  
JUDGMENT**

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.

25 **TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

26 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that a FINAL  
27 **JUDGMENT** was entered in the above-referenced matter on the 10<sup>th</sup> day of January, 2017,  
28

1 a copy of which is attached hereto.

2 Dated this 11<sup>th</sup> day of January, 2017.

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)  
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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 January 11, 2016, service of the NOTICE OF ENTRY OF JUDGMENT was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

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

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Sam Marshall

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

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CLERK OF THE COURT

JUDGE  
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Attorney for Treasure Island, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Plaintiff,

vs.

ROSE, LLC, a Nevada limited liability  
company,

Defendant.

ROSE, LLC, a Nevada limited liability  
company,

Counterclaimant,

vs.

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Counterdefendant.

CASE NO.: A-15-719105-B

DEPT. NO.: XI


FINAL JUDGMENT

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

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

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

Dated this 5th day of January, 2017.

  
DISTRICT COURT JUDGE

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: 

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Attorneys for Treasure Island, LLC

Approved as to form and content by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: 

Daniel F. Polsenberg (Bar No. 2376)  
J. Christopher Jorgensen (Bar No. 5382)  
Joel D. Henriod (Bar No. 8492)  
Abraham G. Smith (Bar No. 13250)  
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Las Vegas, NV 89169  
Attorneys for Rose, LLC

32

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CLERK OF THE COURT

1 NOAS  
2 DANIEL F. POLSENBERG (SBN 2376)  
3 JOEL D. HENRIOD (SBN 8492)  
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11 *Attorneys for Defendant / Counterclaimant*  
12 *Rose, LLC*

13 DISTRICT COURT

14 CLARK COUNTY, NEVADA

15 TREASURE ISLAND, LLC, a Nevada limited  
16 liability company,

17 Plaintiff,

18 *vs.*

19 ROSE, LLC, a Nevada limited liability  
20 company,

21 Defendant.

22 ROSE, LLC, a Nevada limited liability  
23 company,

24 Counterclaimant,

25 *vs.*

26 TREASURE ISLAND, LLC, a Nevada limited  
27 liability company,

28 Counterdefendant.

Case No. A-15-719105-B  
Dept. No. 11

AMENDED NOTICE OF APPEAL

**AMENDED NOTICE OF APPEAL**

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

1. All judgments and orders in this case;
2. "Findings of Fact and Conclusion of Law," filed November 7, 2016, notice of entry of which was served electronically on November 7, 2016 (Exhibit A);
3. "Order Denying Motion for Reconsideration," filed December 14, 2016, notice of entry of which was served electronically on December 16, 2016 (Exhibit B);
4. "Judgment," filed December 21, 2016, notice of entry of which was served electronically on December 22, 2016 (Exhibit C);
5. "Order and Judgment Granting Treasure Island's Motion for Attorneys Fees in the Amount of \$126,000 Against Rose, LLC," filed January 10, 2017, notice of entry of which was served electronically on January 11, 2017 (Exhibit D);
6. "Final Judgment," filed January 10, 2017, notice of entry of which was served electronically on January 11, 2017 (Exhibit E); and
7. All rulings and interlocutory orders made appealable by any of the foregoing.

Dated this 17th day of January, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By /s/ Joel D. Henriod

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*Attorneys for Defendant / Counterclaimant Rose, LLC*

# EXHIBIT A

# EXHIBIT A

  
CLERK OF THE COURT

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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 7<sup>th</sup> day of November, 2016, a copy of which is attached hereto.

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

3 FENNEMORE CRAIG, P.C.

4  
5 By: /s/ Patrick J. Sheehan

6 Patrick J. Sheehan (Bar No. 3812)

7 John H. Mowbray (Bar No. 1140)

8 1400 Bank of America Plaza

9 300 South Fourth St. 14<sup>th</sup> Floor

10 Las Vegas, NV 89101

11 *Attorneys for Treasure Island, LLC*

**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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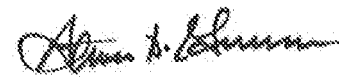
samuel@shumwayvan.com

/s/ Adam Miller

An Employee of Fennemore Craig, P.C.

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*Attorney for Plaintiff Treasure Island, LLC*



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.<sup>1</sup>

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Island.

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

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

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

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

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

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

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

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

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

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

1           39.     Señor Frogs is a subsidiary of Operadora.

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

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

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

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

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

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

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

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

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

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

22          50.     The email states:

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

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

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

7 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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

2  
3   
4 District Court Judge Jw

5 Submitted by:

6 FENNEMORE CRAIG, P.C.

7 By: 

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

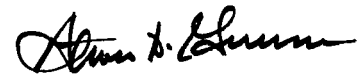
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An Employee of Fennemore Craig, P.C.

