

Case No. 71941

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

**APPELLANT'S APPENDIX
VOLUME 3
PAGES 501-750**

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April 13, 2016

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BRAD ANTHONY
10714 WEATHER TOP CT
LAS VEGAS, NV 89135

IN RE: TREASURE ISLAND V ROSE
CASE NO: A-15-719105-B
DEPOSITION OF: BRAD ANTHONY
DATE TAKEN: MARCH 30, 2016

Dear Mr. Anthony:

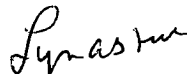
Enclosed are the original Certificate of Deponent page and a copy of the condensed deposition in the above-captioned matter.

Please read the condensed copy of the transcript provided to you, list the changes on the ORIGINAL Certificate of Deponent page, then sign and date the Certificate. Please return **ONLY** the **ORIGINAL Certificate of Deponent page to us at 2330 Paseo Del Prado, Suite C-303, Las Vegas, Nevada 89102** within 30 days. **Please do not fax or email.** A self-addressed stamped envelope is enclosed for your convenience.

We will attach the Certificate of Deponent page to the original transcript and provide copies to the appropriate parties.

Thank you for your prompt attention to this matter.

Sincerely,
CSR ASSOCIATES OF NEVADA, LLC



Lynn A. D. Fell

Enclosures

Cc: Michael C. Van, Esq.
Patrick J. Sheehan, Esq.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada
limited liability company,

Plaintiff,

vs.

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

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.

30(b)(6) DEPOSITION OF BRAD ANTHONY

Taken on Wednesday, March 30, 2016

At 10:01 a.m.

At Shumway Van

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

REPORTED BY: GAYLE SZELINSKI, CCR NO. 585

1

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada
limited liability company,
Plaintiff,
vs. CASE NO. A-15-719105-B
DEPT. NO. XI

ROSE, LLC, a Nevada limited
liability company,
Defendant.

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

REPORTED BY: GAYLE SZELINSKI, CCR NO. 585

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I N D E X

WITNESS: BRAD ANTHONY

Examination

By Mr. Van:

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(Court reporter's opening statement was waived.)

Thereupon--

BRAD ANTHONY,

having been first duly sworn,

was examined and testified as follows:

EXAMINATION

BY MR. VAN:

Q. Will you state your name and spell your

last name for the record.

A. Brad Anthony, A-n-t-h-o-n-y.

Q. And Mr. Anthony, have you ever had your

deposition taken before?

A. I have not.

Q. Okay. Let me kind of go through the

general rules. You have just been administered an

oath which is kind of an interesting oath because it

says you swear to tell the truth, the whole truth.

And I'm going to ask you questions. And

part of my assumption is that when I ask you this

question, that you're going to give me as much

truthful information you have about that question.

The court reporter will be creating what's

called a transcript. So she's going to try to put

down in words what we are -- what is our oral

communication. That sounds much simpler than it

5

1 really is for a lot of reasons.

2 Number one: In ordinary communication, as
3 I start to formulate a question and I start to speak
4 that question, your brain starts to create an answer.
5 And many times as we're speaking to one another before
6 one party finishes the question, you will have already
7 started your answer.

8 That will do nothing but irritate the
9 court reporter, and she will tell us to stop speaking
10 over one another. So allow me to finish my question,
11 and I will allow you to finish your answer. So as I
12 say, it is a little more difficult than it seems.

13 Secondly, it's very important because
14 she's taking down all of our communications, all of
15 our conversation, that we respond orally. So "uh-huh,
16 uh-uh," shaking the head, nodding the head, that
17 doesn't work. If I say to you "Is that a yes," I'm
18 not trying to provoke you. I'm not trying to irritate
19 you. I'm just trying to create a record. You may get
20 it from me. You may get it from your counsel.

21 During the course of this, we're searching
22 for facts. I'm trying to get as much information as
23 you may know with regards to certain areas, and I'm
24 going to ask you certain questions.

25 Your client -- your attorney is here, and

7

1 at a further proceeding, to comment on those changes.

2 For example, if this were a car accident
3 case, and I said to you "What color was the light when
4 you went through the intersection?" And you said
5 "yellow" and you changed it to green later, certainly
6 it's something that I would be able to comment on.

7 You will be able to review all of your
8 answers and then sign at the back of it confirming
9 your testimony if you want to do that.

10 Does that make sense?

11 A. Yes.

12 Q. Okay. Is there any reason why you can't
13 testify today? Are you on any medications?

14 A. No.

15 Q. Have you ever been convicted of a felony?

16 A. No.

17 Q. Do you have a driver's license with you?

18 A. I do.

19 Q. Can I look at it very quickly?

20 (Pause.)

21 MR. SHEEHAN: I've never seen this before.
22 Off the record.

23 (Discussion off the record.)

24 MR. VAN: I'm just confirming the Driver's
25 License No. 1402992672 is the driver's license for

6

1 he may object, and I may disagree with his objections.
2 But nonetheless, he may object. If he does, the
3 appropriate objection is simply: "I object to the
4 form," which means he's objecting to the way I ask
5 that question. I may then just reask the question in
6 a different way.

7 However, if he answers the question --
8 asks -- if he objects by saying that he's instructing
9 you not to answer, that's because he is going to
10 assert a privilege, which is a -- the typical one in
11 these situations would be an attorney/client
12 privilege, meaning that there's been communications
13 between you and him that are privileged.

14 So if I were to ask you a question such
15 as: "Have you had any communications with your
16 attorney?" Answering that question saying yes is
17 appropriate. Telling me what you spoke about would be
18 inappropriate. Because that's part of the
19 communications.

20 At the end of this deposition, the court
21 will prepare a transcript, and it's a booklet. You
22 will have an opportunity to go through that booklet
23 and make any changes that you deem are appropriate or
24 necessary. However, I need to warn you that I will
25 have an opportunity, if we were to use this deposition

8

1 Brad Anthony. And then the address is 10714 Weather
2 Top Court, Las Vegas, Nevada 89135.

3 BY MR. VAN:

4 Q. Is that your current address?

5 A. Yes.

6 Q. Okay. Thank you.

7 MR. VAN: We can go off the record for one
8 second.

9 (Discussion off the record.)

10 BY MR. VAN:

11 Q. Back on the record.

12 You have been -- you have been identified
13 as the 30(b)(6), which is the person most
14 knowledgeable in this setting. This is actually a
15 weird situation because you -- well, let me -- who is
16 your current employer?

17 A. Treasure Island.

18 Q. Okay. What is your job at Treasure
19 Island?

20 A. I'm the general counsel.

21 Q. Okay. As general counsel, you have been
22 identified now as a fact witness, which puts you in a
23 precarious situation. Because as a fact witness, you
24 are here to answer any questions. If I ask you a
25 question and you say, "Well, but I was having a

9

1 conversation with somebody in my role as general
2 counsel," then that would mean that you have no other
3 witness that can come in to testify to that;
4 therefore, you would have no evidence.

5 Does that make sense?

6 MR. SHEEHAN: Objection. Vague
7 and ambiguous to myself. But that's okay. Go ahead,
8 and just ask the questions.

9 He's going to answer most of the questions
10 today. I don't think there's going to be a problem.

11 MR. VAN: Okay. Because the issue of an
12 attorney/client relationship is going to be
13 something -- I'm very cautious of that, because it's
14 something I preserve. And particularly because I got
15 subpoenaed yesterday to go testify where I know I'm
16 going to be sitting in federal court saying
17 attorney/client relation -- or communications the
18 whole time, and it's going to be a complete and utter
19 waste of probably an hour of my time. Because I
20 treasure that.

21 MR. SHEEHAN: Can we just agree that I'll
22 let him answer just about every question, but I don't
23 want to waive the attorney/client privilege, rather
24 than slow up the deposition.

25 MR. VAN: Fair enough. And if you do,

10

1 you're going to specifically do it, and we'll have
2 that discussion at that time.

3 MR. SHEEHAN: Okay.

4 BY MR. VAN:

5 Q. How long have you been employed as general
6 counsel for Treasure Island?

7 A. Six and a half years.

8 Q. Okay. Is it okay if I just refer to
9 Treasure Island as TI?

10 A. It is.

11 Q. Okay. What is your general role as --
12 what's your role in general as general counsel?

13 A. I provide legal advice to the executives
14 and ownership in the property, oversee the regulatory
15 matters, oversee the liability matters, contracts,
16 insurance, security, risk management, and that sort of
17 thing.

18 Q. And who are -- who do you report to
19 directly?

20 A. Phil Ruffin.

21 Q. What are your levels of authority with
22 regard to the contracts? Are you able to enter into
23 contracts without Mr. Ruffin's permission, or do you
24 need his permission?

25 A. It depends what kind of contract we're

11

1 talking about. There are certain types of contracts
2 say, for instance, for our third-party administrator
3 for liability claims that I am empowered to enter into
4 to aid my department's work.

5 For contracts that are going impact the
6 property globally, then as anywhere, I imagine, you
7 have to get the president's or the owner's approval.

8 Q. Okay. With regard to negotiating lease
9 agreements, is that your responsibility as well?

10 A. I am involved in that process, yes.

11 Q. Okay. With regard to the Senor Frog's
12 property, the property in which Senor Frog's is
13 located, who is the ultimate end all -- know all, end
14 all of what happens to that property? Is that you or
15 is that Mr. Ruffin?

16 A. I'm not sure I understand what you mean by
17 that question.

18 Q. Okay. In determining what course of
19 action to take with regard to Rose and with regard to
20 Senor Frog's, who is responsible for that?

21 MR. SHEEHAN: Objection. Form of the
22 question.

23 THE WITNESS: For the negotiations or
24 going forward?

25 ///

12

1 BY MR. VAN:

2 Q. Both for negotiations and going forward.

3 A. For the negotiations, Mr. Ruffin was
4 involved in saying yes or no to certain provisions
5 that were offered. Going forward, I guess it all
6 depends what happens with this lawsuit.

7 If we -- well, really the fate of Senor
8 Frog's going forward is already bound by the
9 Fifth Amendment to the Lease Agreement in that we have
10 to enter into negotiations with them. In the event
11 that Rose is pushed aside, Senor Frog's isn't moved
12 until after negotiations would fail, if that were to
13 happen.

14 Q. Okay. And so when did you start working
15 as general counsel?

16 A. January 3rd, 2010.

17 Q. Where did you work before that?

18 A. I worked at the Morris Pickering Law Firm,
19 and I worked at Halle, Jaffe and Clayton.

20 Q. When did you work at Morris Pickering?

21 A. I worked at Morris Pickering from roughly
22 April 2007 until 2009.

23 Q. And then when at Hall, Jaffe?

24 A. For a few months in 2009. I believe April
25 through October.

13

1 Q. Okay. And then from October 2009 to
2 January 2010 -- you said started on January 3rd, 2010?

3 A. Yes. I was hired into the role in
4 November, but they didn't want me to start until
5 January.

6 Q. Okay. So were you involved in the
7 negotiations of this lease with Rose?

8 A. Yes.

9 Q. Okay. And who did you deal with as -- who
10 was the person with whom you exchanged e-mails and
11 everything in negotiating the terms of this lease?

12 A. Gary Dragul and Elizabeth Gold.

13 Q. And approximately how many leases does TI
14 maintain within its property?

15 A. Between maybe eight and a dozen.

16 Q. Okay.

17 A. That's just leases for space. That's what
18 we're talking about here; right?

19 Q. Yes.

20 A. Yes. I'd say around a dozen.

21 Q. Okay. And you were directly involved with
22 the -- are you directly involved with all of those?

23 A. Yes.

24 Q. Okay. How many of those leases, those
25 eight to ten involve subleases?

15

1 you have?

2 A. I don't know it by square foot. I think
3 the cheapest rent we have per month is maybe 7,000 a
4 month.

5 Q. Who is that?

6 A. It's hair extensions. It's called, I
7 think, Fine Beauty.

8 Q. Okay. Are most of those -- are most of
9 those, most of the rentals calculated by square
10 footage?

11 A. I would say no. The Fine Beauty space
12 occupies a space that might be five-by-ten feet.
13 Right. I don't think the calculus was a square
14 footage, on a square-footage basis there. I think it
15 was just a matter of this is what we want for this
16 space per month.

17 Q. Okay. Do you -- and do you -- what's the
18 theory with regard to leasing? Are you looking for
19 longer-term leases for stability? Are you looking for
20 shorter-term leases for turnover? What are you
21 looking for generally?

22 A. I think generally we are hoping to find a
23 good long-term partnership. When I say partnership,
24 not in the legal sense but just in terms of stability.

25 Q. Okay. When you negotiated the lease with

14

1 A. Just Rose.

2 Q. And approximately what is the square
3 footage price that you're renting out space at this
4 time?

5 MR. SHEEHAN: Objection. Form of the
6 question. I can explain that if you want me to.

7 THE WITNESS: It depends where the space
8 is located in the property.

9 BY MR. VAN:

10 Q. Okay. What's the variations?

11 A. I don't know the exact numbers.

12 Q. Guess. I'm asking for a guess, because I
13 understand you wouldn't know the exact.

14 A. I think when -- I think that when we
15 rented out the construction where the CVS and the
16 marble exhibit are either currently occupied or going
17 to be occupied very shortly, that the price per square
18 foot was a couple hundred dollars, I think, a square
19 foot, maybe 400.

20 Q. Okay.

21 A. And I think as you get towards the
22 interior of the property that isn't fronting the strip
23 or isn't visible from the strip, it goes down
24 accordingly.

25 Q. What's the cheapest square footage rate

16

1 Rose, that was a longer-term lease; correct?

2 A. Yes.

3 Q. Do you have a recollection of the term of
4 that lease or no?

5 A. I believe it was a ten-year initial term
6 with three five-year options, maybe four five-year
7 options.

8 Q. So a minimum of ten, could be 30 years
9 ballpark?

10 A. I believe.

11 Q. Okay. I'm going to show you what's being
12 marked as Exhibit 1.

13 (Defendant's Exhibit 1 was marked.)

14 BY MR. VAN:

15 Q. And have you ever seen this document
16 before?

17 A. This appears to be the lease, the initial
18 lease between Rose and Treasure Island.

19 Q. Okay. On Page 26 of the lease, there's a
20 signature line there for Treasure Island --

21 A. Yes.

22 Q. -- is that correct? And whose signature
23 is that?

24 A. It's Phil Ruffin's signature.

25 Q. Okay. And how is it that you manage these

17

1 leases? Meaning, is there somebody that's responsible
2 in house to manage the leases?

3 A. What do you mean by manage the leases?

4 Q. You're obviously too busy to have to sit
5 back and figure out who's paying on time, who isn't
6 paying on time. Who's in charge? Who your in-house
7 person that's --

8 A. In terms of payments, the accounting team.

9 Q. In terms of everything, what about also
10 violations, breaches, any of that?

11 A. I guess it would depend on what kind of
12 breach it was.

13 Q. Okay. When you talk about the accounting
14 team then, so if there's a violation, the accounting
15 team, they have calendared when payments are supposed
16 to come in; correct?

17 A. Yes.

18 Q. How does the process work by which you,
19 you personally get notice that there has been a
20 violation of the lease?

21 A. Again, in terms of payment is what I'm
22 going to focus on right now.

23 Q. Sure.

24 A. The CFO will call me and say, as an
25 example, Senor Frog's had rent due today, and they

19

1 A. Okay.

2 Q. And that states the lease -- "This lease
3 constitutes the entire agreement between the parties
4 hereto pertaining to the subject matter hereof and
5 supersedes all prior agreements, understandings,
6 negotiations and discussions, whether oral or
7 written." Correct?

8 A. That's what it says, yes.

9 Q. And there's no other agreements out there?
10 MR. SHEEHAN: Objection.

11 BY MR. VAN:

12 Q. Other than the amendments?

13 MR. SHEEHAN: Objection. That were
14 prior --

15 BY MR. VAN:

16 Q. This is the base document. You're not
17 relying on any written understandings?

18 A. Correct.

19 Q. You're not -- you're not dealing with any
20 past practices? We're talking about this agreement;
21 correct?

22 A. Yes.

23 Q. Okay. And then Paragraph 19.9 indicates
24 that, "No supplement, modification, waiver or
25 termination of this lease shall be binding unless

18

1 haven't paid.

2 Q. Okay. And who makes the decision about
3 what to do next?

4 A. If they haven't paid rent?

5 Q. Yes.

6 A. And it was due today? Then I write a
7 letter to them informing them that they were -- or had
8 rent due and did not pay it timely.

9 Q. Okay. And you negotiated the terms of
10 this lease, but Phil Ruffin signed off on it; correct?

11 A. Yes.

12 Q. Was he aware of the terms of the lease?

13 A. Yes.

14 Q. Did you have discussions with him about
15 the terms of the lease?

16 A. Yes.

17 Q. And did you have discussions with him
18 about the amendment to the lease?

19 A. All five, yes.

20 Q. Okay. And do you believe that the lease
21 is binding and that's the agreement, that's the terms
22 as between the parties; correct?

23 A. Yes.

24 Q. Okay. Let me have you look at Page 23,
25 Paragraph 19.7.

20

1 executed in writing by both parties." Correct?

2 A. Yes.

3 Q. All right. So let's go back to Paragraph
4 19.6, the notices. And I want to read this in,
5 because this is pretty much the crux of this -- of the
6 portion of this case.

7 And it says: "Any notices or other
8 communication required or permitted to be given by a
9 party hereunder shall be in writing and shall be
10 deemed to have been given by such party to the other
11 party or parties" -- and then it says -- "A, on the
12 date of personal delivery; B, on the date delivered by
13 a nationally recognized overnight courier service when
14 deposited for overnight delivery; C, on the next
15 business day following any facsimile to a party at its
16 facsimile number set forth below; or D, three business
17 days after being placed in the United States mail, as
18 applicable, registered or certified postage prepaid
19 addressed to the following addressees."

20 Correct?

21 A. I read following addresses, not
22 addressees. But apart from that, correct.

23 Q. Fair enough. Addresses. And then it says
24 in parens: "Each of the parties shall be entitled to
25 specify a different address and/or contact person by

21

1 giving notice as aforesaid." Correct?

2 A. Yes.

3 Q. So this is where notice needs to go under
4 the terms of this agreement; correct?

5 MR. SHEEHAN: Objection. Form of the
6 question.

7 THE WITNESS: Yes.

8 BY MR. VAN:

9 Q. So in the first sentence, it says: "Any
10 notice or other communication required."

11 Isn't it true that if there is a violation
12 of the lease, that you would be required to give
13 notice?

14 A. No.

15 Q. So if there's a violation, there's not a
16 cure period allowed? Is there a cure period allowed?

17 A. Yes.

18 Q. Okay. And under the cure period, isn't it
19 that you have to provide notice in writing?

20 A. In order to trigger the cure period, yes.

21 Q. Okay. And so if there's an event of
22 default in order to trigger the cure period, you have
23 to send one of the required notices to one of the
24 required addressees; correct?

25 A. To the addresses, yes.

22

1 Q. Okay. Now, if you look under that -- if
2 notice were to go to you, if notice were to go to
3 Treasure Island, if it were sent to the front desk,
4 that would not be appropriate; correct?

5 MR. SHEEHAN: Objection. Vague and
6 ambiguous.

7 THE WITNESS: Under the terms of the
8 lease, correct.

9 BY MR. VAN:

10 Q. Okay. Who is Najam Khan? N-a-j-a-m
11 K-h-a-n.

12 A. He's the general manager of the property.

13 Q. Okay. Is he still employed by Treasure
14 Island?

15 A. Yes.

16 Q. And he is someone who is specifically
17 identified as someone who needs to get notice? If
18 there was a gas leak, if there was a sewer leak, if
19 there's anything that had to be addressed, it would go
20 to him; correct?

21 A. Not necessarily.

22 Q. If there were a breach under this lease,
23 would notice have to go to him?

24 A. Yes.

25 Q. Okay. And then a copy would have to be

23

1 sent to you as general counsel under the terms of this
2 lease?

3 A. Yes.

4 Q. Okay. And under the terms of this
5 lease -- and I'm talking about the original lease, not
6 the amendment. I'll talk about that in a second.

7 Under the terms of the original lease, any
8 notice of default would have to go to Rose, LLC,
9 attention Susan, S-u-s-a-n, Markusch, M-a-r-k-u-s-c-h?

10 A. Yes.

11 Q. With a copy to Operadora Andersons,
12 O-p-e-r-a-d-o-r-a, Andersons?

13 A. Yes.

14 Q. Cancun, Mexico. Okay.

15 And absent that going, then there would
16 not be an appropriate notice; correct?

17 MR. SHEEHAN: Objection. Calls for a
18 legal conclusion.

19 THE WITNESS: Under the terms of this
20 lease; correct.

21 BY MR. VAN:

22 Q. Okay. Let me show you what has been
23 marked -- what will be marked as Exhibit 2, which is
24 the Fifth Amendment to the Lease.

25 (Defendant's Exhibit 2 was marked.)

24

1 BY MR. VAN:

2 Q. Can you look on Page 5. And whose
3 signature is that?

4 A. It appears to be Phil Ruffin and Elizabeth
5 Gold.

6 Q. Okay. And that -- and that's dated
7 April 30th, 2014; correct?

8 A. Yes.

9 Q. Okay. Now, if you can go to Page 4 of
10 that document, Page -- or Paragraph 11. Wait a
11 second. Paragraph 11, Page 4.

12 And it says: "The parties agree that for
13 purposes of Section 19.6 of the original lease, the
14 lease, tenant's notice address is updated to 5690 DTC
15 Boulevard, Suite 515, Greenwood Village, Colorado,
16 80111, and that copies of notices sent to tenant per
17 the lease shall be sent to subtenant addressed to:
18 Operadora Andersons S.A. de C.V., Boulevard in Cancun,
19 Mexico." And then "and to subtenant's counsel
20 addressed to Ronald R. Fieldstone, Esquire, and Susan
21 Trench, Esquire, with an address in South Biscayne
22 Boulevard in Miami, Florida." Is that correct?

23 A. Largely. I mean, there were omissions.

24 Q. There were words I left out because I
25 couldn't say them.

25

1 So this Fifth Amendment to the Lease, that
2 amended the original lease, what we just read, as to
3 where notification would go; correct?

4 A. Yes.

5 Q. Okay. Now I'm going to ask a bunch of
6 questions with regard to -- and I want you to just
7 focus on this issue, if you could.

8 On January 31st, 2012, there is a letter,
9 and it's marked -- or will be marked as Exhibit 3.

10 (Defendant's Exhibit 3 was marked.)

11 BY MR. VAN:

12 Q. I'm showing you what's been marked as
13 Exhibit 3. Have you ever seen that letter before?

14 A. Yes.

15 Q. Who is Jerry Griffis?

16 A. He's the chief financial officer for
17 Treasure Island.

18 Q. Okay. Now, based upon the background that
19 we just had about where notices went and how they
20 had -- how they had to conform, is this an appropriate
21 notice? Was it addressed to the right people?

22 A. Let me correct something on this letter.

23 Q. Okay.

24 A. Quickly. The letter is misdated. This
25 letter was actually sent in 2014.

26

1 Q. Okay. I'm looking at -- the date, though,
2 says 2012.

3 A. I know. You asked me if I had seen this
4 letter before. I'm telling you yes, and that this
5 letter was sent January 31st, 2014.

6 Q. Why would you have a two-year difference
7 on the date?

8 A. I don't know.

9 Q. Okay. That being said, even at that, it's
10 not -- it doesn't meet the strict standards of a
11 notice requirement, would it, under the terms of the
12 lease?

13 A. The term -- the way Mr. Dragul wanted
14 notice done --

15 Q. That's not what I asked.

16 MR. SHEEHAN: Let him answer the question.

17 MR. VAN: No. You can follow up.

18 BY MR. VAN:

19 Q. I'm asking very simply. Under the terms
20 of this document, under the terms of the lease, does
21 this letter meet those standards?

22 MR. SHEEHAN: You can still give your full
23 answer.

24 THE WITNESS: Assuming nothing else had
25 changed, then, no.

27

1 BY MR. VAN:

2 Q. Okay. Let me show you what's been
3 marked -- or what's being marked as Exhibit 4.

4 (Defendant's Exhibit 4 was marked.)

5 BY MR. VAN:

6 Q. Exhibit 4. Now, on the upper -- about a
7 third of the way down the page, there's a number. And
8 it's 7012292000029657 -- 4771. And then it appears to
9 be a date, January 16th, 2015. Do you know what that
10 number is?

11 A. It appears to be a tracking number.

12 Q. Okay. Now, this letter is dated
13 January 15th, 2015; correct?

14 A. Yes.

15 Q. Does this letter -- based upon the
16 original document that we talked about, does this
17 letter comply with the notice requirements in either
18 the base lease or the Fifth Amendment to the Lease?

19 A. No.

20 Q. Okay. Now, in this letter it says: "We
21 would also like to note that Senor Frog's accepted" --
22 "attempted to pay \$106,534.87 that was due for
23 August's reimbursement obligation with a check that
24 was returned for having insufficient funds available."

25 Do you know if that was ever rectified?

28

1 Did they ever pay that money?

2 A. Yes.

3 Q. Okay. So that's all been rectified and
4 taken care of?

5 A. Yes.

6 Q. Okay. Let me show you what is being
7 marked as Exhibit 5.

8 (Defendant's Exhibit 5 was marked.)

9 BY MR. VAN:

10 Q. This Exhibit 5 -- again, I'm going back to
11 the lease itself, the lease or exhibit -- or the
12 Fifth Amendment to the Lease.

13 Does this comply with the strict
14 requirements of the lease as far as providing notice?

15 A. No.

16 Q. Okay. Do you know if that money, the
17 119,229, was that ever eventually paid? I know there
18 were issues going back and forth, but was that amount
19 of money paid?

20 A. Eventually, yes.

21 Q. TI has received those funds?

22 A. We have.

23 Q. Okay. Let me show you what is marked as
24 Exhibit 6.

25 (Defendant's Exhibit 6 was marked.)

29

1 BY MR. VAN:
 2 Q. Okay. This is Exhibit 6, and it's dated
 3 May 28th, 2015; correct?
 4 A. Yes.
 5 Q. And this document actually goes to Gary
 6 Dragul, but it has the Rosewood -- the Greenwood
 7 Village address. But it also goes to the other two
 8 parties that are identified in the lease; correct?
 9 A. Yes.
 10 Q. Would you say that this letter complies
 11 with -- despite the fact -- okay. Strike that.
 12 Does this letter comply, as noticed,
 13 consistent with the terms of the lease agreement,
 14 strict construction of the terms of the lease
 15 agreement?
 16 A. Including the Fifth Amendment or not?
 17 Q. Including the Fifth Amendment.
 18 A. Yes.
 19 Q. Okay. Why?
 20 MR. SHEEHAN: Objection. Vague and
 21 ambiguous.
 22 BY MR. VAN:
 23 Q. Why does it -- well, okay. Both the
 24 Fifth Amendment and the First Amendment identify that
 25 they need to go to Rose DTC Boulevard, but identify it

31

1 MR. SHEEHAN: Yes. We gave them to you.
 2 MR. VAN: Okay.
 3 THE WITNESS: I believe so.
 4 MR. SHEEHAN: If you're talking about
 5 earlier -- just for the record, you're talking about
 6 earlier monetary defaults that they had under this
 7 lease?
 8 MR. VAN: No. I'm talking about --
 9 MR. SHEEHAN: You're talking about this
 10 particular monetary default?
 11 MR. VAN: I'm talking about this
 12 particular monetary default.
 13 THE WITNESS: Just this one?
 14 BY MR. VAN:
 15 Q. Let me back up.
 16 These are the only default letters that I
 17 have where you have -- where TI is claiming that Rose
 18 is in default.
 19 And what I'm asking is: Are there -- it
 20 appears that this one has complied with the terms of
 21 the lease. I don't have any other letters that appear
 22 to have complied with the terms of the lease.
 23 A. Okay. Well, there should be a letter from
 24 August 2012 that talks about construction liens and
 25 how they are in potential default in the lease over

30

1 needs to go to someone other than Gary Dragul, to
 2 Susan, whatever her name was, Markusch.
 3 MR. SHEEHAN: Objection.
 4 Mischaracterizes --
 5 MR. VAN: Markusch, M-a-r-k-u-s-c-h.
 6 MR. SHEEHAN: Objection. Mischaracterizes
 7 the Fifth Amendment.
 8 BY MR. VAN:
 9 Q. Okay. And the Fifth Amendment says that
 10 it needs to go to -- it doesn't identify an
 11 individual. But it just needs to go to that address.
 12 Okay. So in your -- it's your testimony
 13 that this complies with both the underlying lease and
 14 the Fifth Amendment to the Lease?
 15 A. It complies with the lease as amended by
 16 the Fifth Amendment to the Lease.
 17 Q. Okay. So based upon your testimony, do
 18 you know of any prior letters -- are these all the
 19 correspondence that you have --
 20 A. No.
 21 Q. -- with regard to the violation -- or the
 22 alleged defaults in the lease?
 23 A. No.
 24 Q. Have you provided the other ones to
 25 counsel, to your counsel?

32

1 their construction liens, and they have to cure it .
 2 Q. And were those properly addressed?
 3 A. That one was, absolutely.
 4 Q. In 2012. So it went to all the right
 5 people. And did they cure those liens?
 6 A. No. No. To my knowledge, no. Oh, the
 7 liens?
 8 Q. Yes.
 9 A. I think so. I think so. I think there's
 10 still money owed on the construction side, but I don't
 11 think the liens ended up being filed.
 12 Q. Okay. And as I understand it -- actually
 13 I'm kind of involved in that. But there's some
 14 litigation with regard to the construction side of it,
 15 but it doesn't affect TI; correct?
 16 A. Correct.
 17 Q. Okay. Do you know if the notice
 18 provisions were complied with in the notices to the
 19 tenant and at subtenant in those notices?
 20 A. There's a single letter, and, yes, it was.
 21 Q. Okay.
 22 MR. SHEEHAN: I've got a copy of it right
 23 here if you want it.
 24 MR. VAN: I'll grab it. He'll grab it
 25 real quick.

33

1 (Pause.)
 2 BY MR. VAN:
 3 Q. As we sit here today, have all of the --
 4 in fact, I want to break it down into two separate
 5 areas.
 6 Has the base rent been paid current?
 7 A. What day is today?
 8 Q. It's the 30th, March 30th.
 9 A. I believe so.
 10 Q. Okay. And during this period, as I'm
 11 reading through these letters, it appears that the
 12 struggle, with one exception -- there was one time
 13 where it was different. But most of the time the
 14 issue is the percentage rents issue; correct?
 15 A. I think, in my opinion, that the letters
 16 show that they have struggled to pay the base rent,
 17 the percentage rent, and the construction loan
 18 repayment at various times throughout the lease.
 19 So there are three different portions of
 20 money owed under the rent -- or under the lease. I'm
 21 sorry. You have the base rent.
 22 Q. Yes.
 23 A. You have the percentage rent quarterly.
 24 And you have what eventually became a monthly
 25 reimbursement of \$50,000 for the construction loan

35

1 appears based upon review -- as an outsider looking
 2 in, it appears that the biggest issue seems to be the
 3 calculation, the payment of the percentage rent
 4 number. Am I inaccurate in that, or is that --
 5 A. I would say that's an issue.
 6 Q. Okay. Has the base rent been paid
 7 generally timely?
 8 A. Timely meaning on time or timely meaning
 9 within the ten-day default period?
 10 Q. Within the default, within the cure
 11 period.
 12 A. Generally.
 13 Q. Okay. And the construction loan payment,
 14 has that been paid generally within the cure period?
 15 A. Generally.
 16 Q. Okay. The percentage rents, has that been
 17 paid generally within the cure period?
 18 A. Generally.
 19 Q. Okay. So the big issue, as I understand
 20 it, is that there is -- we have one instance where a
 21 notice was sent, and admittedly probably not in
 22 conformity with the underlying lease, and payment was
 23 not received within the cure period?
 24 MR. SHEEHAN: Objection. Compound. Vague
 25 and ambiguous.

34

1 that we gave them.
 2 Q. Okay. So let's go through that then.
 3 The base rent, the base rent number, that
 4 one you said is current as of today?
 5 A. I believe it is.
 6 Q. Fair enough.
 7 A. I've not been notified that it isn't.
 8 Q. What's the base rent number?
 9 A. 33,000 a month, I believe. We'd have to
 10 look at the Fifth Amendment. It changed then.
 11 Q. Okay. It's 33 approximately.
 12 A. 33-5, yeah.
 13 Q. The percentage rent number, what is that
 14 based upon?
 15 A. Seven percent of their gross sales minus a
 16 list of items.
 17 Q. Okay. And then -- and that one today as
 18 we sit here today, has that one been paid current?
 19 A. It's not yet due for this quarter. It was
 20 paid current as of the last quarter. I think it's due
 21 in like maybe a month, maybe less.
 22 Q. Okay. And then are they current on this
 23 construction loan repayment?
 24 A. Again, I think so.
 25 Q. And what -- in your opinion what -- it

36

1 THE WITNESS: I think that simplifies the
 2 issue a great deal.
 3 BY MR. VAN:
 4 Q. I always pride myself on being the dumbest
 5 person in the room, so I'm trying to simplify things.
 6 However, based upon your testimony, TI has
 7 been paid everything to date? It doesn't mean there's
 8 not money owing, but they have been paid to date;
 9 correct?
 10 A. Yes.
 11 Q. Okay. Now, the -- let me -- I forgot what
 12 we're on. Is it 6?
 13 A. We just marked 6.
 14 (Pause.)
 15 BY MR. VAN:
 16 Q. I'm going to show you what has been
 17 marked -- I will show you what has been marked as --
 18 I'm going to show you what has been marked as
 19 Exhibit 7.
 20 (Defendant's Exhibit 7 was marked.)
 21 THE WITNESS: Okay.
 22 BY MR. VAN:
 23 Q. That's a letter dated October 31st, 2015.
 24 Have you seen that letter before?
 25 A. Yes.

37

1 Q. That's your signature?
 2 A. Yes.
 3 Q. Okay. And were these -- was this
 4 percentage rent issue cured?
 5 A. Yes.
 6 Q. Okay. And in that letter, the second
 7 paragraph says: "This letter constitutes the notice
 8 required by 15.1 of the lease" -- by Section 15.1 of
 9 the Lease Agreement;" correct?
 10 A. Yes.
 11 Q. So you're complying with the terms of the
 12 lease agreement as to the notice provision; correct?
 13 A. Yes.
 14 Q. Okay. Do you know if you forwarded copies
 15 of this to the law firm?
 16 A. Arnstein & Lehr in Florida?
 17 Q. Yes. Because it shows that at the bottom;
 18 correct?
 19 A. Yes.
 20 MR. SHEEHAN: Could we go off the record?
 21 MR. VAN: Sure.
 22 (Discussion off the record.)
 23 MR. VAN: We'll take a five-minute break.
 24 (A recess was taken.)
 25 ///

39

1 Q. Okay. And this identifies -- then you
 2 executed this agreement; correct? This is your
 3 signature?
 4 A. This letter.
 5 Q. Yeah, this letter.
 6 A. Yes.
 7 Q. And that identifies certain breaches.
 8 Were those breaches cured as well in the first
 9 paragraph?
 10 A. Eventually, yes.
 11 Q. Okay. And isn't it true that both parties
 12 were just waiting for an order from the court to get
 13 some direction about where they were at that time?
 14 A. In November?
 15 Q. In November. Your letter says --
 16 A. No. The order came out in -- it's in the
 17 record, but it came out before this.
 18 Q. It says, "Instead, your attorney alleged
 19 that you were compelled to await the entry of the
 20 court's order prior to tendering that amount. Be
 21 advised that the order has been entered and that
 22 Treasure Island hereby demands payment in full of all
 23 amounts still owed and outstanding."
 24 A. Yes. Prior to this -- near prior to this
 25 letter.

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1 BY MR. VAN:
 2 Q. Back on the record.
 3 We're back on with Exhibit No. 7, which is
 4 the October 31st letter. That letter went to Susan
 5 Markusch from you; correct?
 6 A. Yes.
 7 Q. And this was cured; correct?
 8 A. Yes.
 9 Q. Okay. So based upon our prior
 10 conversation, this letter would have been in
 11 compliance with the terms of the lease because you
 12 identified Rose, Susan, as well as the law firm and
 13 the subtenant; correct?
 14 A. Yes.
 15 Q. This, however, was sent after the letter
 16 regarding termination?
 17 A. Some months after, yes.
 18 Q. Okay. All right. Fair enough.
 19 Let me show you what is being marked as
 20 Exhibit 8.
 21 (Defendant's Exhibit 8 was marked.)
 22 BY MR. VAN:
 23 Q. This is a letter dated November 5th, 2015;
 24 correct?
 25 A. Yes.

40

1 Q. Yeah. Shortly before this letter, the
 2 order had come out, and then it was cured; correct?
 3 A. Yes.
 4 Q. Okay. Now let me go back. There's one
 5 letter I wanted to reference, and I apologize. If you
 6 can go back to Exhibit 6. It's back a few.
 7 A. Okay.
 8 Q. The second paragraph you're asking --
 9 despite the fact that Rose is paying, you're asking
 10 for counsel for Senor Frog's to -- excuse me. I don't
 11 know how you spell it. Brenoch Wirthlin is asking
 12 that you be contacted to negotiate separately and
 13 independently with Senor Frog's; correct?
 14 MR. SHEEHAN: Objection. Mischaracterizes
 15 the evidence.
 16 THE WITNESS: Yes. They hadn't paid.
 17 BY MR. VAN:
 18 Q. Who hadn't paid?
 19 A. Rose.
 20 Q. Okay. It was cured, though?
 21 A. Again, eventually.
 22 Q. Yeah. But they were asking -- they,
 23 meaning your counsel, was asking Senor Frog's to
 24 negotiate -- for you to -- for them to contact you
 25 directly to negotiate a separate lease?

41

1 A. Yes. Pursuant to the Fifth Amendment,
2 yes.
3 Q. Okay. Now, did that communication occur?
4 A. No.
5 Q. They never contacted you?
6 A. No.
7 Q. Okay. How many of the other -- I think
8 you answered this. How many of the other -- this is
9 the only lease in which you have a sublease agreement;
10 correct?
11 A. Yes.
12 Q. Okay. Isn't it accurate that if you were
13 to -- if you were to strike a deal with Senor Frog's,
14 it would be more economically advantageous to TI than
15 if you went through Rose?
16 A. Not necessarily.
17 Q. Okay. How much money does Senor Frog's
18 pay to Rose?
19 A. I don't know.
20 Q. Okay. You've seen the sublease agreement;
21 correct?
22 A. Yes.
23 Q. Does it have the lease terms in there?
24 A. I believe so.
25 Q. Okay. So do they have the rental terms in

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1 was up, we went in and tried to take over the space to
2 operate the restaurant.
3 We didn't like the numbers we were doing
4 versus the potential lease agreement. And we thought
5 that having a company like Senor Frog's might bring
6 some new bodies into the property.
7 Q. Okay. And so you leased -- the lease that
8 you have, though, is with Rose?
9 A. Yes.
10 Q. Why did you have a lease with Rose as
11 opposed to Senor Frog's?
12 A. When this first came about back in, I
13 believe, 2011 -- I'm pretty sure it was 2011, whenever
14 we started talking about this with Gary -- it was
15 represented to us based on my, again, recollection,
16 that Gary and Senor Frog's were coming in here as kind
17 of partners. And Gary was Senor Frog's liaison to the
18 area. So Rose just happened to be Gary's company.
19 It wasn't as though we really contemplated
20 the negotiation stage -- the initial negotiation stage
21 at the very least -- separate entities with subleases
22 and whatnot. The entire space was going to be Senor
23 Frog's.
24 Q. And how is it leased out now?
25 A. Based on the review of the sublease, it

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1 there, the payment?
2 A. Yes. Yes.
3 Q. Okay. Do you believe that TI would
4 benefit economically if it terminated the Rose
5 sublease or if it took Rose out of the equation and
6 had a direct lease with Senor Frog's?
7 A. I don't know.
8 Q. And yet this is the only instance where
9 you have a sublease?
10 A. Yes.
11 Q. Okay. And you didn't have any problems
12 with Rose subletting to Senor Frog's?
13 MR. SHEEHAN: Objection. Foundation.
14 THE WITNESS: Yeah. I'm not sure how to
15 answer that question.
16 BY MR. VAN:
17 Q. Okay. What was in that space before Senor
18 Frog's?
19 A. There was a restaurant and a nightclub.
20 It was the Christian Audigier Nightclub,
21 A-u-d-i-g-i-e-r, and the Khotan, K-h-o-t-a-n,
22 Restaurant.
23 Q. How did they -- did they fail?
24 A. Prior to Khotan was Social House, which
25 was a leased restaurant. When Social House's lease

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1 appears that Senor Frog's has the bottom floor, which
2 was kind of odd, because the kitchen is upstairs. But
3 they have the bottom floor. And the top floor is
4 just -- Gary's holding it. They do events there.
5 And I think Senor Frog's pays them for
6 events that are hosted there. Which is why I don't
7 know exactly how much they pay them, because I don't
8 know how many events are hosted, et cetera, et cetera.
9 Q. How would -- have there been any
10 discussions about -- in the -- well, strike that.
11 In the event that you prevail on
12 terminating the lease and then Senor Frog's leaves --
13 because they very well could because the sublease is
14 no stronger than the original lease -- you would have
15 an empty shell of a building. What are the plans for
16 that building at that point in time?
17 A. Well, our plan right now is to negotiate
18 with Senor Frog's pursuant to our obligation in the
19 Fifth Amendment.
20 Q. Okay. And if Senor Frog's says no?
21 A. There are no plans.
22 Q. Has there been any --
23 A. I'm sorry. I know of no plans.
24 Q. Who would know of plans?
25 A. I'd be pretty high on the list.

45

1 Q. Okay. Would Mr. Ruffin know of the plans?
 2 A. He'd be the one that would tell me about
 3 the plans, yes.
 4 Q. So he may have plans?
 5 A. I don't think so.
 6 Q. He may have plans, though?
 7 MR. SHEEHAN: Objection. Asked and
 8 answered.
 9 THE WITNESS: The last time we spoke about
 10 terminating the lease, the only plan advanced was to
 11 negotiate with Senor Frog's.
 12 BY MR. VAN:
 13 Q. Do you know if Mr. Ruffin has separate
 14 plans for that property?
 15 A. He has not told me of any plans for that
 16 property apart from renegotiating with Senor Frog's
 17 directly.
 18 Q. Okay. Do you know what Rose has used the
 19 upstairs space for other than these events?
 20 A. No.
 21 Q. When you -- is Rose's use of the space
 22 typical for how -- strike that.
 23 Is Rose's use of the place -- of the space
 24 consistent with how you would -- TI would use that
 25 space if they were to take the property back?

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1 MR. SHEEHAN: Objection. Calls for
 2 speculation.
 3 THE WITNESS: I'm not sure how Rose uses
 4 the space.
 5 BY MR. VAN:
 6 Q. Okay. If you were to sub -- if you were
 7 to negotiate a sublease with Senor Frog's, would it be
 8 for the whole space?
 9 A. I don't know.
 10 Q. Okay. Would you increase the rent of
 11 Senor Frog's?
 12 A. From what they're paying to Gary right
 13 now?
 14 Q. Yes.
 15 MR. SHEEHAN: Objection. Calls for
 16 speculation.
 17 THE WITNESS: I don't know.
 18 BY MR. VAN:
 19 Q. Who would know?
 20 A. Nobody. That would be a subject of
 21 negotiations.
 22 Q. Okay. How big is the -- what's the square
 23 footage of the downstairs place, ballpark?
 24 A. I don't know. It will be in the sublease,
 25 but I don't know what it is off the top of my head. I

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1 think the whole space is 14,000. I think it's 14,000.
 2 But I might be thinking about the CVS space. I'm not
 3 sure. I'm sorry.
 4 Q. Okay. With the exception of the one
 5 letter -- well, here. You spoke about a letter dated
 6 August --
 7 (Defendant's Exhibit 9 was marked.)
 8 BY MR. VAN:
 9 Q. I'm showing you what has been marked as
 10 Exhibit 9. Hold on one second.
 11 Showing you what has been marked as
 12 Exhibit 9. That letter, you've written it to --
 13 that's a letter with regard to lien issues; correct?
 14 A. Yes.
 15 Q. Okay. Can you describe why that letter
 16 was sent?
 17 A. The letter was sent because we received
 18 word from some subcontractors that had worked on the
 19 Senor Frog's project that they had not been paid, and
 20 they were going to have to lien the property. In the
 21 lease, there was a no-liens' obligation, and I believe
 22 in Section 4.4.
 23 So we sent the letter notifying them that
 24 if they allowed the property to be liened, it would
 25 constitute a material default of the lease under that

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1 section and asked that they contact us to discuss
 2 their plan of action for resolving this.
 3 Q. Okay. And were you contacted?
 4 A. I was.
 5 Q. Okay. And was it resolved?
 6 A. The liens were never filed, so I assume
 7 so.
 8 Q. Okay. And this was -- this letter was
 9 actually sent to Susan Markusch consistent with the
 10 terms of the lease?
 11 A. It was.
 12 Q. Okay. Now, at one point in time you said
 13 that Gary Dragul changed how he wanted notice; is that
 14 correct?
 15 A. Yes.
 16 Q. Is there any document anywhere that
 17 evidences that?
 18 A. No.
 19 Q. Okay. And the lease says that the only
 20 way you can change it is in writing; correct?
 21 A. The only way you can change the lease is
 22 in writing; yes.
 23 Q. Okay. Do you know -- tell me about Gary
 24 Dragul. What do you know about Gary Dragul?
 25 A. Not very much. He is a -- I think he does

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1 something with shopping malls. I believe he does
 2 something with shopping malls based in Colorado.
 3 Bought a Tesla a couple years ago. Has, you know --
 4 around certain times has been dealing with family
 5 health issues. That's pretty much it.
 6 Q. Do you know if as a result of his
 7 business, Mr. Dragul spends time traveling?
 8 A. He has told me that he does.
 9 Q. Okay. Now, in the terms of the original
 10 lease, you've identified you as additionally getting
 11 notice and someone else whose name I've forgotten.
 12 A. Mr. Khan.
 13 Q. Mr. Khan, K-h-a-n. Why do you have him
 14 and you on notice?
 15 A. It was just boilerplate language. That's
 16 what we put in most of our lease agreements. Doesn't
 17 much matter if I get faxed, because Najam sends me the
 18 letter that he gets anyhow.
 19 Q. But it's important -- it's important
 20 that -- in other words, you've got other things -- so
 21 it's important that he gets notice?
 22 A. Well, it's important that somebody gets
 23 notice. There have been times when people have
 24 written to Mr. Griffis, the CFO, and within a couple
 25 hours it gets down to my office. Yeah.

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1 Q. Okay. But the purpose of having that
 2 provision in the lease is so that you make sure that
 3 notice gets to the right people; correct?
 4 A. I'm sorry. Could you say that again?
 5 Q. The purpose of putting notice provisions
 6 in a lease is so that notice gets to the right people?
 7 A. Yes.
 8 Q. Now, on the notice of default, you don't
 9 know where Mr. Dragul was when that notice of default
 10 was sent, do you?
 11 A. The day it was sent or the day after it
 12 was sent?
 13 Q. The day after it was sent, do you know
 14 where he was?
 15 A. Yes.
 16 Q. Where was he?
 17 A. He was traveling to visit his, I believe,
 18 brother who was ill with something.
 19 Q. Okay. Do you know where his staff were?
 20 A. Only Elizabeth Gold.
 21 Q. And how do you know where Elizabeth Gold
 22 was?
 23 A. Because I spoke to her on the phone.
 24 Q. Okay. And what did you say to her on the
 25 phone?

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1 A. I don't remember the exact conversation.
 2 Q. Okay.
 3 A. But I do know the gist of it if you want
 4 to go there.
 5 Q. Do you know what ICSC is?
 6 A. It's a convention in town, I believe.
 7 Q. Do you know what it's for?
 8 A. Retail stores, I think; right?
 9 Q. It's the International Council of Shopping
 10 Centers.
 11 A. Okay.
 12 Q. It's a pretty good size convention. That
 13 was in town May 15th to May 20th approximately, 2015.
 14 A. That's a long time for that convention.
 15 Are you sure?
 16 Q. It's a whole week. Trust me. It's a
 17 whole week. Having represented people that have
 18 shopping centers, it's a long week.
 19 And on May 25th of 2015 was Memorial Day.
 20 A. Yes.
 21 Q. So let's assume that his staff were out of
 22 the office that whole week as well as celebrating
 23 Memorial Day. That would have been ten days that they
 24 would not have been -- had access to e-mails and mail?
 25 A. Is this hypothetically?

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1 Q. Hypothetically, yes.
 2 MR. SHEEHAN: You can go ahead and --
 3 we're not playing hide the ball. Go ahead and tell
 4 him your story.
 5 MR. VAN: No, I am. And so --
 6 MR. SHEEHAN: I'm talking about my
 7 witness.
 8 BY MR. VAN:
 9 Q. Okay. So did notice of that default go to
 10 Senor Frog's counsel in Florida?
 11 A. No.
 12 Q. Did it go to the -- to Senor Frog's in
 13 Cancun, Mexico?
 14 A. No.
 15 Q. Did it go to Susan at Rose in Colorado?
 16 A. No.
 17 Q. Do you know if Mr. Dragul was in Las Vegas
 18 for that ICSC convention?
 19 A. When I spoke to Elizabeth -- when I spoke
 20 to Elizabeth, she informed me that Gary was traveling
 21 because of his brother's illness, his brother's ill
 22 health.
 23 Q. Okay.
 24 A. And I don't believe his brother is here in
 25 Vegas. I don't know if Gary swung back through Vegas

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1 or not. He never called or informed us that he would
2 be here to try to set up a meeting or anything.

3 Q. There was a letter, that letter that was
4 sent by Fennemore Craig. Do you remember who
5 instructed -- I don't want to know the content of that
6 discussion, but who instructed Fennemore Craig to
7 draft that letter?

8 A. I did.

9 Q. And who told you to do that? Did anyone
10 or just -- did you do that on your own, or did you get
11 authorization from upstairs?

12 A. I cannot recall exactly.

13 Q. Do you recall if there were discussions
14 between you and Mr. Ruffin to remove Rose from the
15 equation and deal with Senor Frog's directly?

16 MR. SHEEHAN: Objection. Vague and
17 ambiguous.

18 THE WITNESS: Yes.

19 BY MR. VAN:

20 Q. There were discussions?

21 A. There were discussions between myself and
22 Mr. Ruffin asking what would happen under the lease if
23 Rose did not pay timely.

24 Q. And Mr. Ruffin is the one who ultimately
25 calls the shots; correct?

55

1 Q. Okay. Who is?

2 A. Mr. Griffis.

3 Q. Okay. The reason I'm asking that question
4 is it appears to me that the biggest thorn in the side
5 seems to be the calculation of the seven percent,
6 based upon two issues. One, the number and, two, the
7 timing within which to get those numbers to parties in
8 order to pay. That's just my 30,000-foot observation.

9 That being said, who is the person that
10 can tell us how that seven percent is calculated? Is
11 it Mr. Griffis?

12 A. Yes.

13 Q. And who is the person that can tell us
14 about the timing, meaning what's the cutoff date and
15 what's the date by which payment has to be made?

16 A. That's in the lease.

17 Q. Okay. And was there ever any suggestions,
18 have there ever been any discussions between the two
19 of you with regard to -- with the two parties with
20 regard to extending that timeframe out?

21 A. No.

22 Q. Okay. Do you know how much money that
23 seven percent -- what is that represented to you, to
24 TI over the last year?

25 A. The vast majority of the rent we receive

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1 A. Yes.

2 Q. And you don't know how much Senor Frog's
3 pays Rose under its sublease?

4 A. I don't. Again, it's in the sublease, but
5 I don't know off the top of my head, no. I presume
6 not very much, because Gary always used to complain
7 how he wasn't making any money on the space.

8 Q. Tell me how that -- so the seven percent
9 is on gross sales?

10 A. Yes. I am pretty sure it's on -- it might
11 be net sales. Let's take a look. It's in Section
12 3.1B in Exhibit 1. Yeah, gross sales.

13 Q. How do you come about to get those
14 numbers? Meaning, how is it that -- what report comes
15 to you?

16 A. There's a report from the registers, and I
17 don't see the report. Personally I don't see the
18 report. Our accounting team gets the numbers.

19 Q. Okay. So the registers are integrated
20 into your system essentially?

21 A. Not 100 percent on that.

22 Q. Okay. Does it take into account comps and
23 other issues?

24 A. I am not super familiar with our register
25 system.

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1 from Senor Frog's. I don't know the exact number, no.

2 Q. Okay. So they don't pay -- the rent
3 numbers, the 33,000-dollar number, is that a
4 significant number or insignificant compared to the
5 larger scheme of things?

6 A. The 33,000 number?

7 Q. Yeah.

8 A. Is relatively paltry in the larger scheme
9 of things.

10 Q. And how -- that seven percent, that's paid
11 quarterly; correct?

12 A. Yes.

13 Q. Okay. And I'm just -- I just happen to
14 grab a letter. It's Exhibit -- I think it's
15 Exhibit 3. And it evidences that the seven percent
16 number for that -- so the seven percent number is
17 \$176,000, and that would have been due for January,
18 February and March with payment in April; correct?