# EXHIBIT B

# EXHIBIT B



CLERK OF THE COURT

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10 Attorneys for Treasure Island, LLC

11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

13 TREASURE ISLAND, LLC, a Nevada limited  
14 liability company;

15 Plaintiff,

16 vs.

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

19 Defendant.

20 ROSE, LLC, a Nevada limited liability  
21 company,

22 Counterclaimant,

23 vs.

24 TREASURE ISLAND, LLC, a Nevada limited  
25 liability company,

26 Counterdefendant.

27 CASE NO.: A-15-719105-B

28 DEPT.: XI

**NOTICE OF ENTRY OF ORDER**  
**DENYING MOTION FOR**  
**RECONSIDERATION**

29 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

1 matter on the 14<sup>th</sup> day of December, 2016, a copy of which is attached hereto.

2 Dated this 16<sup>th</sup> day of December, 2016.

3 FENNEMORE CRAIG, P.C.

4  
5 By: /s/ Patrick J. Sheehan  
6 Patrick J. Sheehan (Bar No. 3812)  
7 John H. Mowbray (Bar No. 1140)  
8 1400 Bank of America Plaza  
9 300 South Fourth St. 14<sup>th</sup> Floor  
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11 *Attorneys for Treasure Island, LLC*  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on December 16, 2016, service of the NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

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

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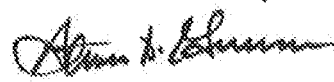
Sam Marshall

samuel@shumwayvan.com

/s/ Adam Miller

An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

1 **ORDER**  
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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9 Email: [psheehan@fclaw.com](mailto:psheehan@fclaw.com)  
10 *Attorney for Plaintiff, Treasure Island*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

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

12 **Plaintiff,**

13 **vs.**

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

16 **Defendant.**

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

19 **Counterclaimant,**

20 **vs.**

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

23 **Counterdefendant.**

**CASE NO.: A-15-719105-B**

**DEPT. NO.: XI**

**ORDER DENYING MOTION FOR  
RECONSIDERATION**

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

12-13-16P01:10 RCVD

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

2 Dated this 14<sup>th</sup> day of December, 2016.

3  
4   
DISTRICT COURT JUDGE

Jw

5  
6 Respectfully Submitted By:

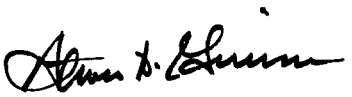
7  
8 PENNEMORE CRAIG, P.C.

9 By: 

10 Patrick J. Sheehan (Bar No. 3812)  
11 John H. Mowbray (Bar No. 1140)  
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13 300 South Fourth St. 14<sup>th</sup> Floor  
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15 Attorneys for Plaintiffs/Counterdefendants  
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# EXHIBIT C

# EXHIBIT C

  
CLERK OF THE COURT

1 **NEO**  
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10 *Attorneys for Treasure Island, LLC*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 TREASURE ISLAND, LLC, a Nevada limited  
14 liability company;  
15  
16 Plaintiff,

CASE NO.: A-15-719105-B  
  
DEPT.: XI

17 vs.

**NOTICE OF ENTRY OF JUDGMENT**

18 ROSE, LLC, a Nevada limited liability  
19 company;  
20  
21 Defendant.

22 ROSE, LLC, a Nevada limited liability  
23 company,  
24  
25 Counterclaimant,

26 vs.

27 TREASURE ISLAND, LLC, a Nevada limited  
28 liability company,  
  
Counterdefendant.

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:  
  
YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a  
JUDGMENT was entered in the above-referenced matter on the 21<sup>st</sup> day of December,

001086

001086

1 2016, a copy of which is attached hereto.

2 Dated this 22<sup>nd</sup> day of December, 2016.

3

FENNEMORE CRAIG, P.C.

4

5

By: /s/ Patrick J. Sheehan

6

Patrick J. Sheehan (Bar No. 3812)

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9

Las Vegas, NV 89101

*Attorneys for Treasure Island, LLC*

10

11

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on December 22, 2016, service of the NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

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

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**Shumway Van**

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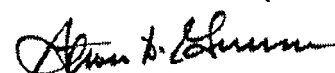
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/s/ Adam Miller  
An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

1 **JUDG**  
2 **FENNEMORE CRAIG, P.C.**  
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9 Email: [psheehan@fcclaw.com](mailto:psheehan@fcclaw.com)  
10 *Attorney for Plaintiff, Treasure Island*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 TREASURE ISLAND, LLC, a Nevada  
14 limited liability company,

CASE NO.: A-15-719105-B

DEPT. NO.: XI

15 Plaintiff,

16 vs.

**JUDGMENT**

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

19 Defendant.

20 ROSE, LLC, a Nevada limited liability  
21 company,

22 Counterclaimant,

23 vs.