19 A. Yes.

20 Q. Okay. So the \$176,000 for three months,
21 for that three-month period?

22 A. Yes.

23 Q. And then in Exhibit 5, the seven percent
24 number for -- hold on. Strike that.

25 So you don't know what the profit is that

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1 TI receives from the Rose Senor Frog's annually, how
2 much revenue it receives?
3 A. No, I don't.
4 Q. That's Mr. --
5 A. Griffis.
6 Q. -- Griffis?
7 A. Yeah.
8 Q. Has TI ever communicated with Rose
9 indicating to them that they wanted to take Rose's
10 position in the space?
11 MR. SHEEHAN: Objection to the extent it
12 contemplates settlement discussions in this case.
13 THE WITNESS: Yeah. That was when we did
14 it.
15 BY MR. VAN:
16 Q. Excuse me?
17 A. After this whole default instance
18 occurred, I spoke with Elizabeth Gold or exchanged
19 e-mails with her. I'm not sure which, probably both.
20 MR. SHEEHAN: Continuing objection.
21 MR. VAN: Okay. Yeah.
22 THE WITNESS: And she wanted to know
23 whether we were trying to get rid of Senor Frog's.
24 And I believe I informed her that pursuant to the
25 Fifth Amendment, we were just looking to take over the

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1 paying every month; correct?
2 MR. SHEEHAN: Objection to this whole line
3 of questioning. Again, it's settlement. You know,
4 you shouldn't really be asking these questions.
5 THE WITNESS: Eventually they pay every
6 month.
7 BY MR. VAN:
8 Q. Okay. But they are today current?
9 A. As far as I know.
10 Q. Okay.
11 A. But...
12 Q. Have you ever had any discussions with
13 Mr. Ruffin about the long-term projections of where to
14 use -- how to use this property in the event that you
15 took it back?
16 A. No.
17 Q. Have you ever discussed with him the fact
18 that if Mr. Dragul is the liaison with Senor Frog's
19 and if you kick out Rose, you may be kicking out Senor
20 Frog's, and therefore you would have an empty space?
21 MR. SHEEHAN: Objection. Asked and
22 answered. We went through this whole thing.
23 THE WITNESS: Our understanding is a bit
24 different than that at this juncture.
25 ///

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1 direct relationship with Senor Frog's.
2 BY MR. VAN:
3 Q. Did you ever offer to pay anything for
4 that position?
5 A. Yes.
6 Q. How much?
7 MR. SHEEHAN: Again, these are settlement
8 discussions. I don't think they're admissible.
9 BY MR. VAN:
10 Q. I understand. Did you ever offer to pay
11 an amount?
12 A. Yes.
13 Q. How much did you offer to pay?
14 A. A quarter million.
15 Q. Who extended that offer?
16 A. I did.
17 Q. Who authorized that offer?
18 A. Phil Ruffin.
19 Q. Why did they offer to take that position?
20 A. I'm sorry?
21 Q. Why was that offer made?
22 A. In an effort to resolve this morass that
23 we find ourselves in.
24 Q. Okay. Wouldn't the easier resolution be
25 to just have them continue to pay because they've been

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1 BY MR. VAN:
2 Q. How do you have that understanding?
3 A. I think based on the circumstances leading
4 to the Fifth Amendment.
5 Q. Have you been having negotiations with
6 Senor Frog's directly regarding that space?
7 A. No.
8 Q. So you have had no discussions since the
9 execution of the Fifth Amendment with regard to that
10 space directly with Senor Frog's?
11 A. In terms of negotiating a new lease?
12 Q. Yes.
13 A. We have had no discussions with respect to
14 negotiating a new lease with Senor Frog's.
15 Q. Have you had any negotiations whatsoever
16 with Senor Frog's?
17 A. We attempted to once.
18 Q. What was the outcome of that attempt?
19 A. Rose blocked our proposed agreement with
20 Senor Frog's and told them not to execute it.
21 MR. SHEEHAN: We should get some context
22 about what we're talking about here, because I think
23 you two are on different pages. To clarify --
24 BY MR. VAN:
25 Q. When was that discussion?

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1 MR. SHEEHAN: What was it about is really
2 what you need to say.

3 THE WITNESS: The discussion was -- oh,
4 I'm sorry. I thought we already entered into one of
5 the exhibits. Apparently...

6 It involves the food -- the food
7 reimbursement issues.

8 BY MR. VAN:

9 Q. Tell me what the food reimbursement issues
10 are.

11 A. There was a letter dated January 2nd,
12 2015, that I'm not sure has been admitted. But it's
13 referenced in Exhibit 4.

14 Q. Tell me what that issue is.

15 A. Treasure Island, in order to assist the
16 operation in the space, assisted in purchasing and
17 storing the food items -- and I believe the liquor
18 items, but I'm not 100 percent on that -- required by
19 Senor Frog's. And all we do is we bill them at cost
20 so that they can take advantage of our bulk buying
21 power and our relationship with our vendors.

22 At some point in early January, late
23 February, they fell very far behind their bill
24 payments essentially. We were just billing the space
25 for the food. So we asked Rose to guarantee this

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1 300,000?

2 A. Eventually, yes.

3 Q. You say eventually. I mean, was that six
4 months later or a month later?

5 A. It took some time to get us back that
6 300,000. I don't know the exact timing, but it was
7 not immediate, no.

8 Q. And today when you're talking about
9 eventually today with regard to payment of -- strike
10 that.

11 Is it your understanding that if under the
12 terms of the Fifth Amendment to the lease, does Senor
13 Frog's have any obligation -- if you terminate the
14 underlying lease, do they have any obligation to
15 remain bound by the terms of the lease?

16 A. No.

17 Q. So they can walk away from the property?

18 A. They absolutely can.

19 Q. And you're okay with that?

20 A. I have no feeling about it one way or the
21 other.

22 Q. Wouldn't it make more sense then to allow
23 them to remain in the property?

24 A. I think we would negotiate with that in
25 mind, yes.

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1 money as the tenant, and they responded -- that is,
2 Elizabeth Gold wrote a letter that said we are not a
3 party to any agreement between -- regarding food
4 purchase.

5 And I spoke to Elizabeth about that, and I
6 said: "In that case, we're going to go ahead and
7 reach out and try to get an agreement with Frog's."
8 And we drafted an agreement and forwarded it over to
9 Elizabeth and Gary via e-mail to Elizabeth.

10 I may have misspoken. We may not have
11 sent it to Gary. We may have just sent it to his
12 counsel, to Elizabeth.

13 And we sent it over to Frog's for their
14 perusal. And what we got back was verbally them
15 telling us that Rose told them not to enter into
16 anything directly with us. So we were told that -- we
17 were kind of between a rock and a hard place. We were
18 doing this not out of any contractual requirement, but
19 just to assist their operation.

20 And we were hanging ourselves out there
21 for about -- I think about \$300,000 in food costs.
22 And we were told we're going to have no security on
23 that. So we cut off their food for a month, and we
24 didn't buy it anymore.

25 Q. Okay. And were you reimbursed the

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1 Q. Okay. Isn't right now -- if you were to
2 drop the litigation today, wouldn't we just still be
3 under the terms of the underlying lease?

4 A. Yes.

5 Q. And so you would continue to get paid
6 every month?

7 A. Yes.

8 Q. Okay. Are you aware of any instances
9 where Senor Frog's served alcohol to minors?

10 A. Yes.

11 Q. Tell me -- tell me what happened there.

12 A. Tell you what happened there?

13 Q. Yeah.

14 A. We have been informed of it several times.
15 However, in this business, you can't always trust what
16 you hear. So what we did was some time ago, without
17 Rose or Senor Frog's knowledge, we hired a secret
18 shopping agency to go and shop the space to make sure
19 they were complying with the laws. You know, this is
20 not Mexico. Las Vegas is not Mexico.

21 We found through that process that their
22 I.D. check procedures were in some cases nonexistent.
23 That they were observed in there offering or
24 serving -- back at that time, there was a lot of this
25 pouring stuff going around where the person in charge

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1 of the club that night would just take a bottle of
2 liquor and pour it into people's mouths.

3 Additionally, we've been informed by
4 employees and ex-employees of Senor Frog's that there
5 are frequently minors in the space, or there were
6 frequently minors in the space, which led to our
7 insistence on additional security and compliance with
8 local laws.

9 Q. You don't have any evidence that any of
10 that is valid; correct?

11 MR. SHEEHAN: Objection. He just answered
12 the question, the secret shopper.

13 THE WITNESS: Do we have any --

14 BY MR. VAN:

15 Q. Well, if you want me to -- okay. Secret
16 shopper. Did the secret shopper put minors in there
17 to buy alcohol?

18 A. No.

19 Q. Did the secret shopper card anyone who
20 purchased alcohol?

21 A. No.

22 Q. So the secret shopper didn't know if any
23 minors ever got alcohol?

24 A. Correct.

25 Q. Okay. Do you have any evidence of minors

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1 negotiating rent reductions when you informed Rose
2 that someone informed TI that Senor Frog's had been
3 serving alcohol to minors?

4 A. Possibly.

5 Q. Okay.

6 A. If so, it was not as a strategy in
7 negotiations. It was simply as a --

8 Q. Okay. Now, there was a complaint filed on
9 this with regard to the lease issue; correct?

10 A. What lease issue are we talking about?

11 Q. The nonpayment of rent issue that we're
12 here for today.

13 A. Yes.

14 Q. Who authorized the filing of the complaint
15 of that action?

16 A. I did.

17 Q. Did Mr. Ruffin authorize it as well?

18 A. Mr. Ruffin was informed about it. What do
19 you mean by authorize?

20 Q. Did he say okay? Do you have --

21 A. Yes. He said okay.

22 Q. So, I mean, do you have separate authority
23 to go out and file lawsuits on behalf of Treasure
24 Island without his knowledge?

25 A. No.

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1 ever having been served alcohol?

2 A. Nothing beyond hearsay evidence.

3 Q. Okay.

4 MR. SHEEHAN: Off the record.
5 (Discussion off the record.)

6 BY MR. VAN:

7 Q. What type of surveillance system does TI
8 have in that facility, in that property; do you know?
9 Do they have any?

10 A. Absolutely. I'm sorry. In the Treasure
11 Island property as a whole?

12 Q. No. In this property, in the --

13 A. Oh, in the Senor Frog's space?

14 Q. In the senor Frog's space.

15 A. No. We only monitor surveillance outside
16 of their property.

17 Q. Do you know what they have added on to
18 that property, what surveillance system exists right
19 now?

20 A. I cannot recall at this time.

21 Q. Do you know if the county or any
22 governmental agency has cited Senor Frog's for serving
23 alcohol to minors?

24 A. To my knowledge, nobody has.

25 Q. Okay. Were Rose and TI in the middle of

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1 Q. Okay. Are you aware of the fact that the
2 complaint was filed on the very same day that
3 Fennemore Craig sent the termination letter, which is
4 the very first letter that you've identified as
5 complying with the notice requirements in the lease?

6 A. Well, that's simply not true.

7 Q. Okay. What day was the complaint filed?

8 A. Oh, not that part.

9 Q. What day was the complaint filed?

10 A. I don't know.

11 Q. Okay. Had you spoken with Rose prior to
12 the filing of the complaint?

13 A. Yes.

14 Q. And isn't it true that there was
15 communications, and immediately there were checks sent
16 to you once they identified the problem?

17 A. No.

18 Q. Did you refuse receipt of any checks?

19 A. Yes.

20 Q. How often have you refused the receipts of
21 checks?

22 A. With respect to this instance?

23 Q. Yes.

24 A. Several times.

25 Q. Okay. So they have been trying to pay?

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1 MR. SHEEHAN: Objection. Foundation.
 2 THE WITNESS: Yes. Sure.
 3 BY MR. VAN:
 4 Q. And why is it that you have not accepted
 5 the money?
 6 A. We have.
 7 Q. Eventually?
 8 A. Eventually.
 9 Q. Okay. Why did you refuse money?
 10 A. We wanted to make sure that accepting the
 11 rent during the pendency of the litigation was not
 12 going to act as a waiver of our right to terminate --
 13 or to enforce the default.
 14 A Nevada Supreme Court case had been
 15 identified that suggested it was okay, but we were
 16 waiting for a specific nod from the Court.
 17 Q. And that's why you went to court, to get
 18 that nod?
 19 A. No.
 20 Q. Okay. Did you go to court to get --
 21 A. Yes.
 22 Q. Okay. Who filed that motion?
 23 A. I believe Fennemore Craig.
 24 Q. Okay. So you filed the motion. In the
 25 motion you cited the case law from the Supreme Court

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1 Q. Okay. And if Senor Frog's leaves and you
 2 leave and you're with an empty space, you're okay with
 3 that?
 4 A. I'd prefer if I didn't leave. But is that
 5 what you said, if I leave?
 6 Q. No. No. Senor Frog's -- you're okay if
 7 Rose leaves and Senor Frog's leaves, and you're okay
 8 if TI has a separate vacant spot on the strip?
 9 MR. SHEEHAN: Objection to the extent it
 10 calls for speculation.
 11 THE WITNESS: Again, I have no feeling one
 12 way or another about that.
 13 BY MR. VAN:
 14 Q. Why would you want to have empty space as
 15 opposed to have a tenant?
 16 A. It's not my job to fill that space.
 17 Q. Whose job is it?
 18 A. The general manager's. They identify the
 19 potential tenants. And then my job is to try to
 20 negotiate a good deal.
 21 Q. What other potential tenants have been
 22 identified for that space?
 23 A. None.
 24 Q. Why is it -- in fact, isn't it true that a
 25 wire transfer was sent to TI shortly after the

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1 that said we can take the money, so you wanted just --
 2 A. Declaratory relief, yes.
 3 Q. You wanted something that said we can take
 4 this money?
 5 A. Yes.
 6 Q. And it had been offered?
 7 A. Late, but, yes.
 8 Q. But it had continued to be offered?
 9 A. Yes.
 10 Q. And what was the purpose of filing the
 11 complaint?
 12 MR. SHEEHAN: Objection. Calls for a
 13 legal conclusion, and the document speaks for itself.
 14 BY MR. VAN:
 15 Q. Okay.
 16 A. The purpose of filing the complaint was to
 17 enforce our rights under the lease.
 18 Q. So you want Rose out?
 19 A. Yes.
 20 Q. Because you want to negotiate separately
 21 with Senor Frog's?
 22 A. Yes.
 23 Q. Because you can cut a better deal with
 24 Senor Frog's?
 25 A. I don't know that.

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1 complaint was filed?
 2 A. I believe so, yes.
 3 Q. In fact, it was on May 29th, and that was
 4 after the complaint was filed but before it was
 5 served; correct?
 6 A. I don't know the timing of the service.
 7 Q. Why did TI refuse Rose's second wire
 8 transfer on June 3rd for all of the amounts
 9 outstanding?
 10 A. We were still waiting for the declaratory
 11 judgment from the Court.
 12 Q. Okay. And then on -- did TI accept Rose's
 13 cashier's check on June 4th?
 14 A. I would presume not.
 15 Q. Okay. Who authorized the refusal of the
 16 payments?
 17 A. I advised them not to accept the payments.
 18 Q. Was Mr. Ruffin aware of that?
 19 A. I advised him that I would not accept the
 20 payments.
 21 Q. And what was his response to that?
 22 A. Okay.
 23 MR. SHEEHAN: Objection to the extent it
 24 calls for a legal conclusion -- I mean,
 25 attorney/client privilege. We've got the agreement.

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1 We're not waiving that. I've been kind of loose
2 but...
3 BY MR. VAN:
4 Q. You were aware of the fact that Rose
5 needed to make those payments; correct?
6 MR. SHEEHAN: Objection. Vague and
7 ambiguous. Calls for a legal --
8 BY MR. VAN:
9 Q. The payments that were wired to you, the
10 payments that were sent to you that you refused?
11 MR. SHEEHAN: Objection. Vague and
12 ambiguous. Calls for a legal conclusion.
13 THE WITNESS: Under the lease, yes.
14 BY MR. VAN:
15 Q. Did TI ever attempt to establish a new
16 method of accepting payments?
17 A. Compared to what?
18 Q. Did they ever agree to any other
19 proposed -- how did you receive your payments before
20 originally? Check? How?
21 A. I think we get them via check. You would
22 have to ask Mr. Griffis.
23 Q. Okay. Was there ever any proposal that it
24 be wired in or that anything else happen? Were there
25 ever any negotiations regarding that?

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1 A. Not that I was involved in, no.
2 Q. Was there ever an offer for an escrow
3 account?
4 A. Not that I'm aware of.
5 Q. Okay.
6 MR. SHEEHAN: Just for the record, are you
7 talking about the discussions between me and
8 Mr. Pisonelli (phonetic) to resolve the payment issue?
9 THE WITNESS: Oh, I'm sorry.
10 MR. SHEEHAN: And I don't even know if you
11 were even aware of that.
12 MR. VAN: No. I was asking if he was
13 aware there were offers being made to put monies into
14 an escrow account.
15 THE WITNESS: For the purpose of the
16 litigation. For the pendency of the litigation, yes.
17 Yes.
18 MR. VAN: Okay.
19 THE WITNESS: I'm sorry. I thought you
20 meant between the parties.
21 MR. SHEEHAN: And, again, that was
22 settlement discussions.
23 BY MR. VAN:
24 Q. Now, under the terms of the -- under the
25 terms of the lease, Rose was allowed to cure the

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1 default; correct?
2 A. Within ten days.
3 Q. Okay. Provided that they had proper
4 notice; correct?
5 MR. SHEEHAN: Objection. Calls for a
6 legal conclusion, and vague and ambiguous.
7 THE WITNESS: Rent was due when it was
8 due. Once it wasn't paid on that date, they had ten
9 days, yes. They were sent notice. They had ten days.
10 They failed to cure.
11 BY MR. VAN:
12 Q. Okay. I'm going to hand you something,
13 and then I'm going to go back through some documents.
14 And this is just -- I've created this. Actually Sam
15 created this.
16 A. Okay.
17 Q. And on left-hand side of this document, it
18 identifies Section 19.6 of the Lease Agreement. It
19 identifies the ways in which you can give notice.
20 And what I'd like to do is I'd like to go
21 through these letters, and the first one is Exhibit 3,
22 and that's a January 31st, 2012, letter, and you say
23 that should have been dated 2014.
24 A. Yes.
25 Q. And then Jerry Griffis -- I mean -- and

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1 the struggle I'm having -- Exhibit 3. Sorry.
2 The struggle I'm having with that is I've
3 never seen a two-year gap on one of those. I could
4 understand it going the other way. If this was a
5 January of 2014 -- if you're saying it should have
6 been January 2014, I can see it saying January 31st,
7 2013. You're talking about a two-year gap, and that's
8 why I'm struggling with that one.
9 But on that letter, the way it is written,
10 what I would like you to do is I'm handing you a pen,
11 and I'd like to -- there's a yes and no answer. And I
12 want to go through that letter and say was that letter
13 delivered by personal --
14 A. I'm sorry. Are you asking me to --
15 Q. No. No. I want you to go down that first
16 column that says January 31st, 2012. It's this column
17 right -- it's the second column over from the left.
18 A. No. Let me ask you what you want me to do
19 on this. Do you want me to circle things?
20 Q. Yeah. I'm going to go through this. In
21 that first box, it says by personal delivery --
22 MR. SHEEHAN: If you don't have the
23 knowledge --
24 BY MR. VAN:
25 Q. Do you know whether that letter was

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1 delivered --
 2 A. I do. It was not.
 3 Q. Okay. And what about by nationally
 4 recognized overnight courier?
 5 MR. SHEEHAN: This is the letter that
 6 Jerry Griffis sent out?
 7 MR. VAN: Jerry Griffis, yes.
 8 THE WITNESS: I'm not sure.
 9 BY MR. VAN:
 10 Q. Just go no. That's fine. If you don't
 11 know, that's fine. Just say I don't know, just no.
 12 A. I'm going to leave it blank.
 13 Q. You know what, put underneath that, put
 14 DN, don't know -- DK, don't know.
 15 A. Okay.
 16 Q. Okay. By facsimile, do you know if it
 17 went by facsimile?
 18 A. I believe it did not, but I don't know.
 19 Q. Okay. And again DK. Did it go by U.S.
 20 mail, registered or certified, certified mail?
 21 A. Yes.
 22 Q. Okay. And how do you know that?
 23 A. Because that's how we send out everything.
 24 Q. Okay. But the other letters that we have
 25 have the certified mailing numbers on them. This one

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1 A. It was not.
 2 Q. Okay. Was it sent by an overnight
 3 carrier?
 4 A. It was sent overnight, I think through
 5 USPS, though.
 6 Q. Okay. So that's fine. Then let's go down
 7 to -- then put no to the overnight carrier, and we'll
 8 get to yes on the registered mail. Not by facsimile?
 9 A. It was not sent by fax, no.
 10 Q. So yes to registered mail, and we've got
 11 the number there. Was it sent to Rose with Susan
 12 Mark -- whatever her name -- Markusch?
 13 A. No.
 14 Q. Okay. If you would mark that. Was it
 15 sent to Operadora?
 16 A. No.
 17 Q. Was it sent to the attorneys in Florida?
 18 A. It might have been sent to Operadora
 19 actually. I may have -- there was one letter I
 20 omitted a CC on. I think this was it.
 21 Q. Okay. You don't have any evidence of that
 22 today?
 23 A. Well, not today.
 24 Q. Okay. January 15th, 2015.
 25 MR. SHEEHAN: Which exhibit?

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1 does not.
 2 A. I think we have it back at the office.
 3 Q. Okay. If you know for sure, then that's
 4 fine. If you don't know, just put don't know.
 5 A. I'm going to go with a yes on that one.
 6 Q. Okay. And then was it sent to Rose
 7 attention Susan Markusch?
 8 A. No.
 9 Q. Okay. Was it sent to Operadora?
 10 A. No.
 11 Q. Okay. And was it sent to the attorneys in
 12 California, which may not --
 13 A. Florida.
 14 Q. -- matter if it's 2012, but it would
 15 matter if it was 2014.
 16 A. It wouldn't matter if it was 2014 either.
 17 Q. Why is that?
 18 A. Because this is January.
 19 Q. Okay. So it wouldn't matter either way.
 20 All right. So let's go to Exhibit No. 4
 21 then. Exhibit No. 4 is the letter dated July (sic)
 22 15th, 2015.
 23 A. Okay.
 24 Q. Now, do you know if that one was sent by
 25 personal delivery?

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1 MR. VAN: 4. Number 4.
 2 THE WITNESS: I'm going to put don't know.
 3 I'm changing my answer to don't know.
 4 BY MR. VAN:
 5 Q. All right. Let's go to the next one,
 6 Exhibit No. 5, May 14th letter. Was that sent to --
 7 was that sent via hand delivery?
 8 A. No.
 9 Q. Was it sent by --
 10 A. No.
 11 Q. -- overnight?
 12 A. No, it was not.
 13 Q. By facsimile?
 14 A. No.
 15 Q. Okay. By USPS?
 16 A. Yes.
 17 Q. Okay. Was it sent to Rose attention Susan
 18 Markusch?
 19 A. No.
 20 Q. Was it sent to Operadora?
 21 A. No.
 22 Q. Was it sent to Operadora's counsel?
 23 A. No.
 24 Q. All right. Let's go to No. 6. It's a
 25 May 28th letter. And this one is pretty clear at

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1 least. But that one went -- okay. It didn't go by
2 personal delivery. It didn't go by overnight. It
3 didn't go by fax, it doesn't appear.
4 It probably went by U.S. mail; correct?
5 A. I don't know.
6 Q. Okay. It appears to have gone by U.S.
7 mail. Did that go to Rose attention Susan Markusch?
8 A. No.
9 Q. Okay. Did that go to Operadora?
10 A. Yes.
11 Q. Did it go to Fieldstone?
12 A. Yes.
13 Q. Okay. Let's go to No. 7, which was
14 October 31st. Did that letter go personal delivery?
15 A. No.
16 Q. Did it go by an overnight carrier?
17 A. No.
18 Q. Did it go by facsimile?
19 A. No.
20 Q. Did it go by regular mail?
21 A. Well, registered certified overnight.
22 Yes.
23 Q. That's what I meant. Sorry. Did it go to
24 Susan Markusch?
25 A. Yes.

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1 Q. Did it go to Operadora?
2 A. Yes.
3 Q. And did it go to Anderson -- or what is
4 it, Arnstein & Lehr?
5 A. Yes.
6 Q. Okay. Then the last one is the
7 November 5th letter, 2015. That's No. 8. Did that
8 letter go personal delivery -- same questions.
9 Personal delivery, if you could just fill that out.
10 A. It did not go personal delivery. It did
11 not go via overnight courier. It did not go by fax.
12 It did go by registered certified overnight. It went
13 to Susan Markusch, it went to Operadora, and it went
14 to Arnstein & Lehr. There's still one more letter in
15 my pile.
16 Q. But that's the earlier -- that's a 2012
17 about the lien issues. It has nothing to do with
18 anything else.
19 Other than -- that one was sent to Susan
20 Markusch; right?
21 A. Yes, it was, and Operadora.
22 Q. Yes. Okay. And we will mark that as
23 Exhibit 10.
24 (Defendant's Exhibit 10 was marked.)
25 MR. VAN: Let's take a five-minute break.

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1 (A recess was taken.)
2 BY MR. VAN:
3 Q. Okay. Back on the record. Just to
4 clarify some points real quickly.
5 You recall that there was a point in time
6 where there was a request or there was a negotiation
7 where payment was going to be held in a separate
8 account, correct, an escrow account while we were
9 trying to figure out whether this affected --
10 A. I'm not sure there was even a negotiation.
11 I think it was a proposal.
12 Q. Okay. Was that ever accepted?
13 A. Not to my knowledge.
14 Q. Okay. And then you were the one that
15 drafted this lease; correct?
16 A. Elizabeth Gold and I drafted this lease.
17 Q. Okay. And as general counsel, do you --
18 you identified to TI that you were acting as TI's
19 lawyer when you notified Rose of the default under the
20 terms of the lease; correct?
21 MR. SHEEHAN: Objection. Vague.
22 Ambiguous.
23 BY MR. VAN:
24 Q. Were you acting as general counsel when
25 you notified Rose of its default under the terms of

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1 the lease?
2 A. Yes.
3 Q. Okay. As general counsel, do you have
4 separate malpractice insurance?
5 A. No.
6 Q. So assuming that the -- that the notice is
7 improper, wasn't properly sent, you haven't notified
8 anyone that you may have been at default for not
9 sending the notices properly with regard --
10 A. I may have been in default?
11 Q. You may have been -- sorry. You may have
12 improperly sent notices of the notice of default.
13 A. I don't understand the question.
14 Q. Okay. Have you advised anyone that your
15 notice of default didn't properly notice the right
16 parties?
17 A. No.
18 Q. Okay. Have you advised Mr. Ruffin that
19 the notice of default didn't go to the right parties,
20 the original one?
21 MR. SHEEHAN: Objection to the extent it
22 calls for attorney/client privilege and instruct you
23 not to answer.
24 MR. VAN: You're instructing him not to
25 answer that?

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1 MR. SHEEHAN: Yes.
 2 BY MR. VAN:
 3 Q. Okay. Based upon your prior testimony,
 4 the notices of default were not properly sent
 5 consistent with the terms of the lease; correct?
 6 MR. SHEEHAN: Objection. Mischaracterizes
 7 his testimony. It doesn't paint the full story.
 8 THE WITNESS: The notices of default --
 9 the original notice of default that was sent, that is
 10 the ten-day notice, was not sent in accordance with
 11 the written document.
 12 MR. VAN: Okay. I don't have anything
 13 else. Do you have anything?
 14 MR. SHEEHAN: No.
 15 MR. VAN: Okay. Thanks.
 16 THE REPORTER: Mr. Sheehan, do you want a
 17 copy?
 18 MR. SHEEHAN: No, I don't.
 19 (Discussion off the record.)
 20 MR. SHEEHAN: Yes, I do want a copy.
 21 (Thereupon, the deposition concluded at
 22 12:09 p.m.)
 23 * * * * *

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1 CERTIFICATE OF REPORTER
 2 STATE OF NEVADA)
 3) ss:
 4 COUNTY OF CLARK)
 5 I, Gayle Szelinski, a duly commissioned Notary
 6 Public, Clark County, State of Nevada, do hereby
 7 certify: That I reported the deposition of Brad
 8 Anthony, commencing on Wednesday, March 30, 2016, at
 9 10:01 a.m.
 10 That prior to being deposed, the witness was duly
 11 sworn by me to testify to the truth, the whole truth,
 12 and nothing but the truth.
 13 That I thereafter transcribed my said shorthand
 14 notes into typewriting and that the typewritten
 15 transcript is a complete, true and accurate
 16 transcription of my said shorthand notes taken down at
 17 said time.
 18 During the deposition, the deponent was advised of
 19 the opportunity to read and sign the deposition
 20 transcript. Under Rule 30 the deponent will be
 21 notified by letter of the availability to read and sign
 22 the transcript.
 23 I further certify that I am not a relative or
 24 employee of counsel of any of the parties, nor a
 25 relative or employee of the parties involved in said
 action, nor a person financially interested in the
 action.
 Dated this 13th day of April, 2016.

Gayle Szelinski
 GAYLE SZELINSKI, CCR No. 5854

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1 CERTIFICATE OF DEPONENT
 2 PAGE LINE CHANGE REASON
 3 _____
 4 _____
 5 _____
 6 _____
 7 _____
 8 _____
 9 _____
 10 _____
 11 _____
 12 _____
 13 _____
 14 _____
 15 _____
 16 _____
 17 * * * * *
 18 DECLARATION OF DEPONENT
 19 I, Brad Anthony, deponent herein, do hereby
 20 declare under penalty of perjury the within and
 21 foregoing transcription to be my deposition in said
 22 action; that I have read, corrected and do hereby affix
 23 my signature to said deposition this ____ day of
 24 _____, 2016.
 25 _____
 BRAD ANTHONY, Deponent

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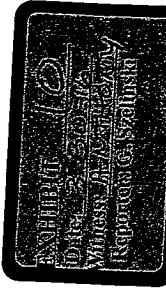
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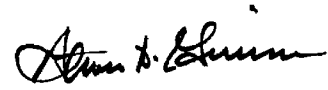
EXHIBIT 24



Deposition of Brad Anthony, Esq. - Treasure Island v. Rose - March 30, 2015

Section 19.6 of the Lease Agreement	January 31, 2012 Letter	January 15, 2015 Letter	May 14, 2015 Letter	May 28, 2015 Letter	October 31, 2015 Letter	November 5, 2015 Letter
By Personal Delivery	Yes / <u>No</u>	Yes / <u>No</u>	Yes / <u>No</u>	Yes / <u>No</u>	Yes / <u>No</u>	Yes / <u>No</u>
By Nationally Recognized Overnight Courier service	Yes / No DK	Yes / <u>No</u>	Yes / <u>No</u>	Yes / No	Yes / <u>No</u>	Yes / <u>No</u>
By Facsimile	Yes / No DL	Yes / <u>No</u>	Yes / <u>No</u>	Yes / No	Yes / <u>No</u>	Yes / <u>No</u>
US Mail, registered or certified	<u>Yes</u> / No	<u>Yes</u> / No	<u>Yes</u> / No	Yes / No	<u>Yes</u> / No	<u>Yes</u> / No
Sent to Rose with attention to Susan Markusch	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>
Sent to Operatora Andersons in Cancun, Mexico	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u> DL	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>
Section 11 of the 5th Amendment						
Operatora Andersons' Attorney in Florida	N/A	Yes / No DL	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>	<u>Yes</u> / <u>No</u>

EXHIBIT 25



CLERK OF THE COURT

MPOR
FENNEMORE CRAIG, P.C.
 Patrick J. Sheehan
 Nevada Bar #3812
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 Email: psheehan@fclaw.com
Attorney for Plaintiff, Treasure Island

DISTRICT COURT**CLARK COUNTY, NEVADA**

TREASURE ISLAND, LLC, a Nevada
 limited liability company,

Plaintiff,

vs.

ROSE, LLC, a Nevada limited liability
 company,

Defendant.

ROSE, LLC, a Nevada limited liability
 company,

Counterclaimant,

vs.

TREASURE ISLAND, LLC, a Nevada
 limited liability company,

Counterdefendant.

CASE NO.: A-15-719105-B

DEPT. NO.: XXIX

**MOTION FOR PROTECTIVE ORDER
 REGARDING THE DEPOSITION OF
 PHILLIP G. RUFFIN**

Plaintiff, Treasure Island, LLC ("Treasure"), hereby moves the court for a protective order with respect to the Notice of Videotape Deposition of Phillip G. Ruffin ("Ruffin") in this matter. The Motion is based upon relevance grounds, the Apex doctrine, the Affidavit of Brad Anthony

10902585.1/039472.0001

1 attached and the following Memorandum of Points and Authorities.

2 Dated this 13th day of October, 2015.

3 FENNEMORE CRAIG, P.C.

4
5 By: /s/ Patrick J. Sheehan
6 Patrick J. Sheehan (Bar No. 3812)
7 John H. Mowbray (Bar No. 1140)
8 1400 Bank of America Plaza
9 300 South Fourth St. 14th Floor
10 Las Vegas, NV 89101
11 *Attorneys for Treasure Island, LLC*

12 **NOTICE OF MOTION**

13 TO: ALL ATTORNEYS AND THEIR ATTORNEYS OF RECORD

14 PLEASE TAKE NOTICE that on the 13 day of Novmeber, 2015, the
15 undersigned will bring the foregoing **MOTION FOR PROTECTIVE ORDER REGARDING**
16 **THE DEPOSITION OF PHILLIP G. RUFFIN** for hearing in Department XXIX of the above-
17 entitled Court at the hour of In Chambers, ~~at xx:xx~~ of said day, or as soon thereafter as
18 counsel may be heard.

19 Dated this 13th day of October, 2015.

20 FENNEMORE CRAIG, P.C.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS.

On or about April 13, 2011 Plaintiff Treasure Island, entered into a lease with Defendant, Rose, LLC ("Rose"). Pursuant to the terms of the lease, Treasure Island leased space to Rose inside the Treasure Island Hotel and Casino in Las Vegas, Nevada. One of the obligations of Rose under the Lease was to pay rent in two forms. The first, minimum monthly rent, the second in an amount equal to 7% of gross sales.

Regarding the latter, the Lease provided that the rent for gross sales would be paid pursuant to a certain formula and that within 30 days of the end of each calendar year during the lease term, the tenant (ROSE), would deliver to landlord a writing setting forth the amount of tenant's gross sales made during each month of the preceding calendar quarter and concurrently therewith, pay the landlord the percentage rent due and payable for the preceding calendar quarter. The Lease further provided for default interest on any rents and other charges to be paid by tenant to landlord if the same were not paid following a ten (10) day notice from the landlord.

Rose breached the Lease and its obligation to pay the 7% gross sales portion of the rent for the first quarter of 2015. As a result, on May 14, 2015, Treasure Island sent Rose a notice of default. Despite the obligations to pay the rent under the Lease, and despite the notice of default to pay the rent, Rose failed and refused to pay the same.

As a result of this breach of lease, Treasure Island sent a letter purportedly terminating the party's Lease. However, Rose disputes that Treasure Island had the ability to terminate the Lease claiming that one or more notices were defective. As a result, this litigation has been filed and in effect, both sides seek declaratory relief as to whether the Lease was properly terminated. The parties have recently filed the case conference report and have begun the discovery phase of the case. As part of the discovery, Defendant has noticed depositions of the person most knowledgeable for Treasure Island and in addition, Phillip Ruffin. Plaintiff has noticed the deposition of Gary Dragul, the President of Defendant Rose.

In reality, it is only Mr. Dragul and possibly Rose's counsel, Elizabeth Gold, who were

involved in the termination of the Lease on the Rose, LLC side. Similarly, for Treasure Island, the only person was Brad Anthony. These were the only individuals that exchanged any correspondence communicated in the past with respect to the issues concerning notices, breaches and the termination of the Lease. Indeed, the issues involved in the termination of the Lease are pretty simple and in all likelihood, will involve this Court making a legal determination based on undisputed facts. Rose subleased the space to an entity called Senior Frogs and the deposition of the person most knowledgeable from Senior Frogs may also be relevant. However, that is the extent of the relevant people. Certainly, Mr. Ruffin the owner of Treasure Island does not have any relevant information regarding this matter. He never communicated in any form with anyone from Rose about the termination. Although he may have had communications with his in-house counsel about the events surrounding the termination, he can provide no first person factual information relevant to this case.

The case will revolve around the parties' lease, the parties communications concerning the same, the notices and communications concerning the alleged breach of the Lease (there is actually no dispute the payment was not made pursuant to the terms of the Agreement) and issues related to the subtenant. Mr. Ruffin had no involvement in any of that as Brad Anthony and possibly, to a small extent, an accountant by the name of Jerry Griffis handled those issues for Treasure Island. As a result, Plaintiff seeks the protective order for Mr. Ruffin since he has no relevant information. In addition, his deposition is protected by the Apex doctrine since Brad Anthony can answer any and all questions upon which Mr. Ruffin would have any knowledge.

II. RUFFIN'S DEPOSITION SHOULD NOT BE ALLOWED SINCE HE HAS NO RELEVANT INFORMATION AND FURTHERMORE, UNDER THE APEX DOCTRINE.

Pursuant to NRCP 26, a party may only take discovery where it may lead to the discovery of relevant information. In this case, the relevant information concerns (a) whether Defendant met its rental payment obligations under the lease, (b) whether Treasure Island had the ability to terminate the parties' Lease following the failure to meet its rental obligations pursuant to the

1 leases and (c) the Notice and Right to Cure provisions in the parties' Agreement and
2 communications related to the same. Thus, only persons who have direct knowledge of whether
3 the payments were made, participated in the communications between the parties involving any
4 defaults or notices would have relevant information. It is Brad Anthony, the general counsel for
5 Treasure Island and Jerry Griffiths, an accountant, who are the persons from Treasure Island who
6 conducted all communications concerning Rose and/or Senior Frogs breach of the lease. Mr.
7 Ruffin did not have any direct communications with Rose concerning any breaches of the Lease
8 or the notices. He did not prepare the notices or have any involvement in the preparation of the
9 notices. As a result, he cannot provide any relevant information to this case.

11 Furthermore, Mr. Ruffin is the owner of Treasure Island. Accordingly, he is a person
12 protected by the Apex doctrine. Under the Apex doctrine, a court must determine whether to
13 allow the deposition of a high level executive based on (1) whether the opponent has unique first-
14 hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking
15 the deposition has exhausted other less intrusive discovery methods. *Apple, Inc. v. Samsung*
16 *Electronics Co. Ltd.*, 282 F.R.D. 259 (U.S.D. Ct. 2012). In this case, Mr. Ruffin has no unique
17 first-hand, non-repetitive knowledge of the facts. The Defendants have not taken the deposition of
18 Brad Anthony, who was the person actually involved in the communications involving any
19 breaches and the notices. Thus, all the information that Mr. Ruffin could possibly provide, can all
20 be provided by Brad Anthony. Pursuant to the Apex Rule, it is at least incumbent on Rose to
21 first, take Mr. Anthony's deposition and then show that there is any information Mr. Ruffin can
22 provide which Mr. Anthony could not.

25 **III. CONCLUSION.**

26 For the above and foregoing reasons Plaintiff requests that a protective order be issued to
27 prevent the deposition of Mr. Ruffin without a further showing that Mr. Ruffin could provide any
28

1 information relevant to this matter that Mr. Anthony did not provide.

2 Dated this 13th day of October, 2015.

3

FENNEMORE CRAIG, P.C.

4

5

By: /s/ Patrick J. Sheehan

6

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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 October 13, 2015, service of the MOTION FOR PROTECTIVE ORDER REGARDING THE DEPOSITION OF PHILLIP G. RUFFIN 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**

Fennemore Craig Jones Vargas

Contact	Email
Patrick J. Sheehan	psheehan@fdaw.com

Fennemore Craig, P.C.

Contact	Email
Adam Miller	amiller@fdaw.com
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PS Lit	lit@pisanellibice.com
Shannon Thomas	smt@pisanellibice.com

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

EXHIBIT 26


CLERK OF THE COURT

1 **ACTC**
James J. Pisanelli, Esq., Bar No. 4027
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6 *Attorneys for Rose, LLC*

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

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

11 Plaintiff,

12 v.

13 ROSE, LLC, a Nevada limited liability
company,

14 Defendant.

Case No.: A-15-719105-B

Dept. No.: XI

**DEFENDANT'S FIRST AMENDED
COUNTERCLAIM**

15 ROSE, LLC, a Nevada limited liability
company,

16 Counterclaimant,

17 v.

18 TREASURE ISLAND, LLC, a Nevada
limited liability company,

19 Counterdefendant.
20
21

22 **FIRST AMENDED COUNTERCLAIM**

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

24 **PARTIES**

25 1. Rose is a Nevada limited liability company.

26 2. Rose is informed and believes and thereon alleges that Counterdefendant
27 Treasure Island, LLC ("Treasure Island") is a Nevada limited liability company.
28

GENERAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 18. Despite this, Treasure Island sent correspondence to Rose on or about May 28,
24 2015, purporting to terminate the Lease ("Alleged Termination"). However, like the Alleged
25 Breach Notice, the Alleged Termination failed to comply with the notice requirements of
26 Section 19.6.

27 19. Treasure Island filed its Complaint against Rose that same day.
28

1 20. Rose is informed and believes that Ruffin was the ultimate decision-maker behind
2 the Alleged Breach Notice and the Alleged Termination. Rose is informed and believes that
3 Ruffin was uninformed or otherwise failed to cross-check Treasure Island's notice practices and
4 the terms of the Lease.

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

8 **D. Treasure Island Commits Additional Breaches of the Lease.**

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

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

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

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

21 **FIRST CAUSE OF ACTION**

22 **(Breach of Contract)**

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

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

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

28

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

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

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

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

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

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

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

SECOND CAUSE OF ACTION

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

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

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

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

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

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

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

(Declaratory Judgment)

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

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

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

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

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

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

WHEREFORE, Rose prays for judgment as follows:

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

- 1 2. For a declaratory judgment finding that:
- 2 (a) Treasure Island's Alleged Breach Notice and Alleged Termination are
- 3 invalid;
- 4 (b) Rose has not defaulted under the Lease;
- 5 (c) The Lease between the parties' remains in effect.
- 6 3. For a temporary and permanent injunction precluding Treasure Island from
- 7 moving forward with terminating the Lease and denying Rose its leasehold interests in the
- 8 Premises.
- 9 4. An award of reasonable costs and attorneys' fees;
- 10 5. Prejudgment and post-judgment interest on the foregoing sums at the highest rate
- 11 permitted by law; and
- 12 6. Any additional relief this Court deems to be just and proper on the evidence
- 13 presented at trial.

14 DATED this 16th day of November, 2015.

15 PISANELLI BICE PLLC

16

17 By: /s/ Jarrod L. Rickard

18 James J. Pisanelli, Esq., Bar No. 4027

19 Jarrod L. Rickard, Esq., Bar No. 10203

 400 South 7th Street, Suite 300

 Las Vegas, Nevada 89101

20 *Attorneys for Rose, LLC*

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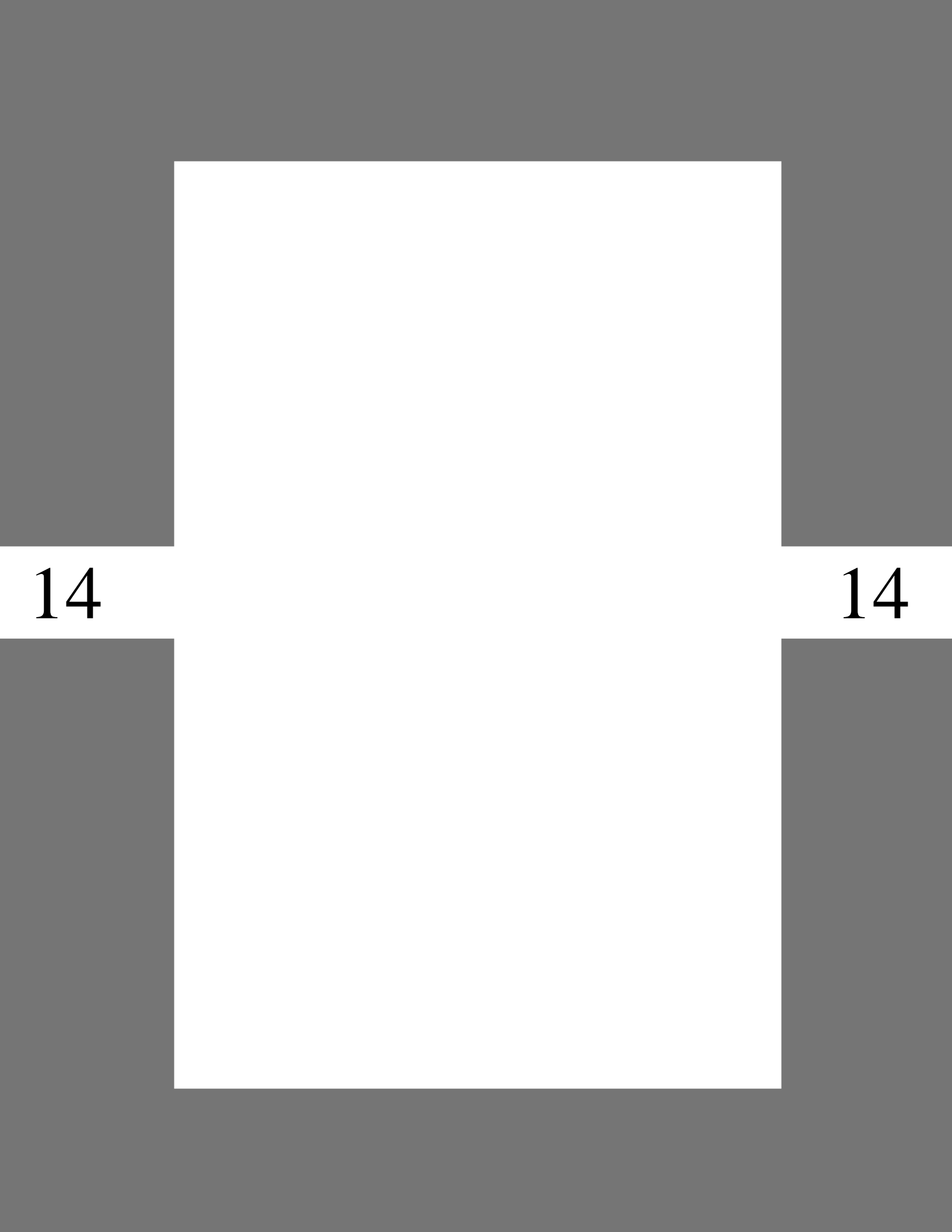
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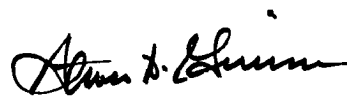
/s/ Shannon Thomas
An employee of PISANELLI BICE PLLC



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CLERK OF THE COURT

SHUMWAY VAN
MICHAEL C. VAN, ESQ.
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Attorneys for Defendants/Counterclaimants

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada
limited liability company,

Plaintiff

v.

ROSE, LLC, a Nevada limited liability
company,

Defendant

ROSE, LLC, a Nevada limited liability
company,

Counterclaimant

v.

TREASURE ISLAND, LLC, a Nevada
limited liability company,

Counterdefendant

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

CERTIFICATE OF SERVICE FOR
DEFENDANT/COUNTERCLAIMANT'S
TRIAL BRIEF

...

...

...

...

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2016, that the foregoing, **DEFENDANT/COUNTERCLAIMANT'S TRIAL BRIEF**, was served to all parties listed on the master service list in accordance with the Electronic Service and Filing Order created in this matter.

SHUMWAY VAN



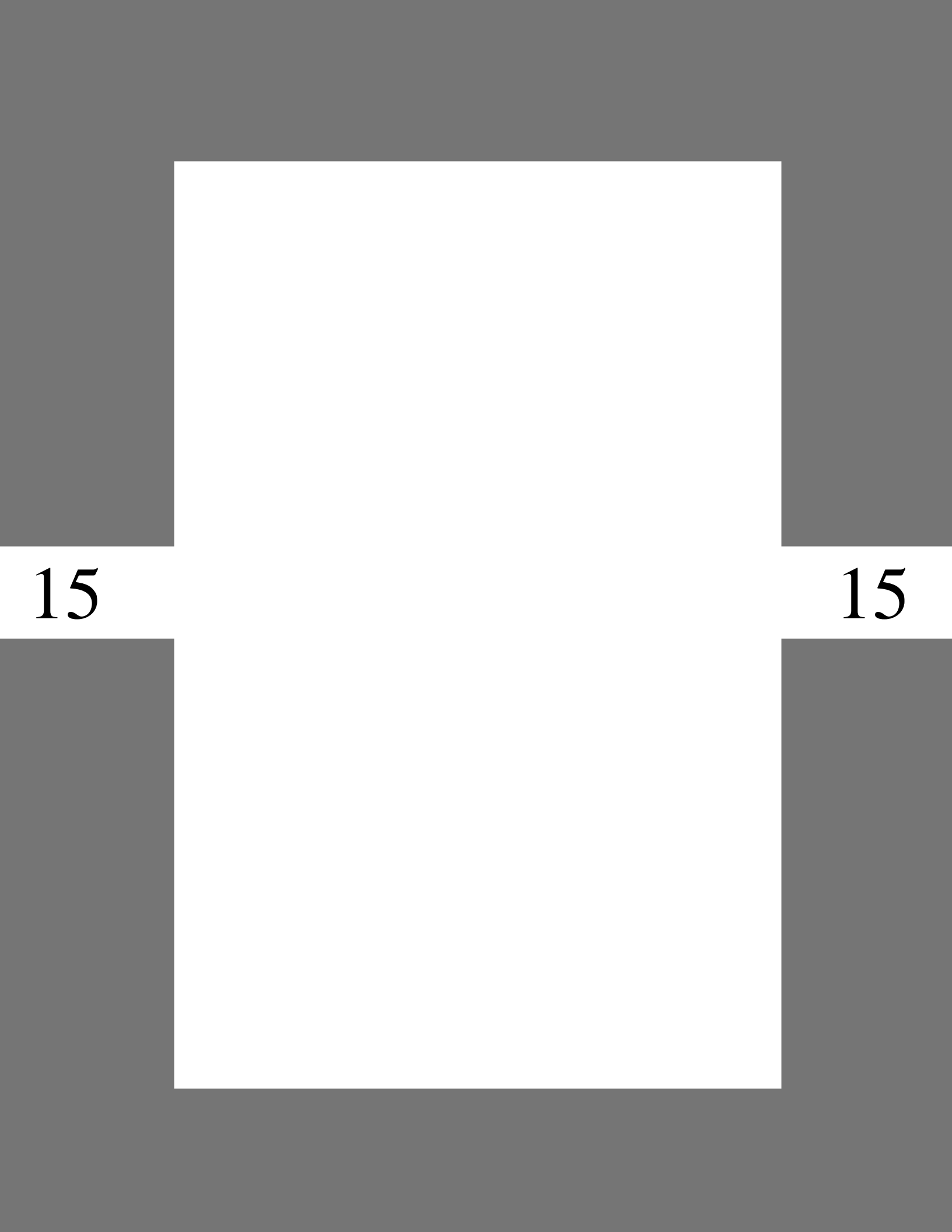
By: _____
Employee of Shumway Van

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15

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PMEM

FENNEMORE CRAIG, P.C.

Patrick J. Sheehan, Esq. (Bar No. 3812)

John H. Mowbray, Esq. (Bar No. 1140)

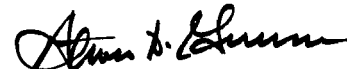
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*Attorneys for Treasure Island, LLC*Electronically Filed
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CLERK OF THE COURT

DISTRICT COURT**CLARK COUNTY, NEVADA**TREASURE ISLAND, LLC, a Nevada limited
liability company;

Plaintiff,

vs.

ROSE, LLC, a Nevada limited liability
company;

Defendant.

ROSE, LLC, a Nevada limited liability
company,

Counterclaimant,

vs.

TREASURE ISLAND, LLC, a Nevada limited
liability company,

Counterdefendant.

CASE NO.: A-15-719105-B

DEPT.: XI

JOINT PRETRIAL MEMORANDUM

Patrick J. Sheehan, Esq., of the law firm Fennemore Craig, P.C., counsel for Plaintiff and Samuel A. Marshall, Esq., of the law firm Shumway Van, counsel for Defendant/Counterclaimant hereby submit their Joint Pre-Trial Memorandum.

...

1 **I. BRIEF STATEMENT OF FACTS**

2 This case involves a claim by Treasure Island, LLC that Rose, LLC breached its lease and
3 Treasure Island had the right to terminate the lease. Further that Treasure Island did in fact
4 terminate the parties lease.

5 Rose, LLC disputes that Treasure Island had the right to terminate the lease. It alleges that
6 the notice provided by Treasure Island, LLC advising Rose, LLC of the default and opportunity to
7 cure was deficient and that it failed to include certain parties including the subtenant.

8 **II. CLAIMS FOR RELIEF**

9 Plaintiff seeks declaratory relief that the lease has been terminated. It originally sought
10 lease monies and retains the right to seek additional lease monies if it suffers additional damages.
11 However, the tenant is current on the lease pursuant to this Court's earlier Order.

12 The Defendant/Counterclaimant alleges that Treasure Island had no right to terminate the
13 lease and seeks declaratory judgment that the lease has not been terminated, that Treasure Island
14 breached the agreement without providing proper notice, and TI breached the agreement by not
15 accepting Rose's rent monies and attempting to establish an alternate method of its acceptance of
16 Rose's monthly payments.

17 **III. AFFIRMATIVE DEFENSES**

18 Defendant/Counterclaimant Rose, LLC, alleges the following affirmative defenses:

- 19 1. The Complaint fails to state a claim upon which relief can be granted.
- 20 2. Treasure Island's claims are barred by the doctrine of waiver.
- 21 3. Treasure Island's claims are barred by the doctrine of unclean hands.
- 22 4. Treasure Island's claims are barred by the doctrine of estoppel.
- 23 5. Treasure Island's claims are barred by the parole evidence rule.
- 24 6. Treasure Island's claims are barred by the statute of frauds.
- 25 7. Treasure Island has failed to satisfy a condition precedent for its claims.
- 26 8. Treasure Island's claims are barred by the fact that it is in breach of the parties'
27 agreement.
- 28 9. Treasure Island's claims are barred because its damages, if any, were caused by its

1 own conduct.