24 TREASURE ISLAND, LLC, a Nevada  
25 limited liability company,

26 Counterdefendant.

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



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

3 Dated this 20 day of December, 2016.

4  
5   
DISTRICT COURT JUDGE

Jw

6  
7 Respectfully Submitted By:

8 FENNEMORE CRAIG, P.C.

9  
10 By:  #13690

11 Patrick A. Sheehan (Bar No. 3812)

12 John H. Mowbray (Bar No. 1140)

13 1400 Bank of America Plaza

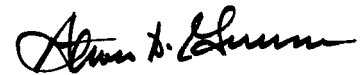
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Las Vegas, NV 89101

Attorneys for Plaintiffs/Counterdefendants

# EXHIBIT D

# EXHIBIT D



CLERK OF THE COURT

1 NEO  
2 FENNEMORE CRAIG, P.C.  
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4 John H. Mowbray (Bar No. 1140)  
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9 Email: [psheehan@fclaw.com](mailto:psheehan@fclaw.com)  
10 *Attorneys for Treasure Island, LLC*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

13 Plaintiff,

14 vs.

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

17 Defendant.

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

20 Counterclaimant,

21 vs.

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

24 Counterdefendant.

CASE NO.: A-15-719105-B

DEPT.: XI

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

25 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

26 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ORDER  
27 AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS  
28

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

4 Dated this 11<sup>th</sup> day of January, 2017.

5 FENNEMORE CRAIG, P.C.

6  
7 By: /s/ Patrick J. Sheehan  
8 Patrick J. Sheehan (Bar No. 3812)  
9 John H. Mowbray (Bar No. 1140)  
10 1400 Bank of America Plaza  
11 300 South Fourth St. 14<sup>th</sup> Floor  
12 Las Vegas, NV 89101  
13 *Attorneys for Treasure Island, LLC*  
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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 January 11, 2016, service of the NOTICE OF ENTRY OF ORDER AND JUDGMENT GRANTING TREASURE ISLAND'S MOTION FOR ATTORNEYS FEES IN THE AMOUNT OF \$126,000 AGAINST ROSE, LLC was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

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

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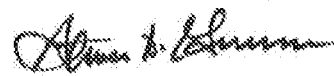
Sam Marshall

samuel@shumwayvan.com

/s/ Adam Miller

An Employee of Fennemore Craig, P.C.

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CLERK OF THE COURT

1 **ORDER**  
2 **FENNEMORE CRAIG, P.C.**  
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10 *Attorney for Treasure Island, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

12 **Plaintiff,**

13 **vs.**

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

16 **Defendant.**

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

19 **Counterclaimant,**

20 **vs.**

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

23 **Counterdefendant.**

**CASE NO.: A-15-719105-B**

**DEPT. NO.: XI**


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

24 Plaintiff Treasure Island, LLC ("Treasure Island") having filed a motion for attorney's  
25 fees, the Court having reviewed the papers and pleadings filed on behalf of Treasure Island and  
26 Rose, LLC relating to the same and good cause appearing therefore the Court awards Treasure  
27 Island \$126,000 in attorney fees against Rose, LLC.  
28

1 The Court enters such an Order based on its findings that the lease agreement between the  
2 parties contained an attorneys fees clause providing that the prevailing party in any dispute  
3 concerning the lease would be entitled to their reasonable attorneys fees. The Court reviewed the  
4 motion and the factors set forth by the Nevada Supreme Court in *Schouweiler v. ENC Company*,  
5 101 Nev. 827, 834, 712 P2d 786, 790 (1985) and determined that the fees requested of \$126,000  
6 were reasonable. Treasure Island's counsel had the qualities, skill, ability, training, education,  
7 experience and standing necessary for the award of the fees. They spent the time required with  
8 respect to the specific issues in this case. The litigation was important. The work actually  
9 performed by Treasure Island's lawyers was given the proper attention and the final result was  
10 successful.


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

13 Dated this 5th day of January, 2017.

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15 DISTRICT COURT JUDGE  
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Respectfully Submitted By:

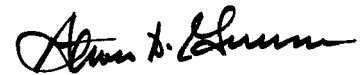
FENNEMORE CRAIG, P.C.

20 By:   
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26 Attorneys for Treasure Island, LLC  
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# EXHIBIT E

# EXHIBIT E





CLERK OF THE COURT

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10 *Attorneys for Treasure Island, LLC*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

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

**CASE NO.: A-15-719105-B**

12 Plaintiff,

**DEPT.: XI**

13 vs.

**NOTICE OF ENTRY OF FINAL  
JUDGMENT**

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.

25 **TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

26 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that a FINAL  
27 **JUDGMENT** was entered in the above-referenced matter on the 10<sup>th</sup> day of January, 2017,  
28

1 a copy of which is attached hereto.