2 10. Treasure Island's claims are barred by the doctrine of prevention of performance.

3 11. Treasure Island has failed to act in a commercially reasonable manner.

4 12. Rose deserves the right to amend this Answer to assert additional affirmative
5 defenses as they are discovered or determined.

6 Plaintiff/Counterdefendant Treasure Island, LLC, alleges the following affirmative
7 defenses:

8 1. The counterclaim fails to state a claim upon which relief can be granted.

9 2. The counterclaims are barred under the doctrines of waiver laches and estoppel.

10 3. The claims are barred on the doctrine of unclean hands.

11 4. The counterclaims are barred due to the fact that it is in breach of the parties'
12 agreement.

13 **IV. CLAIMS OR DEFENSES TO BE ABANDONED**

14 No claims or defenses are to be abandoned at this time.

15 **V. EXHIBITS**

16 Plaintiff/Counterdefendant Treasure Island, LLC's list of exhibits:

17 1. Lease Agreements.

18 2. Letter from Griffis to Dragul dated January 31, 2012 [TILLC000001].

19 3. Letter from Kahn to California Service Center dated May 3, 2012 with sight plans
20 [TILLC000002 – TILLC000004].

21 4. Letter from Anthony to Rose, LLC dated August 31, 2012 [TILLC000005 –
22 TILLC000006].

23 5. Letter from Anthony to Rose, LLC dated September 19, 2012 [TILLC000007 –
24 TILLC000008].

25 6. Letter from Gold to Treasure Island, LLC dated September 26, 2012
26 [TILLC000009 – TILLC000010].
27
28

- 1 7. Unsigned letter from Griffis to Dragul dated November 12, 2012 [TILLC000011].
- 2 8. Letter from Anthony to Rose, LLC dated May 10, 2013 [TILLC000012 –
- 3 TILLC000014].
- 4 9. Letter dated November 12, 2013 from Meade to Treasure Island, LLC and Senior
- 5 Frogs [TILLC000015 – TILLC000016].
- 6 10. Two page email change regarding Bang the Drum All Day, cease and desist
- 7 [TILLC000017 – TILLC000018].
- 8 11. Letter from Kim to Solomon dated June 12, 2014 [TILLC000019].
- 9 12. Letter from Williams to Gary Dragul dated August 13, 2014 [TILLC000020].
- 10 13. Letter dated September 17, 2014 from Anthony to Andrew Solomon
- 11 [TILLC000021 – TILLC000023].
- 12 14. September 22, 2014 USPS tracking invoice [TILLC000024].
- 13 15. Letter from Griffis to Rose, LLC dated January 2, 2015 [TILLC000025].
- 14 16. Letter dated January 7, 2015 from Gold to Treasure Island, LLC, attention Griffis
- 15 [TILLC000026].
- 16 17. Letter dated January 15, 2015 from Anthony to Dragul [TILLC000027 –
- 17 TILLC000028].
- 18 18. Letter dated May 14, 2015 from Anthony to Dragul [TILLC000029 –
- 19 TILLC000030].
- 20 19. Letter dated May 29, 2015 from Dragul to Kahn and Anthony [TILLC000031 –
- 21 TILLC000032].
- 22 20. Facsimile transmission from Rose, LLC to Treasure Island, LLC, attention Brad
- 23 Anthony, six pages [TILLC000033 – TILLC000038].
- 24 21. Amended Sublease [TILLC000039 – TILLC000082].
- 25
- 26
- 27
- 28

1 22. May 28, 2015 letter noticing termination of lease and Fed Ex delivery
2 confirmations [TILLC000083 – TILLC000091].

3 23. Delivery confirmation from USPS for October 30, 2015 letter sent to Mexico
4 [TILLC000092 – TILLC000093].

5 24. December 23, 2015 Letter from Susan E. trench re: "Loan Repayment" letter
6 [TILLC000094].

7 25. March 21, 2016 Letter from Susan Trench re: Loan Repayment [TILLC000095].

8 26. Fed Ex Tracking for May 14, 2015 Default Letter [TILLC000096]

9 27. June 1, 2015 Email from Abigail Watts-FitzGerald to Patrick Sheehan
10 [TILLC000097].

11 Defendant/Counterclaimant Rose, LLC's list of exhibits:

12 1. Lease Agreement between Treasure Island, LLC and Rose, LLC, dated April 13,
13 2011, attached hereto in electronic format and identified as ROSE000000I through
14 ROSE000030;

15 2. First Amendment to Lease Agreement between Treasure Island, LLC and Rose,
16 LLC, dated October 10, 2011, attached hereto in electronic format and identified as ROSE000031
17 through ROSE000032;

18 3. Second Amendment to Lease Agreement between Treasure Island, LLC and Rose,
19 LLC, dated December 22, 2011, attached hereto in electronic format and identified as
20 ROSE000033;

21 4. Third Amendment to Lease Agreement between Treasure Island, LLC and Rose,
22 LLC, dated April 20, 2012, attached hereto in electronic format and identified as ROSE000034
23 through ROSE000035;

24 5. Fourth Amendment to Lease Agreement between Treasure Island, LLC and Rose,
25

26 PSHEEHAN/11521175.1

1 LLC, dated April 18, 2013, attached hereto in electronic format and identified as ROSE000036
2 through ROSE000038;

3 6. Fifth Amendment to Lease Agreement between Treasure Island, LLC and Rose,
4 LLC, dated April 30, 2014, attached hereto in electronic format and identified as ROSE000039
5 through ROSE000043;

6 7. Subordination, Non-Disturbance and Attorney Agreement between Rose, LLC and
7 Senor Frogs Las Vegas, LLC, dated May 6, 2014, attached hereto in electronic format and
8 identified as ROSE000044 through ROSE000051;

9 8. Correspondence dated May 28, 2015, from Brenoch R. Wirthlin, Esq. to Gary J.
10 Dragul regarding Termination of Lease, attached hereto in electronic format and identified as
11 ROSE000052;

12 9. Correspondence dated May 29, 2015, from Gary J. Dragul to Najam Khan and
13 Brad Anthony, Esq. regarding Treasure Island Lease Notice, attached hereto in electronic format
14 and identified as ROSE000053 through ROSE000062;

15 10. Correspondence with attachments and fax confirmation dated June 3, 2015, from
16 Gary J. Dragul to Najam Khan, and shipping label with June rent check payment and identified as
17 ROSE000063 through ROSE000070;

18 11. Correspondence with attachments and fax confirmation dated June 3, 2015, from
19 Gary J. Dragul to Najam Khan, cc: Brad Anthony, and shipping label with June rent check
20 payment to Jerry Griffis, regarding Treasure Island Payment Notice, attached hereto in electronic
21 format and identified as ROSE000071 through ROSE000078;

22 12. Refusal of FedEx delivery of June rent check to Jerry Griffis, dated June 4, 2015,
23 attached hereto in electronic format and identified as ROSE000079;

24 13. Refusal of FedEx delivery of June 3, 2015 correspondence to Brad Anthony, dated
25

1 June 4, 2015, attached hereto in electronic format and identified as ROSE000080;

2 14. Refusal of FedEx delivery of June 3, 2015 correspondence to Najam Khan, dated
3 June 4, 2015, attached hereto in electronic format and identified as ROSE000081;

4 15. Correspondence dated October 31, 2015, from Brad R. Anthony to Susan
5 Markusch regarding Percentage Rent, with Certified Mail envelope dated October 30, 2015,
6 attached hereto and identified as ROSE000082 through ROSE000083;

7 16. Copy of check no. 6451, in the amount of \$168,127.00, made payable to Treasure
8 Island, LLC from Rose, LLC, dated October 30, 2015, attached hereto and identified as
9 ROSE000084;

10 17. Email correspondence between Brad Anthony, Gary Dragul, and Najam Khan,
11 dated March 5, 2014, attached hereto and identified as ROSE000085 through ROSE000086;

12 18. Email correspondence between Brad Anthony and Elizabeth Gold, dated April 24,
13 2014, attached hereto and identified as ROSE000087;

14 19. Email correspondence between Brad Anthony and Elizabeth Gold, dated April 25,
15 2014, attached hereto and identified as ROSE000088 through ROSE000089;

16 20. Email correspondence between Brad Anthony and Elizabeth Gold, dated April 25,
17 2014, attached hereto and identified as ROSE000090;

18 21. Email correspondence between Elizabeth Gold and Gary Dragul, dated July 2,
19 2015, attached hereto and identified as ROSE000091 through ROSE000093;

20 22. Email correspondence between Brad Anthony and Elizabeth Gold, dated
21 December 16, 2011, attached hereto and identified as ROSE000094;

22 23. Email correspondence between Brad Anthony and Elizabeth Gold, dated March
23 12, 2014, attached hereto and identified as ROSE000095 through ROSE000097;

24 24. Email correspondence between Brad Anthony and Elizabeth Gold, dated March
25

19, 2014, attached hereto and identified as ROSE000098 through ROSE000100;

25. Email correspondence between Brad Anthony, Elizabeth Gold, and Gary Dragul,
dated March 25, 2014, attached hereto and identified as ROSE000101 through ROSE000103;

26. Email correspondence between Brad Anthony and Elizabeth Gold, dated April 4,
2014, attached hereto and identified as ROSE000104;

27. Email correspondence between Brad Anthony and Elizabeth Gold, dated April 7,
2014, attached hereto and identified as ROSE000105 through ROSE000106;

28. Email correspondence between Brad Anthony and Elizabeth Gold, dated April 15,
2014, attached hereto and identified as ROSE000107 through ROSE000108;

29. Email correspondence between Brad Anthony and Elizabeth Gold, dated April 25,
2014, attached hereto and identified as ROSE000109 through ROSE000110;

30. Email correspondence between Brad Anthony, Elizabeth Gold, and Gary Dragul,
dated April 21, 2014, attached hereto and identified as ROSE000111;

OBJECTIONS TO EXHIBITS

The parties have stipulated to the authenticity of all exhibits, but have reserved all other proper objections, including objections to lack of foundation, admissibility and relevancy, to the listed exhibits as well as all other evidence.

VI. AGREEMENTS AS TO THE LIMITATION OR EXCLUSION OF EVIDENCE

None.

VII. WITNESSES

Plaintiff/Counterdefendant's List of Witnesses:

1. Brad Anthony
c/o Patrick J. Sheehan
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101.

2. Jerry Griffis

c/o of Patrick J. Sheehan
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101.

3. Najam Kahn
c/o of Patrick J. Sheehan
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101.

4. Gary J. Dragul
c/o Shumway Van
8985 S. Eastern Ave., #100
Las Vegas, NV 89123.

Defendant/Counterclaimant's List of Witnesses:

1. Najam Kahn
c/o of Patrick J. Sheehan
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101.

2. Phil Ruffin
Manager, Treasure Island, LLC
c/o Patrick J. Sheehan, Esq.
John H. Mowbray, Esq.
FENNEMORE CRAIG, P.C.
300 South Fourth Street, Suite 1400
Las Vegas, NV 89101.

3. Jerry Griffis
c/o of Patrick J. Sheehan
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101.

4. Brad Anthony
c/o Patrick J. Sheehan
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101.

5. Jorge Lizarraga
Manager, Senor Frog's, Las Vegas, LLC
c/o Ronald R. Fieldstone, Esq.
Susan Trench, Esq.
Arstein & Lehr LLP
200 South Biscayne Boulevard, Suite 3600
Miami, Florida 33131.

6. Gary J. Dragul

c/o Shumway Van
8985 S. Eastern Ave., #100
Las Vegas, NV 89123.

7. David Krouham
President, Operadora Andersons S.A. de C.V.
Boulevard Kukulcan km 14.2
Cancun, Mexico
C.P. 77500 Zona Hotelera

VII. PRINCIPAL ISSUES OF LAW TO BE CONTESTED

A. Whether Plaintiff/Counterdefendant's notice of breach was sufficient allowing termination.

B. Whether any deficiency was material enough to defeat the notice.

C. Whether there was any waiver laches or estoppel upon Defendant preventing their claim that the notice was insufficient.

D. Whether Defendants unclean hands prevents them from contesting the notice.

IX. ESTIMATE OF THE TIME REQUIRED FOR TRIAL

1 day.

X. ADDITIONAL MATTERS

None.

DATED this 1 day of September, 2016.

DATED this 1 day of September, 2016.

FFENNEMORE CRAIG, P.C.

SHUMWAY VAN

By: 

By: 

PATRICK J. SHEEHAN, ESQ.
Nevada Bar No. 3812
JOHN H. MOWBRAY, ESQ.
Nevada Bar No. 1140
1400 Bank of America Plaza
300 South Fourth St. 14th Floor
Las Vegas, Nevada 89101
*Attorneys for Treasure Island,
LLC*

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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 I am an employee of Fennemore Craig, P.C. and that on September 6, 2016, service of the JOINT PRETRIAL MEMORANDUM 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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Gabriela Mercado

Kamra Fuller

Robin Cordova

Sam Marshall

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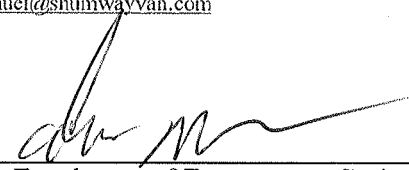
brent@shumwayvan.com

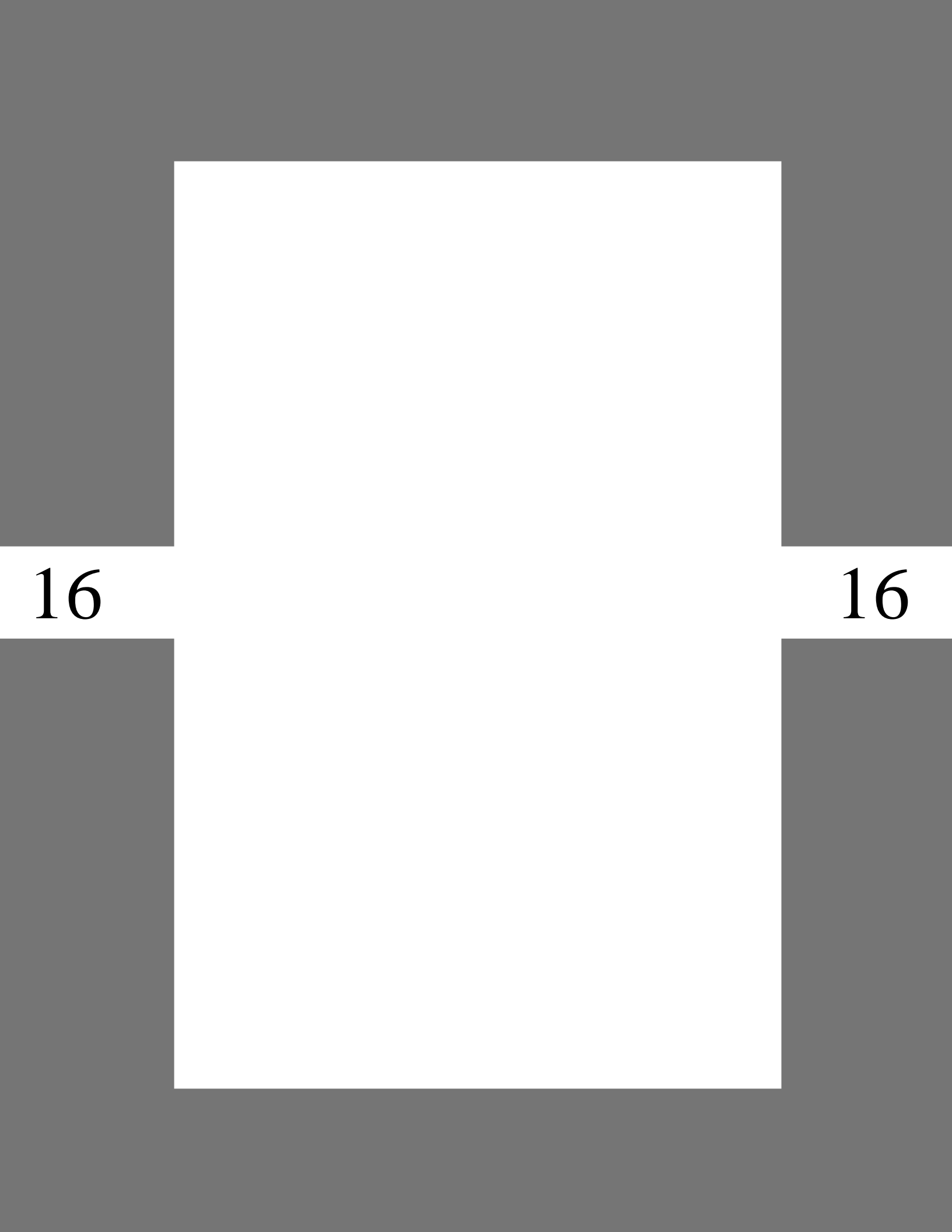
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An Employee of Fennemore Craig, P.C.



16

16


CLERK OF THE COURT

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samuel@shumwayvan.com
Attorneys for Defendant/Counterclaimant

DISTRICT COURT
CLARK COUNTY, NEVADA

TREASURE ISLAND, LLC, a Nevada
limited liability company,

Plaintiff

v.

ROSE, LLC, a Nevada limited liability
company,

Defendant

ROSE, LLC, a Nevada limited liability
company,

Counterclaimant

v.

TREASURE ISLAND, LLC, a Nevada
limited liability company,

Counterdefendant

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

**DEFENDANT/
COUNTERCLAIMANT'S
LIMITED PRE-TRIAL
MEMORANDUM**

Trial Date: October 6, 2016
Trial Time: 9:30 a.m.

Defendant/Counterclaimant Rose, LLC ("Rose"), by and through its counsel of record, the law firm of Shumway Van, respectfully submits the following Limited Pre-Trial Memorandum pursuant EDCR 7.27. This Pre-Trial Memorandum is limited in nature considering the Court has already been briefed on the main issues in this case; however, Rose would like to further brief the


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000569

1 Court on its Counterclaims against Treasure Island, LLC ("TI") prior to trial. This Memorandum
 2 cites as exhibits the trial exhibit list previously provided to this Court and is based upon the
 3 following Memorandum Points and Authorities and the pleadings and papers on file.

4 DATED this 5th day of October, 2016.

5
 6 SHUMWAY VAN

7
 8 By: 
 9 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

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. FACTUAL BACKGROUND**

12
 13 Rose and TI entered a lease on April 13, 2011 (the "Lease") for the property directly
 14 adjacent to the body of water TI had historically held its pirate show (the "Premises").¹ The
 15 Premises is two stories tall and is comprised of over 18,000 square feet.² The rent for the Premises
 16 is collected in two (2) parts.³ First, a monthly rent wherein Rose was initially obligated to pay
 17 \$52,000.00 per month on the first of the month.⁴ This amount was later reduced to \$33,250.00 per
 18 month ("Monthly Rent").⁵ Second, seven percent (7%) of Señor Frog's gross sales within thirty
 19 (30) days after the end of each quarter (the "Percentage Rent").⁶

20 Although the Lease is only between Rose and TI, the Premises has been marketed as Señor
 21 Frog's, a Mexican-themed restaurant owned by Grupo Anderson's ("Anderson's") and operated
 22

23
 24
 25 ¹ See Exhibit 1.

26 ² See Id.

27 ³ See Id.

28 ⁴ See Id.

⁵ See Exhibit 28.

⁶ See Exhibit 1. Initially, SFLV tendered payment of the Percentage Rent directly to TI; however, with the Amended Sublease referenced below, Rose became obligated to remit the Percentage Rent payments.

by its subsidiary, Operadora Andersons (“Operadora”), from the beginning of the Lease.⁷ In Nevada, Señor Frog’s is owned by Anderson’s subsidiary, Señor Frog’s Las Vegas, LLC (“SFLV”), and at the beginning of the Lease, Anderson’s and Rose were, for all intents and purposes, business partners in SFLV and, as part of their arrangement, Rose sublet the entire Premises to SFLV.⁸ Rose’s president, Gary Dragul, is a savvy commercial real estate investor and brought to the partnership his business expertise regarding the ins and outs of commercial real estate.⁹ Anderson’s, on the other hand, is not intimately familiar with real estate practices in the United States and brought to the partnership its Mexican-themed restaurant that has been largely a success in Latin America.¹⁰ Sometime into the SFLV partnership and, both Anderson’s and Rose determined it would be best to forego the SFLV partnership so that Operadora could focus on running its restaurant and Rose could focus primarily on the real estate element of the companies’ relationship.¹¹ As a result, Rose and SFLV amended the parties’ sublease on May 6, 2014 (the “Amended Sublease”).¹²

THE AMENDED SUBLEASE

With respect to TI, the restructuring of Rose and SFLV’s operations had little effect on TI. On the face, TI had the same restaurant occupying the Premises and TI continued to receive the same rent payments from Rose. However, instead of Rose and SFLV sharing profits, SFLV was now obligated to pay rent to Rose and Rose was obligated to remit to TI the Percentage Rent.¹³ Rose has always been current on its rent obligations to TI; however, there have been times when SFLV did not timely tender the Percentage Rent.¹⁴

For example, on January 31, 2014, TI sent Rose a default notice stating Rose was behind on the Percentage Rent in the amount of \$172,272.00 (the “January 2014 Notice”).¹⁵ Although TI

⁷ See Exhibit 1 Section 7.7.

⁸ See Exhibit 60 at Pg. 2 and 3 generally.

⁹ See Exhibit 60 at Pg. 2, ¶ 5.

¹⁰ See Exhibit 59 at Pg. 2.

¹¹ See Exhibit 60 at Pg. 3, ¶ 11.

¹² See Exhibit 30.

¹³ See Id.

¹⁴ Prior to the Amended Sublease, SFLV tendered payment to TI for the Percentage Rent.

¹⁵ See Exhibit 5. Brad Anthony testified that this letter, although dated January 31, 2012, was in fact sent on January 31, 2014. See Exhibit 57 at 25:8 – 26:8.

1 was obligated under Section 19.6 of the Lease to send Rose the January 2014 Notice to the attention
 2 of its controller, Susan Markusch ("Ms. Markusch"), with a copy sent to Operadora in Cancun,
 3 Mexico, TI only sent the January 2014 Notice to Rose with attention to Mr. Dragul. Fortunately,
 4 Mr. Dragul timely received the default notice, sent it to Operadora, and Operadora cured the same.
 5 Although the Amended Sublease put the onus on Rose to pay the Percentage Rent, Operadora did
 6 not want to rely solely on Mr. Dragul curing Rose's defaults and wanted additional notice
 7 provisions added to the Lease and reiterated in the Sublease.¹⁶ For example, Section 9.d. of the
 8 Amended Sublease specifically provides:¹⁷

9 **[TI] is obligated to provide [SFLV] with simultaneous notice of any [Rose]**
default under the Prime Lease as outlined in Exhibit D. In the event that [TI]
 10 notifies [Rose] of any default under the Prime Lease and does not provide
 11 simultaneous notice to [SFLV], [Rose] will provide [SFLV] with a copy of any [TI]
 12 notice of default under the Prime Lease within twenty-four (24) hours and an
 13 opportunity to cure same on behalf of [Rose] and to the satisfaction of [TI]. If
 14 [SFLV] cures any alleged default under the Prime Lease on behalf of [Rose] and to
 15 the satisfaction of [TI] and excepting when the alleged default is prompted or
 16 caused by [SFLV], [Rose] will be responsible to repay [SFLV] within thirty (30)
 17 days for any monetary amounts reasonably expended to cure the alleged default
 18 under the Prime Lease, plus a late charge equal to seven and one-half percent (7.5%)
 19 of the amount due along with interest per annum in the amount of twelve percent
 20 (12%) from the date paid by [SFLV] until repaid by [Rose]. If SFLV cures an
 21 alleged default under the Prime Lease that is not prompted or caused by [SFLV] on
 22 behalf of [Rose] and to the satisfaction of [TI] as noted above **more than four (4)**
 23 **times**, then [Rose] will not object to [SFLV's] efforts to assume the Prime Lease
 24 consistent with the SDNS. Nothing herein, however, allows [SFLV] to offset any
 25 monetary amounts expended to cure any alleged defaults under the Prime Lease
 26 from the Rent due under Sections 4 and 6 hereunder.¹⁸

21 This provision of the Amended Sublease provides great protection for both Rose and
 22 SFLV. For SFLV, this provision provides cure rights to SFLV with regard to the Lease between
 23 Rose and TI even though SFLV is only a third-party beneficiary to the Lease. For Rose, this
 24 provision provides a willing and able party the ability to step in and cure should it fall behind on
 25
 26

27 ¹⁶ See Exhibit 63 at 68:1-4.

28 ¹⁷ See Exhibit 30 generally.

¹⁸ See *Id.* at Section 9.d.

1 its new obligations of paying the Percentage Rent to TI up to four (4) times before its subtenant
2 would take Rose's place and negotiate directly with TI.

3 Not only was the Sublease amended in 2014, the Lease was also amended by its Fifth
4 Amendment just one week prior to the Amended Sublease (the "Fifth Amendment").¹⁹ This Court
5 has been fully briefed on the Fifth Amendment.²⁰ Essentially, the notice provisions of Section 19.6
6 were reiterated and strengthened in favor of SFLV with the additional requirement for TI to notify
7 Operadora's counsel of any default on the part of Rose.²¹ As David Krouham ("Mr. Krouham"),
8 President of Anderson's, testified in his deposition, the Fifth Amendment was revised "Because
9 [SFLV] wanted TI to give [SFLV] any notice [of] any default from Rose to have a chance to cure
10 it if Rose [did not] do it or they [did not] give [SFLV] any notice of default."²² Clearly, all parties
11 had the same understanding of how notices were to be provided regarding the Premises.
12 Nonetheless, TI proceeded to provide notices to whomever it pleased, depending on the
13 circumstances.

14 **TI'S FAILURE TO COMPLY WITH THE NOTICE PROVISION OF THE LEASE**

15 Less than six (6) months after the execution of the Fifth Amendment, TI sent a Notice of
16 Lease Violation to Rose to the attention of Andrew Solomon ("Mr. Solomon").²³ The alleged
17 violation dealt directly with SFLV's conduct in the Premises and could have affected its ability to
18 remain in the space. However, TI failed to send a copy of this notice to Operadora or its counsel.
19 Fortunately, Mr. Solomon notified Operadora of the letter and the issue was resolved. Less than
20 four (4) months later, SFLV fell behind on its payment to TI for food and beverage items.²⁴ For
21 the first time since 2012, TI actually cc'd Operadoa on this communication and even sent a copy
22 to Operadoa's counsel in Florida, perhaps because TI wanted payment and it did not care if it came
23 from Rose or SFLV. However, TI failed to send Rose this communication to the attention of Ms.
24 Markusch. Fortunately, this matter was resolved despite TI's failure.

25 ¹⁹ See Exhibit 28.

26 ²⁰ See Exhibit 58 generally.

27 ²¹ See Exhibit 28 at Section 11.

28 ²² See Exhibit 63 at 68:1-4.

²³ See Exhibit 33.

²⁴ See Exhibit 35.

On January 15, 2015, TI again sent a notice to Rose regarding issues dealing directly with SFLV, including the food and beverage issue mentioned above; however, TI only sent this notice to Mr. Dragul and not to Ms. Markusch, Operadora, or Operadora's counsel.²⁵ Finally, on May 14, 2015, TI sent its Alleged Default Notice to Rose with attention only to Mr. Dragul and failed to copy Operadora or its counsel on the communication.²⁶ Unfortunately, Mr. Dragul was away from the office dealing with a family emergency, then in Las Vegas for a convention, and was unable to rectify TI's error and put the appropriate parties on notice of the Alleged Default prior to TI sending its Alleged Termination Notice. The avoidance of this exact scenario was the intent of both Rose and SFLV when it amended the Lease and Sublease. However, due to TI's failure to notify the appropriate parties, both Rose and SFLV were unable to cure Rose's missed payment and TI brought this case before the Court.

**TI'S CLAIM OF AN ALLEGED AGREEMENT BETWEEN TI AND ROSE
REGARDING NOTICES**

Not only does TI admit it failed to comply with the notice provisions of the Lease and Fifth Amendment when it sent the Alleged Default Notice solely to Mr. Dragul, Brad Anthony ("Mr. Anthony"), general counsel for TI, testified in his deposition that TI's failure was intentional and the result of some spurious agreement between TI and Mr. Dragul.²⁷ According to Mr. Anthony, Rose and TI agreed that TI would only send notices to Mr. Dragul personally and not in accordance with the notice provisions found in the Lease and Fifth Amendment.²⁸ Not only does Mr. Anthony have no evidence of this arrangement, such an agreement would violate the Lease and defeats logic as it would only benefit TI in the event TI wanted Operadora to be unable to cure a missed payment as has happened in this case, effectively giving up the rights Rose and SFLV had sought to secure in the Fifth Amendment. It is clear from the Lease, Fifth Amendment, and Sublease that TI was required to notify Rose with attention to its controller, Operadora, and Operadora's counsel of any

²⁵ See Exhibit 37.

²⁶ See Exhibit 38.

²⁷ See Exhibit 57 at 26:13-14 and 48:12-28. See also TI's 4/11/16 Opposition to Defendant's Motion to Continue Trial and Opposition to Motion to Take the Deposition of Phil Ruffin and Extend Discovery at Pg. 2, ll. 5-8.

²⁸ See Exhibit 57 at 26:13-14 and 48:12-28.

1 breach on Rose's part so that Operadora could step in and cure a default by Rose considering its
 2 significant investment and interest in the Premises. Under the Lease, any amendment was to be
 3 done in writing so as to prevent a party to the Lease from alleging some verbal agreement that
 4 materially affected the terms of the Lease.²⁹ What is most interesting about Mr. Anthony's claimed
 5 agreement with Mr. Dragul is that not only did TI fail to even comply with the Lease and Fifth
 6 Amendment, it also repeatedly failed to comply with Mr. Anthony's alleged agreement.

7 The first disclosed letter sent by TI to Rose was on August 31, 2012 and dealt with issues
 8 surrounding the construction of the Premises.³⁰ Of *all* the letters sent by TI to Rose, this is the *only*
 9 letter that complies with the Lease. In its Trial Brief, TI alleged that this agreement between Mr.
 10 Anthony and Mr. Dragul took place during a phone conversation between Mr. Anthony and Mr.
 11 Dragul shortly after TI's August 31, 2012 letter.³¹ However, up until the Alleged Default Notice,
 12 TI sent notices to multiple individuals at Rose. Only one other notice was copied to Operadora and
 13 its counsel³² but notices to Rose were sent to the attention of Mr. Dragul³³, Ms. Markusch³⁴, Mr.
 14 Solomon³⁵, and Elizabeth Gold³⁶. Therefore, if there was an agreement between TI and Mr. Dragul
 15 that only Mr. Dragul was to receive notices, TI failed to comply with that agreement as well. No
 16 such agreement ever existed and, even if it did, neither Mr. Anthony or Mr. Dragul had the
 17 authority to cut out the rights of their intended third party beneficiary, SFLV. In fact, Mr. Anthony
 18 testified in his deposition that he was not authorized to enter contracts that would "impact [TI]
 19 globally, [without Mr. Ruffin's] approval."³⁷ Therefore, this Court should not give any weight to
 20 Mr. Anthony's nonsensical and unsupported allegation that Mr. Dragul voluntarily gave up
 21 negotiated rights essential to Rose and SFLV. Rather, the Court should view TI's breach as
 22
 23

24 ²⁹ See Exhibit 1 at Section 19.9.

25 ³⁰ See Exhibit 8.

26 ³¹ See Exhibit 61 at Pg. 2, ll. 18-23 and Exhibit 62 at ¶ 4.

27 ³² See Exhibit 35.

28 ³³ See Exhibits 5, 9, 12, 13, 35, 37, 38, and 40.

³⁴ See Exhibit 8.

³⁵ See Exhibits 31 and 33.

³⁶ See Exhibit 38.

³⁷ See Exhibit 57 at 11:5-7.

intentional and in bad faith in an effort to completely cut out the cure rights of both Rose and Operadora.

TI'S ADDITIONAL BREACHES AND DEALINGS IN BAD FAITH

Immediately upon learning of Rose's breach and TI's Alleged Termination Notice, Mr. Dragul sent a letter to TI outlining the notice requirements under the Lease and Fifth Amendment and attempted to wire payment of the Percentage Rent at issue in this case³⁸; however, TI returned Rose's payment.³⁹ Immediately thereafter, Rose again attempted to tender payment but TI returned the same.⁴⁰ Then, on June 4, 2015, Rose sent a cashier's check to TI overnight via FedEx⁴¹; however, Rose's payment was returned to sender⁴². TI has never responded to Mr. Dragul's many letters putting TI on notice of its failure to comply with the notice provisions of the Lease nor would it allow Rose to perform on the Lease after the commencement of this case until it received permission from this Court to accept rent payments without waiving its rights to terminate. Furthermore, TI has never responded to Rose's September 11, 2015 Notice of Lease Default⁴³ or its Second Notice of Lease Default⁴⁴ sent November 18, 2015 or made any attempts to cure the same. TI's actions were in bad faith and in direct violation of the Lease and Fifth Amendment. By its actions, TI made clear its intention of preventing Rose's, and Operadora's, ability to cure.

TI IS USING THIS CASE AS A PRETEXT TO ACCOMPLISH ITS ULTERIOR MOTIVES, WHICH ARE NOT FURTHERED TO THE SPIRIT OF THE PARTIES' AGREEMENT

This case was initiated by TI on the very day it sent an alleged notice of termination to Rose and on the same day it attempted to commence negotiations directly with Rose's subtenant SFLV. In addition to TI admitting it intentionally breached its Lease with Rose, Rose has argued from the beginning that TI has been acting in bad faith and using its Alleged Default Notice sent to Rose on May 14, 2015 as merely a pretext to accomplish its desired goal, terminating Rose's

³⁸ See Exhibit 42.

³⁹ See Exhibit 44.

⁴⁰ See Id.

⁴¹ See Id.

⁴² See Exhibit 47.

⁴³ See Exhibit 64.

⁴⁴ See Exhibit 65.

Lease with TI to either lease directly to SFLV at a premium or repurpose the Premises. Rather than honoring its contractual obligations or negotiating a lease termination with Rose, TI has burdened this Court in its bad-faith attempt to terminate its Lease with Rose at the meager cost of legal fees. If TI were acting in good faith, it would have responded to Rose's May 29, 2015 letter, its June 3, 2015 letter, its September 11, 2015 Notice of Lease Default, its Second Notice of Lease Default dated November 18, 2015, accepted Rose's tendered rent, and appropriately provided Rose and Operadora with their respective bargained for opportunities to cure. However, TI has refused to cure its default and forced Rose to incur, and continue to incur, substantial litigation fees defending its leasehold interest.

II. LEGAL ARGUMENT

It is uncontested that a valid contract was breached by TI when it failed to comply with the notice requirements under Section 19.6 of the Lease and Section 11 of the Fifth Amendment. The undisputed record also reflects that TI breached the payment acceptance terms of the Lease, and that TI both circumvented Rose's contractual Sublease relationship with SFLV and had alternative plans for the Premises. Therefore, this Court should deny TI's claims and find in Rose's favor with respect to its Counterclaim in that TI has breached the Lease and acted in bad faith.

A. **TI BREACHED THE LEASE WHEN IT FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS UNDER THE LEASE AND THE FIFTH AMENDMENT AND WHEN IT REFUSED TO ACCEPT ROSE'S ATTEMPTS TO TENDER RENT PAYMENTS.**

To prevail on a claim for breach of contract in Nevada a plaintiff must prove: 1) the existence of a valid contract; 2) a breach by the defendant; and, (3) damage as a result of the breach.⁴⁵ Neither party disputes the existence of a valid contract or the substance of the notice, cure or rent payment acceptance obligations in the Lease or Fifth Amendment. The only issues before this Court with respect to Rose's claims for breach of the Lease are whether TI in fact failed to comply with the notice, cure and payment tender acceptance provisions in the Lease after proper notice and opportunity to cure, and if so the amount of Rose's related damages.

⁴⁵ Saini v. Int'l Game Tech., 434 F. Supp. 2d at 919-20 (D.Nev.2006).

1 TI had clear and unequivocal notice obligations under the Lease, as amended, that the
2 parties affirmatively bargained for, but failed to comply with the amended notice provisions and
3 did so by design. Under Section 19.6 of the Lease, TI had to provide Rose with written notice of
4 any breach or default to the attention of Ms. Markusch and was required to send a copy to
5 Operadora in Cancun, Mexico. Additionally, under Section 11 of the Fifth Amendment, TI was
6 required to send a copy of any default to SFLV's counsel in Florida. TI does not dispute the fact
7 that it failed to provide Rose with proper notice, in fact, TI admits that its failure to comply with
8 the notice requirements under Section 19.6 and the Fifth Amendment was intentional. Therefore,
9 TI breached the Lease when it failed to satisfy the notice requirements under the Lease and Fifth
10 Amendment.

11 When Rose learned of TI's breach of the notice provisions in the Lease, Rose immediately
12 notified TI of the breach and provided TI with an opportunity to cure its notice errors as evidenced
13 by Rose's May 29, 2015 Notice of Breach. However, TI never cured the noticed breach and Rose
14 therefore put TI in default by issuing Notices of Default on September 11, 2015 and November
15 18, 2015. Rose has incurred damages as a result of TI's breach of the notice provisions in the
16 Lease and can submit evidence of its incurred costs and fees for the purpose of resolving the
17 damages component of Rose's claim for Breach of Lease.

18 Likewise, TI had clear and unequivocal rent payment acceptance responsibilities under the
19 amended Lease but again ignored its contractual obligations. Under Section 3.1 of the Lease, TI
20 was required to accept properly tendered rent payments from Rose, yet TI refused to comply with
21 the Lease and accept Rose's payments or allow for cure efforts and even refused to respond to
22 Rose's related Notices of Breach and Default dated September 11, 2015 and November 18, 2015.
23 Rose has incurred defense and prosecution costs and fees with respect to the issues and again can
24 provide the Court with a tabulation of the same for damages purposes.

25 Without a doubt, TI's breach was material. It is a well-established principle of contract law
26 that "materiality [can] be judged as a matter of law in cases where the parties' contract stipulated
27 that certain facts were to be considered material; however, where materiality must be shown by
28

1 matters outside the terms of the contract, it is a question of fact.” Here, Rose and Anderson’s
 2 bargained for Section 19.6 of the Lease and Section 11 of the Fifth Amendment to protect their
 3 interests in SFLV and the Premises. TI was well aware of the notice provisions and the relationship
 4 between Rose and SFLV when it sent the Alleged Notice of Default but decided not to notify
 5 Operadora or its counsel or even Rose’s actual designated notice contact. This Court should give
 6 no credence to Mr. Anthony’s self-serving allegation that Mr. Dragul asked TI to shun the notice
 7 provisions of both the Lease and Fifth Amendment. TI’s notice failings were material under any
 8 analysis, as they are dispositive of TI’s claims, and a portion of Rose’s counterclaims, and
 9 implicate the very essence of the parties’ agreement.

10 The notice requirements under the Lease and Fifth Amendment were not for the benefit of
 11 Rose and TI alone. Anderson’s, Operadora and SFLV have been third-party beneficiaries of the
 12 Lease since its inception. The notice provisions under the Lease and Fifth Amendment even
 13 include requirements for TI to send copies of any notices under the Lease to Anderson’s operating
 14 company Operadora as well as its counsel for cure purposes⁴⁶, and the Amended Sublease also
 15 allows SFLV to make direct rent payments to TI for cure purposes.⁴⁷ The notice provisions in the
 16 Lease and Fifth Amendment were material under any analysis and TI should not be excused for
 17 its intentional and exploitive breaches of the Lease.

18 **B. TI ALSO BREACHED THE IMPLIED COVENANTS OF GOOD FAITH**
 19 **AND FAIR DEALING IN THE LEASE BY FAILING TO ACT IN GOOD**
 20 **FAITH WITH RESPECT TO ANY DISCRETIONARY NOTICE OR RENT**
 21 **PAYMENT ACCEPTANCE PROVISIONS IN THE LEASE.**

22 Nevada law recognizes the existence of an implied covenant of good faith and fair dealing
 23 in every contract.⁴⁸ Furthermore, “when one party performs a contract in a manner that is unfaithful
 24 to the purpose of the contract and the justified expectations of the other party are thus denied,
 25 damages may be awarded against the party who does not act in good faith.”⁴⁹

26 ⁴⁶ See Exhibit 1 at Section 19.6 and Exhibit 28 at Section 11.

27 ⁴⁷ See Exhibit 30 at Section 9.d.

28 ⁴⁸ Pemberton v. Farmers Ins. Exchange, 858 P.2d 380, 109 Nev. 789 (1993).

⁴⁹ Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 107 Nev. 226, 808 P.2d 919, 923 (1991).

1 The purpose of the Lease was to allow Rose to Lease the Premises for the purpose of
2 operating SFLV within the space. Each of TI's actions, as described herein, were calculated to
3 oppose that purpose. TI has not claimed in defense of Rose's implied covenant counterclaims that
4 the notice and rent payment acceptance terms of the Lease allow for any discretion on the part of
5 TI, or that TI exercised any such discretion appropriately. Instead, the parties appear to agree that
6 the notice and rent payment acceptance terms of the Lease are unambiguous and do not provide
7 TI with any discretionary rights. Even if the Lease allows TI any such discretion, TI has breached
8 the implied covenant of good faith and fair dealing by trying to circumvent party intent and fairness
9 with respect to the long-term nature of the Lease and related notice and cure opportunities. Rose
10 and Anderson's justified expectations were that they could operate their restaurant and sublease
11 and TI would follow the notice, cure and rent payment acceptance provisions of the Lease and
12 Fifth Amendment; however, their justified expectations were denied when TI deliberately
13 breached Section 19.6 of the Lease and Section 11 of the Fifth Amendment as part of an effort to
14 hamper any cure efforts, and then refused properly tendered rent payments in violation of Section
15 3.1 of the Lease to further disrupt any cure rights. TI cannot rid itself of Rose's Lease, expel a
16 longstanding tenant like Rose, negotiate a direct contractual relationship with SFLV, and/or use
17 the Premises for other purposes – by simply ignoring its contractual leasing obligations or the
18 involved parties' obvious expectations. Rose therefore has established its entitlement to damages
19 for TI's failure to act in good faith. And since TI's actions in this case were intentionally calculated
20 to remove Rose from the Premises and further TI's ulterior motives for use of the Premises, the
21 record is sufficient to support a strong message to TI in the form of an affirmative damages award
22 to Rose in an amount not less than all of its incurred costs and fees.

23 **III. CONCLUSION**

24 Based upon the foregoing, and given the high stakes involved for Rose and SFLV, it would
25 be unjust for this Court to permit TI to breach material notice provisions of the Lease and Fifth
26 Amendment intentionally that were so relentlessly bargained for by Rose and Anderson's. TI's
27 actions were part of an effort to escape Rose's favorable Lease terms for the Premises, were in
28

1 breach of the Lease and TI's covenant of good faith and fair dealing, and were in bad faith.
2 Therefore, TI's purported termination of the Lease should be set aside, its claims denied, and TI
3 should be liable for any and all damages Rose has suffered due to TI's breaches of the Lease.

4 DATED this 3rd day of October, 2016.

SHUMWAY VAN

By:


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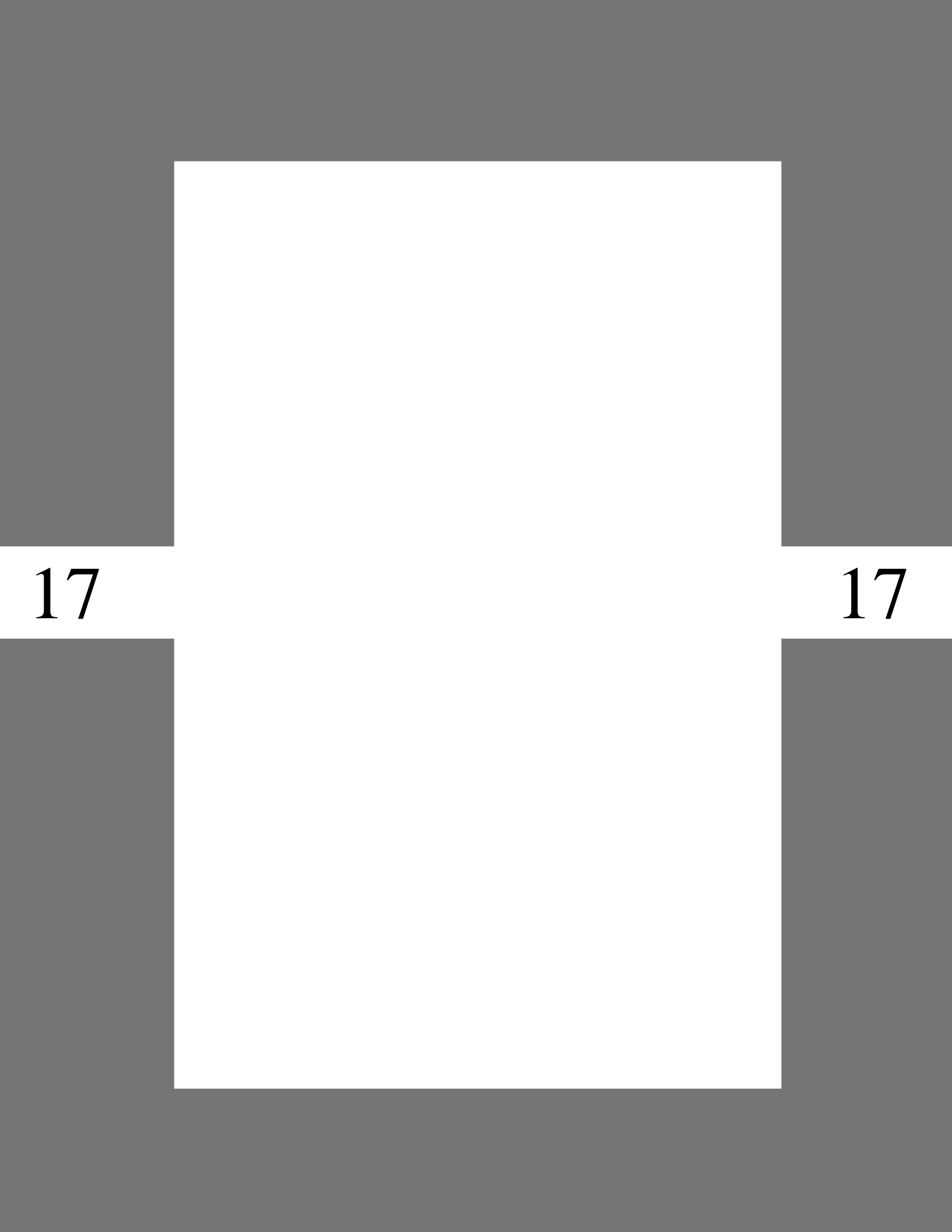
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that the foregoing DEFENDANT/
COUNTERCLAIMANT'S LIMITED PRE-TRIAL MEMORANDA was submitted
electronically for filing and/or service with the Eighth Judicial District Court on the 5th day of
October, 2016 to all parties appearing on the electronic service list in Odyssey E-File & Serve
(Wiznet).

/s/ Rebekah Griffin

An employee of Shumway Van

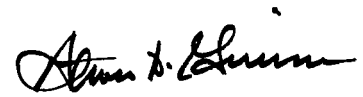
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TRAN



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

TREASURE ISLAND LLC,

Plaintiff,

vs.

ROSE LLC,

Defendant.

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

BENCH TRIAL - DAY 1

THURSDAY, OCTOBER 6, 2016

APPEARANCES:

FOR TREASURE ISLAND LLC:

PATRICK J. SHEEHAN, ESQ.

FOR ROSE LLC:

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

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E X H I B I T S

Exhibit Nos. 1 - 53, 55, 56, 58-62, 64 and 65 stipulated

1 **LAS VEGAS, CLARK COUNTY, NEVADA, OCTOBER 6, 2016, 9:36 A.M.**

2 * * * * *

3 THE COURT: Good morning, Counsel. How are you?

4 MR. SHEEHAN: Good, Your Honor. How are you?

5 MR. VAN: Good morning, Your Honor.

6 MR. MARSHALL: Good, Your Honor.

7 THE COURT: Just absolutely delightful. Thank you.

8 So do you have any exhibits that you're stipulating
9 to?

10 MR. VAN: Your Honor, we have stipulated to the
11 admission of all of the exhibits that are in the trial binder.

12 THE COURT: So that would be 1 through 65?

13 MR. SHEEHAN: That is correct.

14 THE COURT: Which one's the depo? That would be 63.
15 So with the exception of 63, they're all admitted. If you're
16 going to use the depo, we can publish it.

17 MR. SHEEHAN: There's a couple depositions in there.

18 THE COURT: Okay. So besides 63 which other one?
19 Because I don't admit depositions. They get treated differently.

20 MR. VAN: 54.

21 THE COURT: 54. So are there only the two?

22 MR. SHEEHAN: 57.

23 THE COURT: So with the exception of 54, 57 and 63,
24 they're admitted.

25 (Exhibit Nos. 1 - 53, 55, 56, 58-62, 64 and 65 admitted.)

JD Reporting, Inc.

1 THE COURT: The depositions can be published if you
2 need to use them for some reason.

3 Anything else?

4 MR. VAN: No.

5 THE COURT: Anybody want to make an opening
6 statement?

7 MR. SHEEHAN: Yes.

8 MR. VAN: Yes. We're actually going to take one
9 witness out of order, but we'll do opening statements, and then
10 Mr. Krouham has to leave town. So other than that.

11 THE COURT: Okay. Let's do opening statements.

12 MR. SHEEHAN: Thank you, Your Honor. May I approach
13 the bench, please?

14 THE COURT: You can. Thank you.

15 (Opening statement for the plaintiff.)

16 MR. SHEEHAN: Your Honor, since it's a bench trial I
17 just went ahead and drafted this and put this on a piece of
18 paper rather than put it on the easel on the board here. But
19 in essence it sets forth the five reasons why Treasure Island
20 is entitled to prevail in this matter. It's in addition to the
21 trial brief, which you also have, and the trial brief has case
22 law that supports all of these arguments.

23 First of all, it's undisputed that the Defendant Rose
24 failed to pay its rent on time. In fact, they had a history of
25 paying late, but on this particular occasion on May 14th,

1 they were overdue with a rental obligation, and it's actually a
2 percentage of rent. They failed to pay it. They admit they
3 failed to pay it. They admit that they were in default at that
4 time. We had to give them a notice and opportunity to cure.
5 We provided them that notice and opportunity to cure. They
6 admit that they got the notice. They admit that they didn't
7 cure within the time.

8 The lease provides that if they didn't pay the rent
9 on time, we gave them the notice and opportunity to cure, they
10 didn't cure during that time frame, we had the right to
11 terminate the lease. That's what we did.

12 The big argument that they've made, as Your Honor is
13 well aware, is that we didn't copy a subtenant called Operadora
14 on the notice. Your Honor, this is really the most important
15 thing that I can convey to the Court. That is Operadora's
16 claim. It is not Rose's claim, and I cited a wealth of case
17 law that says that. We understand -- and that's the argument
18 number one here -- we understand that if -- there's a clause
19 that says that we have to negotiate with Operadora with respect
20 to the lease.

21 We understand that Operadora could bring a claim and
22 say you cannot kick us out of this space, and you must honor
23 our sublease because you didn't provide us notice. We
24 understand that, that Operadora has that claim. We believe we
25 have defenses to it, but the Judge's decision in this case

1 isn't going to affect Operadora or Operadora's claims. They're
2 not a party to this action.

3 They haven't brought a claim against us yet. We feel
4 reasonably confident that we're going to get along just fine
5 with Operadora and reach a lease with Operadora, but Your Honor
6 even talked about the elephant in the room, but they're really
7 not, and that's point number one, that Rose, we met our
8 obligations, notice obligations with respect to Rose, and
9 that's the only thing that's relevant here today. Did we meet
10 our business obligations with respect to Rose? Clearly we did.

11 If you looked at their brief that they submitted to
12 you, they don't say we didn't meet the obligations with respect
13 to Rose. They say that we didn't notice Operadora, and we
14 cited a wealth of case law that says that they cannot take
15 advantage of that, that Operadora can, that third party can.
16 That third-party can say, no, it's not good vis-à-vis us, but
17 Rose cannot take advantage of that provision. So that, the
18 Operadora notice issue, belongs to Operadora, and Rose cannot
19 assert it, and they've cited no case law stating that it can.

20 Again, we understand and, you know, Your Honor's not
21 making any decisions here today that is going to be binding on
22 Operadora. That's for another day. So that's number one. So
23 really the case is over right then and there, and it really
24 should've almost been summary judgment on our part, but that is
25 the law. That's what the law says, but we have more arguments,

1 and again, all you have to do is buy one of these five
2 arguments on here, and Treasure Island prevails.

3 So let's go to number two. Even if Rose could assert
4 Operadora's claim, it is precluded from doing so in this case
5 under the doctrines of waiver and estoppel because its
6 principal, Mr. Dragul, specifically asked Treasure Island not
7 to send any default notices to Operadora. You're going to hear
8 the testimony today, and you're going to see that the first
9 default notice that was sent out was copied to Operadora.

10 Mr. Dragul told Brad Anthony here, Don't send it to
11 Operadora. I'll take care of this issue. You're going to
12 believe Mr. Anthony because the evidence shows that the very
13 next letter that went out was sent exactly as Mr. Dragul asked
14 it to be sent to him and not to be copied to Operadora.

15 We again cited a wealth of case law about waiver and
16 estoppel that a party cannot say, please don't send this to
17 Operadora. Then we don't send it to Operadora, and then now
18 all of a sudden they're going to say your termination is no
19 good --

20 THE COURT: Keep going.

21 MR. SHEEHAN: -- because you didn't send it to
22 Operadora. Again, we understand Operadora reserves that claim.
23 So that's reason number two.