2 Dated this 11<sup>th</sup> day of January, 2017.

3 FENNEMORE CRAIG, P.C.

4  
5 By: /s/ Patrick J. Sheehan

6 Patrick J. Sheehan (Bar No. 3812)

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8 1400 Bank of America Plaza

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10 Las Vegas, NV 89101

11 *Attorneys for Treasure Island, LLC*

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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 January 11, 2016, service of the NOTICE OF ENTRY OF JUDGMENT was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet):

**E-Service Master List  
For Case**

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

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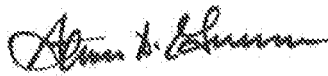
rebekah@shumwayvan.com

Sam Marshall

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

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CLERK OF THE COURT

JUDGE  
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Attorney for Treasure Island, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Plaintiff,

vs.

ROSE, LLC, a Nevada limited liability  
company,

Defendant.

ROSE, LLC, a Nevada limited liability  
company,

Counterclaimant,

vs.

TREASURE ISLAND, LLC, a Nevada  
limited liability company,

Counterdefendant.

CASE NO.: A-15-719105-B

DEPT. NO.: XI


FINAL JUDGMENT

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

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

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

Dated this 5th day of January, 2017.

  
DISTRICT COURT JUDGE

Respectfully Submitted By:

FENNEMORE CRAIG, P.C.

By: 

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*Attorneys for Treasure Island, LLC*

Approved as to form and content by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: 

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

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CLERK OF THE COURT

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14 [Samuel@ShumwayVan.com](mailto:Samuel@ShumwayVan.com)

11 *Attorneys for Defendant / Counterclaimant*  
12 *Rose, LLC*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 TREASURE ISLAND, LLC, a Nevada limited  
16 liability company,

17 Plaintiff,

18 *vs.*

19 ROSE, LLC, a Nevada limited liability  
20 company,

21 Defendant.

22 ROSE, LLC, a Nevada limited liability  
23 company,

24 Counterclaimant,

25 *vs.*

26 TREASURE ISLAND, LLC, a Nevada limited  
27 liability company,

28 Counterdefendant.

Case No. A-15-719105-B  
Dept. No. 11

**AMENDED CASE  
APPEAL STATEMENT**



**AMENDED CASE APPEAL STATEMENT**

1. Name of appellants filing this case appeal statement:

Defendant/Counterclaimant ROSE, LLC

2. Identify the judge issuing the decision, judgment, or order appealed from:

THE HONORABLE ELIZABETH G. GONZALEZ

3. Identify each appellant and the name and address of counsel for each appellant:

*Attorneys for Appellant Rose, LLC*

DANIEL F. POLSENBERG  
JOEL D. HENRIOD  
ABRAHAM G. SMITH  
LEWIS ROCA ROTHGERBER CHRISTIE LLP  
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SHUMWAY VAN  
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Las Vegas, Nevada 89123  
(702) 478-7770

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 Respondents Treasure Island, LLC*

PATRICK J. SHEEHAN  
JOHN H. MOWBRAY  
FENNEMORE CRAIG, P.C.  
300 South Fourth Street, Suite 1400  
Las Vegas, Nevada 89101  
(702) 692-8000

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

N/A

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

Retained counsel

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

Retained counsel

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

N/A

9. Indicate the date the proceedings commenced in the district court, *e.g.*, date complaint, indictment, information, or petition was filed:

Complaint filed May 28, 2015

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

This is an action for breach of lease. Rose pays rent to Treasure Island in two methods, monthly rent and quarterly percentage rent based on Rose's subtenant's, Senor Frog's, quarterly gross sales. Rose missed a percentage rent payment in early 2015 and Treasure Island failed to provide Rose with notice of its missed payment in accordance with the written contracts between the parties. The district court ruled in favor of Treasure Island on the basis that there was an alleged verbal agreement between the parties, prior to the last lease amendment, which placed additional notice requirements on Treasure Island, wherein it was agreed that Treasure Island would not comply with the notice provisions as outlined in the lease.

On December 7, 2016, Rose appealed from the "Findings of Fact and Conclusions of Law," entered on November 7, 2016, terminating its lease with Treasure Island. Rose now appeals from the final order and judgment as well as an award of attorneys' fees.

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

*Rose, LLC v. Treasure Island, LLC* – Case No. 71941

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

This case does not involve child custody or visitation.

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

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

7 Dated this 17th day of January, 2017.

8 LEWIS ROCA ROTHGERBER CHRISTIE LLP

9 By /s/ Joel D. Henriod

10 DANIEL F. POLSENBERG (SBN 2376)

11 JOEL D. HENRIOD (SBN 8492)

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22 *Attorneys for Defendant / Counterclaimant*  
23 *Rose, LLC*  
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/s/ Jessie M. Helm  
An Employee of Lewis Roca Rothgerber Christie LLP