24 Reason number three, and this is a killer also, Your
25 Honor. You're going to see that in the sublease between Rose

1 and Operadora -- and by the way, I keep saying Operadora.
2 That's the same as Señor Frog's.

3 THE COURT: I knew that.

4 MR. SHEEHAN: Okay. Right. So you're going to see
5 in the sublease between Rose and Operadora, Rose had an
6 affirmative obligation to send any default notices it received
7 to Operadora within 24 hours.

8 All right. How can Rose come up here with a straight
9 face and say, you know what, you didn't send the notice to
10 Operadora, and therefore, even though we defaulted, even though
11 we were late with the rent many times, even though you gave us
12 a notice and opportunity to cure, and we didn't cure within
13 that time, because you didn't send it to Operadora, the same
14 obligation we had, you can't prevail? We cited the unclean
15 hands case law. We cited the waiver and estoppel case law, but
16 that's really the crux of this case, Your Honor, and it's under
17 number three there.

18 Clearly it would be a miscarriage of justice to allow
19 Rose not to pay its rent, not to pay during the cure period,
20 specifically tell Treasure Island not to carbon copy Operadora
21 on any default notices, failed to send the default notice to
22 Operadora under its express obligation to do so in its own
23 contract with Operadora and then try to use the excuse that
24 Treasure Island did not copy Operadora to get out of its
25 deliberate breach of its rental obligations. That's number

1 three.

2 Number four, even if Rose could assert Operadora's
3 claim, didn't waive that claim, isn't estopped from bringing
4 the claim, and can get around the fact that it failed to notice
5 Operadora pursuant to its own obligation, Operadora had no
6 plans to cure the breach, Your Honor. You're going to see the
7 evidence on a realtime basis, and that evidence is that their
8 counsel said, Okay. We just want -- they didn't -- their
9 counsel didn't say, you know what, we would have cured if you
10 had provided us a notice, or you didn't provide us a notice,
11 and therefore that's no good.

12 They said, Okay. We just want to confirm that you're
13 just terminating Rose. You're not terminating the sublease and
14 that you're going to honor your obligations with respect to the
15 sublessee, and there's an e-mail to that effect. It doesn't
16 say, hey, if you would have noticed us, we would have cured the
17 default. That's on a realtime basis, Your Honor. That's May
18 -- in June 1st, not after the fact.

19 And you're going to notice, Your Honor, through the
20 testimony, you're going to see the affidavit of Mr. Krouham.
21 Mr. Krouham's going to testify here today, and you're going to
22 see that he didn't -- they have not filed their own complaint.
23 They haven't intervened in this case. He didn't have anything
24 to do with this case until three or four months ago when Mr.--
25 when Rose's counsel said to Operadora, you know what, you

1 better play ball with us here because, you know, they could
2 renegotiate the lease with you, and it would be unfair, which
3 again Operadora has their own defenses. So sign this affidavit
4 for us, and tell the Court that you in fact participated in the
5 negotiations.

6 And by the way, I forgot to exclude Mr. Krouham. Can
7 we please exclude Mr. Krouham?

8 THE COURT: Not until we get to evidence.

9 MR. SHEEHAN: Okay. I'm sorry.

10 THE COURT: We're in argument.

11 MR. SHEEHAN: All right.

12 THE COURT: You can invoke the exclusionary rule when
13 I start hearing evidence.

14 MR. SHEEHAN: Fine.

15 But you're going to see that there's inconsistencies
16 and so on and so forth, and the testimony's not believable.
17 And number five, you're going to see that they didn't have the
18 ability to pay. But again, Your Honor, Mr. Krouham was not
19 listed as a witness in this matter. So we didn't go out and do
20 any discovery on this matter. We tried to exclude him as a
21 witness. Your Honor, did allow us to take his deposition. We
22 were allowed to take his deposition, but we weren't allowed to
23 do a full investigation of him, of Operadora and so and so
24 forth, but that's because Operadora is not really relevant
25 here.

1 They're relevant if they want to bring their own
2 claim. But under the case law and everything else, the claim
3 belongs to Operadora. Operadora can certainly -- if they don't
4 reach an agreement with Treasure Island, they can certainly say
5 you, Treasure Island, you have to live with the same sublease
6 that we have and the same terms because you didn't notice us on
7 this. They can make that claim. We have our defenses, but
8 that's not relevant to the action between Treasure Island and
9 Rose. I cannot stress this enough, but you will see that it's
10 totally unbacked that they would have cured this problem had
11 they known.

12 THE COURT: Thank you.

13 Mr. Van.

14 (Opening statement for the defense.)

15 MR. VAN: Thank you, Your Honor.

16 Your Honor, we talked about the duty of good faith
17 and fair dealing, and good faith requires that a party act in
18 good faith and do what they are required to do and what they
19 are expected to do and anticipated to do under the contract.
20 This is the letter of the law.

21 Fair dealing is what we do, what is right. That's
22 what we satisfy as the spirit of the law. In Paragraph 15.2 of
23 the underlying lease, it says: But -- but an event of default
24 does not occur until notice and a 10-day-cure period has
25 transpired. The event of -- and that would require that notice

1 be given to specific people.

2 At the inception of this contract, Rose and Señor
3 Frog's were originally a joint venture. Señor Frog's was
4 managed by David Krouham. He's the restaurant guy. Gary
5 Dragul is the property guy, and so they have this relationship
6 where one of them will do the lease work. The other one will
7 run the restaurant.

8 TI would have this Court believe that contractual
9 provisions requiring notice to a third party have discrete
10 purposes separate and apart from the notice to the first party,
11 which is what they've argued in their trial brief, and they
12 used East Coast and Ohio law. None of it is from Nevada.

13 However, in this case, the third party is actually
14 also the first party. It's the party that is actually in the
15 property. It's the party that is out there using this
16 property. In fact, it's interesting to note that there is no
17 other sublease on any of the TI properties with the exception
18 of this one.

19 When you drive down The Strip, you don't drive down
20 and say, hey, let's go to Rose to get a drink or some nachos.
21 You say, hey, let's go to Señor Frog's because that's the brand
22 that they have been trying to work with to expand.

23 Between misrepresenting e-mails and misrepresenting
24 the timeline, TI has tried to manufacture this entire case to
25 make Rose look like it's the bad actor when this case would not

1 have come before the Court had TI properly noticed the
2 appropriate parties in accordance with the lease. The lease
3 very specifically says -- and I'm not talking about the
4 amendment, which is clarified -- but it says, You need to give
5 two people notice: One, Rose; two, Operadora, because both of
6 them wanted to be in a situation to cure the lease in the event
7 that it was -- there was a problem.

8 You just heard a statement. We do not dispute that
9 Rose was in default. Wrong. We do dispute that. Do not
10 dispute that TI could terminate. Wrong, we do dispute that.
11 Do not dispute that we got actual notice. Well, yes, we do
12 dispute that.

13 Legally the matters are very clear. There was a
14 contract entered into between TI as one party, and Rose, Señor
15 Frog's as the other. As a result of that contract between Rose
16 and Señor Frog's, they have invested, they collectively, Señor
17 Frog's and Rose have collectively invested \$9 million into the
18 construction, marketing and branding of that location. This is
19 an agreement they have between one another.

20 That same contract spelled out that in the event of
21 breach and as a result of the amount of investment that were
22 going to be made by Señor Frog's and by Rose, there would be a
23 time for a cure period as well as an opportunity to resolve it,
24 and in the event that there was a breach, the two parties would
25 work it out between themselves.

1 TI, Treasure Island, would be required to provide
2 notice to two people, Susan Markusch, who was the controller at
3 Rose with the power of the pen to make sure that the breach is
4 timely cured. She is the controller. Gary Dragul is the owner
5 of Rose. He travels. He's the marketing guide. He's not the
6 guy that -- he gets 9000 e-mails in a week. That's the very
7 purpose for that notice provision to go to Susan. Operadora
8 Anderson, Señor Frog's management company, they needed to get
9 notice because it was specifically put on there that they would
10 get notice because of the extent of their investment so that
11 they could cure it in the event there were any issues.

12 And originally, originally -- this is kind of an
13 interesting thing -- Operadora has nothing to do with it.
14 Operadora has nothing to do with it. The problem is, for the
15 longest period of time, TI was receiving its payments directly
16 from Operadora. At no point in time did TI say, oh, by the
17 way, you're not the tenant here so we're not going to accept
18 your \$110,000, or your 35,000, or your 50,000. We're not going
19 to accept your money because you're not the tenant. They
20 accepted all of the money, and then in 2014, there was a change
21 as between Señor Frog's and Rose as to how they would handle
22 the accounting.

23 This is either a perfect storm or a diabolical plot.
24 Well, let's go through the concept of the perfect storm. In
25 May of 2015, which is the time frame that's at issue, Gary

1 Dragul was -- and I want to go through some dates very
2 specifically -- from Monday May 11th until through that
3 Friday the 15th, Gary Dragul had a brother and a sister in a
4 hospital, each of them having surgery, and his father also was
5 suffering from health issues. He was in and out of the office
6 as much as he could be.

7 The alleged default occurred on May 14th when the
8 notice was sent to Dragul contrary to the lease. As fate would
9 have it, Susan Markusch was also out of the office because she
10 was at a graduation. Nonetheless, it was addressed to Gary,
11 not to Susan. That's different areas of the office. Different
12 people handle that.

13 The alleged default notice was delivered on May 15th.
14 It was not delivered to Susan; it was not delivered to
15 Operadora as is required under the terms of the lease. And
16 ICSC is the big convention in town. It's the biggest
17 convention for my client.

18 THE COURT: I know what it is.

19 MR. VAN: Excuse me?

20 THE COURT: I know what it is.

21 MR. VAN: Yeah. It's the -- and it's the biggest
22 convention for my client. So he shows up in town, and the
23 irony is on -- now, remember, we're in default in theory. On
24 the 16th, my client speaks with Najam Khan from TI. On the
25 16th and the 17th, they have dinner there. There's issues with

1 regard to the sign. Everybody's down there, and no one ever
2 says, oh, by the way, Gary, you're in default. I understand
3 that you're here. You're in default. Nobody ever raises the
4 issue.

5 They are at ICSC for Monday, Tuesday, Wednesday of
6 that week. He gets back to his office Thursday, Friday, but
7 nobody shows up at the office because everyone is trying to
8 recover from everything that they've done from Saturday,
9 Sunday, Monday, Tuesday and Wednesday. It's kind of their
10 downtime. Then you have the Memorial Day weekend, the 23rd,
11 the 24th, 25th.

12 Mr. Dragul gets back to work on the 26th-27th range
13 but still hasn't seen this FedEx package. On the 28th he gets
14 a phone call from Operadora saying, We've been terminated, very
15 first time that notice of the termination comes is the 28th.
16 On that very same day -- and I want you to read their brief
17 because it's important. Their trial brief says, Oh, we were
18 having all these problems, and therefore we had to file the
19 lawsuit -- on the very same day, on the 28th, they filed a
20 lawsuit.

21 My client received copy of the termination letter.
22 Rose receives copies of the termination letter on the 29th, and
23 on the 29th wire transfers the money, absolutely wire transfers
24 the money. Saturday, Sunday, Monday go by. Tuesday the wire
25 is rejected. They rewire the money on Tuesday, the exact same,

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1 thinking that there was a fluke in the system, rewired again.
2 Again it is rejected.

3 On the 3rd, June 3rd, they send it in an overnight
4 FedEx, and the irony of it is they send it the right way. They
5 send it to TI, attention Brad Anthony, with additional -- with
6 three separate e-mails -- three separate FedExes, one to Najam
7 Khan, one to Jerry Griffis -- who's the money guy -- and one to
8 Brad Anthony. All three of them get copies. One has the
9 check; the other two have copies of the check.

10 Brad Anthony will likely testify that contrary to the
11 contract that he drafted there is no written change allowing
12 for the notice to go to any other parties. He said that in his
13 deposition. Contrary to the contract in 2012, he says he had
14 this amorphous conversation with Gary Dragul, and it was
15 addressing construction issues -- who gets paid; how to get
16 paid on these construction issues -- and apparently in that one
17 conversation, there is this change to the contract that makes
18 it so that Gary Dragul is the only one to get notice. Now,
19 Gary will dispute that in his testimony.

20 For the next two years, there are correspondence
21 going between several persons and parties that are completely
22 inconsistent. Some include Operadora; some don't. Some
23 include Rose; some don't. They send correspondence to whoever
24 they wanted with little regard to the contract. All of the
25 correspondence, every piece of correspondence that comes from

1 Rose we will show that it is properly sent consistent with the
2 terms of the contract.

3 Now, remember this contract or this oral agreement
4 that we have to modify this written contract, which the statute
5 of frauds kind of deals with, that they want to kind of sweep
6 under the rug and play like it doesn't exist, that occurred in
7 2012. 2014, they negotiate the fifth amendment. In that fifth
8 amendment they strengthen -- or they change the address of
9 Rose, where to send the notices to Susan, but they also
10 strengthen the notice provision to Operadora to include not
11 only Operadora but their counsel.

12 Irony of this is at no point in time does it say to
13 Gary Dragul. Oh, by the way, Gary and I have made these
14 changes. So two years later, negotiated contract prepared and
15 reviewed by Mr. Anthony doesn't mention the fact that Gary
16 Dragul is the only contact point that we need to send this
17 notice.

18 Then again, contrary to the contract Mr. Anthony will
19 state that he spoke with Elizabeth Gold, and he sent her an
20 e-mail about the default. The irony of that is there's never
21 been a production of that e-mail. We save every -- we've got
22 every e-mail in our electronic world. We don't have this
23 alleged e-mail that says, oh, by the way you're in default, not
24 there. When specifically questioned at his deposition,
25 Mr. Anthony states, The notice of default, the original notice

1 of default that was sent, that is the 10-day notice was not
2 sent in accordance with the written document.

3 What this case really gets down to is that TI,
4 Treasure Island, would like this Court to strictly construe the
5 terms of the contract by stating that payment was one day, two
6 days late but wants you to completely disregard strict
7 construction when you look at the rights -- the right to notice
8 and the right to cure.

9 Gary Dragul and David Krouham will testify that they
10 did not have knowledge of the breach until notice of the
11 termination letter in May, May 28th, 29th, that immediately
12 May 29th Rose wired the full amount of payment. The wire was
13 rejected on the 2nd. The wire was rejected again on the 3rd,
14 that there was a cashier's check that went out on the 3rd to
15 Brad Anthony, Najam Khan, and Jerry Griffis. That check was
16 returned. It was required for this Court to get involved so
17 that they would accept their money.

18 This is the one and only time there has been an issue
19 with regard to rent payment from Rose. They have always been
20 current. Your Honor, it's important to remember also that
21 there's two different types of rent. The monthly rent never
22 been late, never an issue.

23 The percentage rents have been an issue, and the
24 reason is one party would get the accounting and say, Okay,
25 here's the amount that we think you owe. They'd send it to the

1 other party, and their accountants would crunch numbers and say
2 well, what about this Groupon issue, and what about this, and
3 what about that, and they would badger back and forth until
4 they got a number, and then that payment would be made. That's
5 the payment that's at issue, not the monthly rent payment, but
6 the percentage rent payments.

7 My client has been current on any and all other
8 payments. The legal theory of good faith and fair dealing and
9 strict construction must be applied. There are millions and
10 millions of dollars at stake.

11 The Court must look at the prejudice issues as well.
12 What's the prejudice to TI? They receive all of their money --
13 that they've received all of their money, and they are current
14 on their lease payments. What's the prejudice to Rose and
15 Señor Frog's? They lose \$9 million of investment, and they
16 lose the 25 years of the upcoming lease.

17 There are also counterclaims out there, Your Honor,
18 failure to notice, failure to accept rent, and the covenant of
19 good faith and fair dealing, which we've outlined above.

20 Now, you can get to the issue of the more diabolical
21 issue: Why? Well, the property's more value now -- more
22 valuable now. Treasure Island's sitting back thinking to
23 themselves, hmm, let's see. We've got this one little issue
24 here. Maybe we can take advantage of this, take advantage of
25 the \$9 million and take advantage of the fact that the market

1 rates have gone up now. Maybe they planned this notice so it
2 was right before ICSC, and right before the Memorial Day
3 weekend, and in doing so they planned this, and they would not
4 accept \$119,000. It doesn't make sense that anybody would sit
5 back with a cashier's check for \$119,229 that was agreed upon
6 between the accounting departments. They would not accept that
7 amount of money.

8 This lease was entered into at the bottom of the real
9 estate market in 2011. Now the market is strengthening, and
10 they're trying to profit from that by a technical default that
11 they claim to exist, which in fact we believe does not exist.
12 Ironically, during Mr. Anthony's deposition, he kind of slipped
13 and said, okay, well, the rent of the party next door is 200 to
14 \$400 a square foot. Well, that's got to be a problem when
15 you're paying \$50 a foot. They're looking for an opportunity
16 and an excuse to get them out.

17 Even if the Court were to look past TI's failure to
18 honor the notice provisions of the lease and ignored TI's
19 related attempts to thwart Rose's performance, this out of --
20 abhors the policy considerations of trying to work these things
21 out. In determining materiality, the Court therefore must
22 balance the equities as well as considering TI's claims to
23 prevent injustice. This is a case where you need to look at
24 the good faith and fair dealing.

25 We welcome the opportunity of the realtime because

1 what you will find is in 2012 there is this alleged meeting
2 that was confirmed by a letter with regard to construction
3 issues, and they're hanging their hat on that to say we have
4 transformed and amended the whole contract contrary to contract
5 law, contrary to the statute of frauds, contrary to the
6 contract that says, Any change in this agreement must be in
7 writing; that writing does not exist.

8 Ironically, we're not talking also about some
9 layperson. Brad Anthony's their general counsel. His job is
10 to protect them. There are e-mails going back and forth for
11 the creation of this fifth amendment, but nowhere in any of
12 those does he say, oh, by the way, we need to change the Susan
13 Markusch matter over to Gary Dragul as the only person that
14 needs to receive notice.

15 THE COURT: Thank you.

16 Does anyone want to invoke the exclusionary rule?

17 MR. SHEEHAN: Well, it turns out that the first
18 witness is Mr. Krouham, and the rest are parties I think.

19 THE COURT: All right. So if anybody comes in, ask
20 them if they're a witness. Then ask them to remain outside.

21 THE MARSHAL: Yes, ma'am.

22 THE COURT: All right. Sir, if you'll take the
23 stand, please, Mr. Krouham.

24 (Plaintiff's witness, David Krouham, sworn.)

25 THE CLERK: Thank you. Please be seated, and please

1 state and spell your name for the record.

2 THE WITNESS: David Krouham. K-r-o-u-h-a-m.

3 THE COURT: Thank you, sir. Sir, you'll notice there
4 is a pitcher with some water there. There are some M&Ms in the
5 dispenser. If you should need some coffee, if you let us know,
6 we'll get you some.

7 THE WITNESS: No tequila?

8 THE COURT: No tequila.

9 THE WITNESS: Okay. Thank you.

10 DIRECT EXAMINATION

11 BY MR. VAN:

12 Q Mr. Krouham, could you state -- oh, sorry. You've
13 already done that. That's force of habit. I apologize.

14 THE COURT: We are ahead of you.

15 BY MR. VAN:

16 Q Mr. Krouham, what do you do for a living?

17 A I run a restaurant business, sir.

18 Q Okay. And what business is that?

19 A Grupo Anderson's. I am the CEO of the company.

20 Q What is Grupo Anderson?

21 A We have a partnership in 42 restaurants and 34 retail
22 stores all around the world.

23 Q Okay. And how did you get started in the restaurant
24 industry?

25 A In 1986, dish washing in the same company Carlos'N

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1 Charlie's in Cancun.

2 Q What was the name of it again?

3 A Carlos'N Charlie's is one of the restaurants.

4 Q Carlos'N Charlie's, you were a dishwasher?

5 A In Cancun, yes, sir.

6 Q Okay. And how did you rise from being a dishwasher
7 to owning Grupo Anderson's?

8 A Working hard and having fun.

9 Q Okay. What does -- does Grupo Anderson own the
10 restaurant chain Señor Frog's?

11 A Yes, sir, and the brand also.

12 Q Okay. And approximately how many Señor Frog's do you
13 own?

14 A 19.

15 Q 19. Is it fair to say that you have extensive
16 expertise in running and operating the restaurant?

17 A Yes, sir.

18 Q Okay. Is it fair to say that you deal -- that you
19 have limited experience with regard to real-estate issues in
20 the United States?

21 A Yes, sir.

22 Q Okay. Now, have you -- how did you meet Gary Dragul?

23 A Doing this Las Vegas business.

24 Q Okay. And you oversee the operations of these
25 restaurants, correct?

1 A Yes, sir.

2 Q How did you first get in contact with Treasure
3 Island?

4 A Through Gary Dragul in a meeting.

5 Q Okay. So did you contact Gary Dragul, or did he
6 contact you?

7 A No, he contact me.

8 Q And what did he say to you?

9 A That he wanted to open a restaurant, Señor Frog's
10 restaurant in Las Vegas.

11 Q Okay.

12 A With us.

13 Q Now, you were not a party to the original lease; is
14 that correct?

15 A No, we were not.

16 Q Okay. Let me have you turn --

17 MR. VAN: May I approach?

18 THE COURT: You may.

19 MR. VAN: As a little side note, Your Honor, the
20 first time I was in Court, I walked in front of the podium
21 without permission from the Court, and the bailiff drew his gun
22 and pointed it at my head. So I try not to do that anymore.

23 THE COURT: Judge Gate's bailiff did that to me once.
24 So I understand.

25 / / /

1 BY MR. VAN:

2 Q Okay. Let me have you look at Exhibit 1. Have you
3 ever seen that document before?

4 A Yes, sir.

5 Q What was your relationship with Rose at the time that
6 this agreement was entered into?

7 A This is the original lease agreement, right?

8 Q Correct.

9 A We were partners.

10 Q And you'll note on page 23 of that agreement it
11 refers to notice, Section 19.6 -- I'm sorry. Go to page 22
12 first.

13 A Yes, sir.

14 Q And on that notice provision, it says: That any
15 communication required or permitted to be given by the parties,
16 and then it gives an Operadora address on Boulevard, and you're
17 going to have to pronounce that?

18 A Ototan [phonetic].

19 Q Is that in Cancun, Mexico? Is that your office?

20 A Yes, sir.

21 Q Okay. Why did you want notice about anything that
22 was going on in this lease?

23 A Because we have a big investment here, and we wanted
24 to be part of any default.

25 Q How long is this lease? What's the duration of this

1 lease? Yeah, you can look through it. It's --

2 A It's okay if I look?

3 Q Yeah, page --

4 THE COURT: You may.

5 MR. VAN: Page 2, Paragraph 2.1.

6 THE COURT: You can look through all of Exhibit 1 to
7 give yourself context. Counsel may send you a page to look at,
8 too.

9 THE WITNESS: Thank you.

10 BY MR. VAN:

11 Q Look on page 2.

12 A Yes, sir. 10 years, an initial time of 10 years.

13 Q Okay. So it starts in 2011 for 10 years. That's
14 2021, and then look at Paragraph 2.3.

15 A Additional term.

16 Q Yes. And how many additional terms are there?

17 A Four additional periods of five years.

18 Q Okay. So you essentially have a 30-year lease
19 starting in 2011, correct?

20 A Yes, sir.

21 Q How much money did you invest in the development of
22 this property originally, originally?

23 A Together, you mean with Rose?

24 Q Originally just you. That's my next question.

25 A Like \$7 million, 6, \$7 million.

1 Q Okay. And how much did you and Rose together invest?

2 A \$9 million.

3 Q Okay. So Rose invested 2 million. You invested
4 7 million?

5 A Or 3 million, yeah.

6 Q Okay. So with regard to the notice provision, that's
7 why you wanted to be put on notice, is you had so much money
8 invested in this?

9 A Yes, sir.

10 Q And the longevity of this lease, you wanted to --
11 this was a good lease for you?

12 A Yes.

13 Q How was that property performing?

14 A Better by day.

15 Q Okay. Let me have you go to Exhibit 28.

16 A Page or exhibit?

17 Q 28. Exhibit 28.

18 A Look for No. 28. Yes, that fifth amendment?

19 Q Yes, sir. Do you remember that document?

20 A Yes, sir.

21 Q And why was there -- why do we have this document?
22 Do you remember?

23 A No.

24 Q Okay. Look on page -- I apologize -- page 4,
25 Paragraph 11.

1 A Uh-huh.

2 Q And this is in reference to the notice provision we
3 looked at on the original agreement?

4 A Yes, sir.

5 Q And it said that: Copies to the tenant shall be sent
6 to the subtenant address at Operadora Anderson, and that's the
7 same address, correct?

8 A Yes, sir.

9 Q And then subtenant's counsel Ronald Fieldstone and
10 Susan Trench, were they your attorneys at the time?

11 A Yes, sir.

12 Q Why did you add Operadora's counsel on as a party to
13 get notice at that point in time?

14 A Because we didn't want to miss it. So we wanted to
15 have a chance to be notified through -- also through our
16 attorneys.

17 Q If what? If there was -- why?

18 A A default from Rose.

19 Q Okay. And did you have an arrangement with Rose with
20 regard to that as to how you would handle that if there was a
21 default?

22 A With Rose?

23 Q Yeah.

24 A With a contract, sir.

25 Q Okay. Were you prepared to cure the contract?

1 A From the percentage, sir.

2 Q Okay. And in May of 2015, you received a termination
3 letter, correct?

4 A Yeah.

5 Q If you can look at Exhibit 40 --

6 A Yes, sir.

7 Q -- is that the letter that you received?

8 A Yes.

9 Q Is that -- was there a notice of default that you
10 received prior to this?

11 A No, sir.

12 Q And is this a notice of default?

13 A No.

14 Q What is this?

15 A Letter of termination.

16 Q Okay. So consistent with the terms of the original
17 lease, did you ever receive a notice of breach?

18 A No.

19 Q Would you have -- would you have cured the breach had
20 you received that notice?

21 A Yes. Can I tell you why?

22 Q Sure.

23 A I'm sorry, sir. I don't know your name, but you were
24 saying before that three or four months ago we came into the
25 picture, and that's not true. When we were negotiating this

1 contract, we asked them to put a paragraph or a clause -- I
2 don't know the word in English, I'm sorry, that says that if
3 Rose's defaults, we want TI to honor the exact contract, and TI
4 never agreed to do that. So the best we can get from TI was
5 what is written in the contract. That says that they were
6 willing to negotiate a new contract with us.

7 But it doesn't say the terms of that contract. So
8 that's why we asked them to have that chance to cure it because
9 we know we are in risk if Rose loses their contract because we
10 don't know how much are they going to want to charge us. So
11 that's why we want to be notified, and that's why we want to
12 cure it because we're happy with the contract that we have
13 right now. We don't know what kind of contract they're going
14 to offer us.

15 Q So from -- in May of 2015, was your company prepared
16 and economically able to cure the default?

17 A Yes, sir.

18 Q Okay. Now, there's a sublease. You entered into a
19 sublease agreement with -- well, let me strike that for a
20 second. There was a point in time after 2011 where your
21 relationship with Rose changed from partner to something else,
22 correct?

23 A Yes.

24 Q When was that?

25 A Why or --

1 Q When. When.

2 A When?

3 Q Why is the next question.

4 A When, I believe it's in -- I don't know the exact
5 days, but I think it's, like, in 2014.

6 Q Hold on one second. Maybe I can --

7 A I think it's when we went into the sublease I think.

8 Q Okay. If you can look at Exhibit 30 --

9 A Yes, sir.

10 Q -- does that refresh your memory of when that
11 occurred?

12 A In 2014.

13 Q Okay. So that's the time when your relationship
14 changed from a partnership to a different relationship. Why
15 did that change?

16 A Because we bought Rose's shares in the company.

17 Q Rose what?

18 A Their shares or --

19 Q Yeah. So why did you change from both of you being
20 partners to you just running the restaurant part of it and him
21 running the real estate side of it?

22 A It was for both best interests. We wanted to stay
23 operating the restaurant and own the hundred percent of the
24 restaurant, and he wanted to be our landlord, and we were fine
25 with that.

1 Q How was Gary Dragul at running restaurants?

2 A I don't know if when he was a child he ran one, but I
3 don't know. He never run a restaurant I think.

4 Q And how are you at running restaurants?

5 A I think I'm very good.

6 Q Okay. So the change came because you wanted to be in
7 control of the restaurant, not with a partner, and he wanted to
8 just run the real estate side of it?

9 A Yes.

10 Q Okay. Now, as part of that sublease as well, there's
11 an obligation that says that if Rose becomes aware of a default
12 they need to put you on notice, correct?

13 A Yes.

14 Q And, in fact, in that provision, you put down that --
15 the notice provision there is on page 10 and 11 -- in that one
16 it evidences that the notice for Rose needs to go to Ben Kahn,
17 who is -- who is Ben Kahn? Do you know?

18 A I think -- yes, I know. It's Rose's attorney.

19 Q Okay. And if to the subtenant, which would be you --

20 A Yes.

21 Q -- then it would go to Ronald Fieldstone and Susan
22 Trench, correct?

23 A Yes, sir.

24 Q And they were your attorneys?

25 A Yes, sir.

1 Q Okay. But that didn't change the obligation under
2 the original lease for TI to give you notice, did it?

3 A No.

4 Q TI is not a party to this sublease, correct?

5 A No.

6 Q All right. Now, there was a statement made, and you
7 made a comment about that, that you haven't been involved in
8 this until the last three months. How long have you been made
9 aware of this issue?

10 A May 28.

11 Q That was the first time that you got notice?

12 A Yes.

13 Q Has Mr. Dragul been communicating with you with
14 regard to the status of this all along?

15 A Yes.

16 Q And you're familiar with what's going on in the
17 litigation?

18 A Kind of, yes.

19 Q Okay. Under the terms of the original lease, had
20 there not been a provision for you to get notice, do you
21 believe that Rose would've signed that lease?

22 A You mean on the original?

23 Q The original lease. Under the terms of that original
24 lease, you were to get notice, correct?

25 A Yes, sir.

1 Q And that has never changed, correct?

2 A Yes, sir.

3 Q Meaning it has never changed?

4 A Never changed.

5 Q Okay. How many other notices have you received from
6 Treasure Island with regard to any other defaults?

7 A None, I think.

8 Q Yet under the terms of the agreement you're supposed
9 to be getting notices, correct?

10 A Yes, sir.

11 Q Based only on the amount of notices that you've
12 received, based only on that, how many defaults could you say
13 that there has been with regard to the lease between Rose and
14 Treasure Island?

15 A None.

16 Q Except for that one, with the exception of that one?

17 A Yes.

18 Q And you've not received any other notices?

19 A No.

20 Q And again you would have -- had you had the
21 opportunity, you would have had the ability to cure any default
22 that Treasure Island claimed?

23 A Yes, sir.

24 Q Without any problems?

25 A Yes, sir.

1 MR. VAN: Okay. I have nothing further.

2 THE COURT: Cross-examination.

3 MR. VAN: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. SHEEHAN:

6 Q Let's just address that last point real quick. If
7 you could turn behind Tab 8.

8 A I'm sorry. I'm sorry. I'm sorry.

9 Q Okay. Take your time.

10 MR. VAN: I'm sorry. Where are you looking?

11 MR. SHEEHAN: Tab 8.

12 THE COURT: 8.

13 MR. VAN: 8.

14 BY MR. SHEEHAN:

15 Q If you'll notice, this is the default notice, and it
16 is to your address, correct?

17 A Yes.

18 Q By the way, you didn't offer to cure that default,
19 did you?

20 A May I read it?

21 Q Sure.

22 A Okay.

23 Q I'll make it easy for you.

24 A Yes, sir.

25 Q Operadora has never agreed to cure any default on

JD Reporting, Inc.

1 behalf of Rose, correct?

2 A No, it says in the contract that we agree to cure it.

3 Q Have you ever sent a letter to Treasure Island or
4 sent any money to Treasure Island to cure a default on behalf
5 of Rose?

6 A Sir, this is not a --

7 Q The question, sir, is real simple. Have you ever
8 offered to cure a default on behalf of Rose?

9 A I have never received a default letter from Treasure
10 Island.

11 Q All right. If you could turn behind Tab 29, please.

12 A Yes, sir.

13 THE COURT: You said 29?

14 MR. SHEEHAN: Yes.

15 THE COURT: Thank you. Got it.

16 BY MR. SHEEHAN:

17 Q The document is entitled: Subordination,
18 Non-disturbance and Attornment Agreement; have you seen this
19 document before, sir?

20 A I suppose, yes.

21 Q All right. And this is the agreement between
22 Treasure Island, Rose LLC, and Señor Frog's Las Vegas LLC.
23 Señor Frog's Las Vegas LLC is your entity, the sublessee for
24 the space, correct?

25 A Yes.

1 Q And the parent company is Operadora, correct?

2 A Yes, sir.

3 Q And to my knowledge, this is the only document that
4 was ever signed between Treasure Island and Señor Frog's,
5 slash, Operadora; are you aware of any other document that was
6 signed between the parties?

7 You have to say no just for the record. I saw you
8 shake your head, but --

9 A I'm just reading.

10 Q Okay. Sure.

11 A I'm sorry.

12 Q And again the question is: Are you aware of any
13 other document, signed document agreement between Treasure
14 Island and Señor Frog's, slash, Operadora?

15 A No, sir.

16 Q All right. And this document does not contain any
17 notice provision, does it?

18 A I don't know, sir. Let me please read it.

19 Q Sure.

20 A Thank you.

21 Q To save time, I'll represent to you that there is no
22 notice provision in here, but if you see one later, you're
23 welcome to go on.

24 A Yes, sir, thank you.

25 Q But we can all talk about it, okay?

1 A I'm sorry I'm reading slow.

2 Q That's okay. Take your time, but there is one
3 provision I would like you to take a look at.

4 MR. VAN: Well, Your Honor --

5 THE COURT: Hold on a second. Sir, you can read as
6 much as you want, and you don't have to take counsel's word for
7 it if you don't want to.

8 And, Mr. Van, if you have an objection, you need to
9 make it.

10 THE WITNESS: Oh, thank you, Your Honor.

11 MR. VAN: Misstates the document. The document
12 speaks for itself and it misstates.

13 THE COURT: Overruled. You can keep going, Counsel.
14 BY MR. SHEEHAN:

15 Q That's fine. I mean, there isn't a specific notice
16 address in here. It just states in Paragraph 3: Any notices
17 required shall be in writing. But that's fine.

18 The point about the document though is in paragraph A
19 on page 2, if you go to the second sentence, it says: To the
20 extent that the lease agreement is terminated by prime landlord
21 due to a default by landlord tenant and subtenant is not in
22 default on the amended sublease, subtenant and prime landlord
23 will enter into negotiations for a new leasing agreement for
24 either the sublease the premises or the entire premises.

25 Do you see that, sir?

1 A Yes, sir.

2 Q All right. And that was your understanding all
3 along, correct?

4 A Yes, sir.

5 Q All right. And by the way, I did hear you mention
6 that if TI had agreed to abide by the terms of your sublease
7 with Rose, you would've been fine with that, correct?

8 A The exact contract, yes.

9 Q And that remains true today?

10 A Pardon me?

11 Q And that remains true today?

12 A No, sir, it remains what is written right now.

13 Q Okay. Let's turn over to Tab 30, Amended Sublease.
14 I believe you testified earlier that Treasure Island did not
15 sign this document, correct, was not a party to this document,
16 did not sign it?

17 A Yes, sir.

18 Q Okay. Now first of all, the Amended Sublease is for
19 what space? Is it the -- the space that is being leased by
20 Señor Frog's, slash, Operadora, it is not the entire premises,
21 is it? It is only the downstairs and the kitchen upstairs,
22 correct?

23 A Yes, sir, and we can lease any time we need it the
24 upstairs space from them.

25 Q Well, actually the sublease premises is described in

1 paragraph 3, correct?

2 A Sublease premises, yes, sir.

3 Q All right. And it describes what space is being
4 subleased, correct?

5 A Yes, sir. It also shows later that we can lease the
6 upstairs space somewhere here.

7 Q Okay. All right. Let's stop to look at that.

8 A Yeah. I can find it for you.

9 Q You said Paragraph C, 4C on page 2, and it actually
10 says that if you are going to hold a special event, then you
11 must use the space, but it doesn't state that Señor Frog's is
12 entitled to use the space, correct?

13 A This is not the paragraph, sir. There's another
14 paragraph. It's D.

15 Q D?

16 A Yes, sir.

17 Q Okay. And where does it say in there that you are
18 entitled to lease additional space?

19 A Here?

20 Q Yes.

21 A Paragraph D.

22 Q All right. I don't believe it says it in there, but
23 let's move on anyway.

24 A It says: If subtenant rents from landlord a portion
25 of the premises other than that sublease premises, we have to

1 pay X amount of money.

2 Q Okay. Now let's turn to page 5, Paragraph 6.

3 A Yes, sir.

4 Q And that talks about the rent that Señor Frog's,
5 slash, Operadora is paying to Rose, correct?

6 A Yes, sir.

7 Q All right. And what is the amount of that rent?

8 A \$80,000.

9 Q \$80,000 plus 3 and a half percent extra for the
10 second year, correct?

11 A Yes, sir.

12 Q All right. So for January of 2015, February of 2015
13 and March of 2015, you paid Rose the sum of approximately
14 \$82,500 for each of those months, correct?

15 A Yes, sir.

16 Q And you were not -- you paid those amounts on time,
17 correct?

18 A Yes, sir.

19 Q All right. So if Rose -- the way this worked was you
20 paid Rose the rent money, and then Rose turned around and paid
21 it to Treasure Island, correct?

22 A I don't know, sir. I paid to Rose.

23 Q Okay. But you understood that Rose had an obligation
24 to pay?

25 A Oh, yes.

1 Q Okay. And the rents were roughly equivalent; is that
2 correct?

3 A I don't know, sir.

4 Q Okay.

5 A I just pay my rent.

6 Q All right. But you did pay the 82,500 for January,
7 February and March?

8 A Yes, sir.

9 Q And you understood that Rose then had to pay rent to
10 Treasure Island?

11 A Yes, sir.

12 Q And now I heard them earlier, the presentation by
13 Mr. Van that said that Mr. Dragul --

14 MR. SHEEHAN: I hope that I'm pronouncing that name
15 right --

16 MR. VAN: Dragul.

17 MR. SHEEHAN: Dragul.

18 BY MR. SHEEHAN:

19 Q -- Mr. Dragul was the business side of things, and
20 you were the restaurant side of things; is that correct?

21 A He didn't say business. He said other word. He used
22 other word.

23 Q Okay. But is that roughly true that he was the
24 business side, and you were the restaurant side?

25 A No, I'm a businessman also.

1 Q All right. Did you personally negotiate the terms of
2 the lease with Treasure Island?

3 A With Rose.

4 Q Okay. So you negotiated this agreement that's right
5 front of us, the sublease?

6 A Yes, sir.

7 Q Okay. But you did not negotiate any leases with
8 Treasure Island; that was Mr. Dragul?

9 A Yes, sir.

10 Q Were you aware that Rose owed Treasure Island
11 percentage rent in the approximate amount of \$60,000 per month?

12 A On May 28 I received a letter, but it didn't say how
13 much.

14 Q Okay. Were you aware at all points in time that
15 there was percentage rent due from Rose to Treasure Island
16 under the terms of the original agreement?

17 A Yes.

18 Q And you were aware that that was roughly -- and that
19 was based on your sales, correct?

20 A Yes, sir.

21 Q And so it was roughly about \$60,000 a month, fair
22 enough?

23 A Yes. I don't know. It depends on the quarter.

24 Q Yeah, but an average might have been --

25 A No, a little less.

1 Q A little less, but something like --

2 A Like 50,000.

3 Q Okay.

4 A 52, something like that.

5 Q All right. Fair enough. And so you were aware that
6 Rose had to pay that to Treasure Island?

7 A Yes, sir.

8 Q And you're also aware that you had paid 83,000 --
9 \$82,500 a month so that Rose would have the money to pay that
10 to Treasure Island, correct?

11 A I pay my rent, yes, sir.

12 Q All right. Let's turn to Paragraph 9D on page 7.

13 A Yes, sir.

14 Q Second sentence there, do you see the second sentence
15 begins with the word In under 9D?

16 A In the event that prime landlord?

17 Q Yep.

18 A Yes.

19 Q It says: In the event that prime landlord notifies
20 landlord of any default under the prime lease and does not
21 provide simultaneous notice to subtenant, landlord -- that
22 would be Rose -- will provide subtenant -- that would be you,
23 Operadora -- with a copy of any prime landlord notice of
24 default under the prime lease within 24 hours and an
25 opportunity to cure. Do you see that?

1 A Yes, sir.

2 Q All right. Now, and you were aware that there was a
3 notice of default sent, but it wasn't sent to Operadora by
4 Treasure Island, correct?

5 A At that time I was not aware, sir.

6 Q Well, you're aware of that now?

7 A I don't know if Treasure Island sent Rose a default
8 letter.

9 Q Can you please turn to behind Tab 38.

10 A Yes, sir.

11 Q 38. Have you seen this document before, sir?

12 A I'm not sure, sir.

13 Q All right. Well, let me ask you a question.

14 A Yes, sir.

15 Q Did Rose ever provide you a copy of that default
16 notice to Rose by the prime landlord Treasure Island?

17 A No, sir.

18 Q Did they have an obligation to do so under the
19 paragraph that we just talked about?

20 A Yes, sir.

21 Q And by the way, you are reasonably good friends with
22 or acquaintances with Mr. --

23 MR. VAN: Dragul.

24 BY MR. SHEEHAN:

25 Q -- Dragul, and you have each other's phone numbers

1 and talk on the phone, correct?

2 MR. VAN: Object to the form.

3 THE COURT: Overruled.

4 THE WITNESS: Yes.

5 BY MR. SHEEHAN:

6 Q He could've picked up the phone and called you at any
7 time to tell you about that, correct?

8 A You can ask him.

9 Q Okay. Did he ever?

10 A Did he ever what?

11 Q Call you to tell you that they were in default?

12 A I called him after I received the letter of
13 termination.

14 Q Okay. And that was on May 28th, correct?

15 A Yes, sir, when we receive it.

16 Q And he actually told you that at that time that they
17 were not in default on the rent and that they paid the rent,
18 correct?

19 A Yes, sir.

20 Q And he never told you about any other default notices
21 that had been sent to --

22 A No, sir.

23 Q Now, if you could turn to page 8.

24 A In the same --

25 Q Yeah, in the -- I'm sorry -- behind Tab 30.

1 A 30, yes, sir. Page 8?

2 Q Yes.

3 A Yes.

4 Q Now, again this document, if you turn to the end of
5 it, there's no signature by Treasure Island on the document.
6 It's just between Rose and Señor Frog's, correct?

7 A You said page 8?

8 Q Well, let's go to page 8 first then.

9 A Yes.

10 Q Paragraph I there.

11 A Uh-huh. Yes.

12 Q All right. What does that say? You can read it out
13 loud.

14 A Landlord agrees to comply with its obligations under
15 the prime lease and not to create a default thereon due to
16 landlord's actions; however --

17 Q First of all, I'm sorry to interrupt you, but
18 landlord is Rose, correct?

19 A Yes, sir.

20 Q Okay. So Rose agrees to comply with its obligation
21 to the prime lease and not create default under -- thereunder
22 due to Rose's actions. That was what they promised you,
23 correct?

24 A What was your question?

25 Q Okay. So basically what that says is Rose agreed to

1 comply with its obligations with Treasure Island under the
2 prime lease and not create a default thereunder, correct?

3 A Yes.

4 Q And then it says: However, in no event shall this
5 provision apply to any default under the prime lease prompted
6 or caused by subtenant, and it further says -- what does the
7 last sentence there say? Do you see where it says: And
8 subtenant shall not have the right or authority to determine
9 whether or not landlord has in fact complied with its
10 obligations under the prime lease?

11 A Yes.

12 Q All right. Now let's turn to behind Exhibit 35, Tab
13 35.

14 A 35?

15 Q Yes, please.

16 A Yes, sir.

17 Q Have you seen a copy of this letter before, sir?

18 A I don't know, sir. I don't think so.

19 Q Okay. Why don't you go ahead and take your time and
20 read it real quickly.

21 A Sure. Thank you.

22 Yes, sir.

23 Q All right. Now, we're going to need a little
24 explanation for the Court on this one. Treasure Island buys a
25 lot of food so it has bulk buying power. When it buys food, it

1 gets lower prices because it buys so much, correct?

2 A I don't know the prices.

3 Q Okay. Well, you on behalf of Señor Frog's asked
4 Treasure Island if they would buy your food for you, and then
5 you would reimburse Treasure Island for the cost of that food,
6 correct?

7 A Yes, they sell us the food.

8 Q Okay. And you did that because rather than buy the
9 food directly yourself, the cost would be higher if you bought
10 it yourself because Treasure Island has buying power. They
11 bought it for you, and then you reimburse Treasure Island, fair
12 enough?

13 A No.

14 Q All right.

15 A No, we have another restaurant in Las Vegas, Carlos'N
16 Charlie's, and we buy cheaper.

17 Q Okay. So --

18 A We buy independently.

19 Q All right. It doesn't matter why I guess.

20 A Okay.

21 Q But the point is, is that you, in fact, as Señor
22 Frog's, had an arrangement where Treasure Island bought your
23 food for you?

24 A Yes, sir.

25 Q And you were supposed to reimburse them for the cost

1 of that food, correct?

2 A We reimburse them, yes, sir. We're not supposed,
3 yes.

4 Q Okay. But as of the beginning of 2015, you were
5 significantly behind, correct?

6 A Yes, sir.

7 Q In fact, you hadn't paid the food for August?

8 A What it says here.

9 Q Yes. And that says August, right?

10 A It says August, yes, sir.

11 Q And it says September, correct?

12 A Yes, sir.

13 Q And, in fact, October hadn't been paid either at this
14 point in time, fair enough?

15 A I don't know, sir. It doesn't say here.

16 Q All right. Well, I'll provide a different document
17 later through another witness, but --

18 A Yeah.

19 Q In fact, your check to cover the August food bill in
20 early 2015 bounced, didn't it?

21 A Yes, sir.

22 Q And why is it that your check for the August food
23 bill that you sent at the end of December 2014 bounced? Why is
24 that?

25 A Because our headquarter company made a mistake

1 sending the money incorrectly.

2 Q And that's your sworn testimony?

3 A Pardon me?

4 Q That's your sworn testimony? It's not because you
5 didn't have the money to pay?

6 A You never ask me why it bounced, never before. You
7 asked me in my deposition if we have problems -- if we have
8 problems at that time with our money, and I told you, yes, we
9 had problems. That business was not doing very well, yeah, and
10 then we pay.

11 MR. SHEEHAN: All right. Your Honor, I would like to
12 publish his deposition. It's behind tab 63.

13 THE COURT: Okay. Do you have the original or a
14 certified copy?

15 MR. SHEEHAN: I unfortunately -- we --

16 THE COURT: Is everybody stipulating to use the
17 version that's under tab 63?

18 MR. VAN: Yes, Your Honor.

19 THE COURT: Okay. Dulce, I'm going to take it out of
20 my book, but I don't need it, and hand it to you so you can do
21 what you do.

22 BY MR. SHEEHAN:

23 Q You recall having your deposition taken in this
24 matter, correct?

25 A Yes, sir.

1 Q And you agreed that all your answers would be under
2 oath, correct?

3 A Yes, sir.

4 THE COURT: Sir, I'm handing you a copy of the
5 deposition that's been published.

6 THE WITNESS: Thank you very much.

7 THE COURT: Everybody agrees that they can use that
8 copy.

9 THE WITNESS: Thank you.

10 THE COURT: Counsel refer you to a page. You can
11 refer before or after the place he sends you to give yourself
12 context.

13 THE WITNESS: Thank you.

14 THE COURT: Okay.

15 BY MR. SHEEHAN:

16 Q I'd ask you to turn to page 47, please.

17 A Yes, sir.

18 Q And at line 10 do you see where the question was
19 asked of you: Do you recall a time where you were behind on
20 the food bill?

21 A Page 47. I'm sorry. Page 44, 48. They're not in
22 order.

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

24 THE COURT: You may.

25 / / /

1 BY MR. SHEEHAN:

2 Q There's four pages per thing. So it's -- see -- at
3 page.

4 A Oh, yeah. I'm sorry.

5 Q No troubles. A lot --

6 A 47. I'm new in this.

7 Q No problem. You're doing great.

8 A Okay.

9 Q All right. And you see on page 47, on the bottom
10 left-hand corner -- you're on page 47 now, right?

11 A Yes, sir.

12 Q All right. And do you see on line 10?

13 A Yeah. Do you recall a time where you -- yes, sir.

14 Q All right. And I said: Do you recall a time where
15 you were behind on the food bill, and your answer was?

16 A Because we didn't have money to --

17 Q No. What's your answer on the next line?

18 A It says: Because we didn't have money to pay.

19 Q Okay. And at that period of time the property was
20 struggling mightily, correct?

21 A At that period of time what?

22 Q The property was struggling. You didn't have any
23 money?

24 A That business.

25 Q The business?

1 A Yes, sir.

2 Q Now, sir, you recall on May 28th -- we talked about
3 this earlier -- that you got the termination letter, and you
4 contacted Mr. Dragul, correct?

5 A Yes, sir.

6 Q You also hired a lawyer at that time. Your lawyers
7 from Mexico hired a United States lawyer at that time to reach
8 out to Treasure Island, correct?

9 A Yes, sir.

10 Q Okay. And if you could turn behind tab 50.

11 A The deposition.

12 Q No, in the --

13 A Oh, here.

14 Q But keep the deposition handy.

15 A Yes, sir.

16 Q Okay. And that's behind tab -- Exhibit 50, and
17 that's the e-mail from your lawyer. Now, I'm going to read you
18 my questions directly from the deposition just so we won't have
19 any problem here. I'm going to word it quote -- word for word.

20 A Yes, sir.

21 Q All right. If you want to, you can see it's on
22 page 28.

23 A Page 28.

24 Q Yes, line 13.

25 A Yes, sir.

1 Q I'm not trying to trick you. That's why I'm just
2 going to give you the same questions: All right. And when you
3 got -- Question, all right. And when you got the May 28th
4 termination letter, your lawyer wrote on Señor Frog's Las Vegas
5 behalf this e-mail, correct?

6 And you answered, Correct.

7 So that's fair, correct?

8 A Yes, sir.

9 Q All right. So this e-mail -- and by the way, the
10 e-mail says -- this e-mail from your lawyer -- This e-mail will
11 confirm our discussions. The letter from Mr. Wirthlin, that's
12 the termination letter on May 28th to Rose LLC and Operadora
13 Anderson's dated May 28, 2015, was sent to my client for
14 notice -- my client meaning you -- was sent for notice purposes
15 only under Section 11 of the fifth amendment to the lease
16 agreement between Rose LLC and Treasure Island LLC.

17 As we discussed under Section 9 of the fifth
18 amendment, my client, Señor Frog's, is not affected by default
19 by Rose LLC as to prime tenant. As we further discussed, Rose
20 LLC is disputing the default. You have confirmed with me that
21 your client does not plan on taking any action until the
22 dispute with Rose LLC is resolved, whether by court action or
23 settlement between the parties. None of this will impact
24 adversely on my client, which will be permitted to continue its
25 subtenancy. If your client prevails and terminates Rose LLC's

1 tenancy, at that point you would then negotiate a lease
2 directly with my client in accordance with Section 9 of the
3 fifth amendment. That's what your lawyer wrote, correct?

4 A Yes, sir.

5 Q On behalf of your company, correct?

6 A Yes, sir.

7 Q All right. And in that e-mail basically they said
8 Señor Frog's position was that they wanted to make sure that
9 Señor -- that if the lease between Rose and Treasure Island was
10 terminated that Treasure Island would negotiate with Señor
11 Frog's for a direct lease pursuant to the terms of the parties'
12 contract, and as you can see from your deposition testimony,
13 you answered, Yes, that is correct?

14 A Yes.

15 Q Okay. All right. There's nothing in this letter --
16 continuing on to page 29 there, line 8 --

17 A Yes, sir.

18 Q All right. My question: All right. There's nothing
19 in this letter that says that Señor Frog's is willing to pay
20 any past due rent moneys, correct? And your answer?

21 A Yes.

22 Q Okay. And then I said: This letter accurately sets
23 forth Señor Frog's position in response to the May 28th
24 letter, correct? And your answer was?

25 A Correct.

1 Q Okay. Now, sir, who is your lawyer?

2 A Where?

3 Q In this matter.

4 A Right now?

5 Q Yes.

6 A Mr. Michael Van, and Mr.--

7 Q Okay. And how long has Mr. Van been representing
8 you?

9 A Since mediation, sir.

10 Q So about four months ago?

11 A (No audible response.)

12 Q Okay. Now, you haven't -- the time frame hasn't come
13 for you to meet with Treasure Island, and you haven't talked
14 with Treasure -- except for this e-mail, there's been no
15 communications between Treasure Island and Señor Frog's to the
16 best of your knowledge, correct?

17 A Yes, sir.

18 Q And in fact, you've never met Mr. Anthony before
19 today, have you?

20 A I don't know.

21 Q But you were not part of the negotiations for the
22 lease between Rose and Treasure Island or any of the amendments
23 thereto, correct?

24 A Yes, sir. You already asked me that, yes.

25 Q Pardon me?

1 A Yes.

2 Q Okay. So the answer is, no, you were not part of any
3 of those negotiations; I am correct?

4 A Oh, you are correct.

5 Q If you could turn behind Tab 59, please. All right.
6 Somebody from Mr. Van's office sent this to you in Mexico for
7 you to sign, correct?

8 A Guadalajara, sir, yes.

9 Q So somebody from Mr. Van's office drafted this for
10 you, correct?

11 A Correct.

12 Q Now, if you'd turn to page 3 and look at
13 Paragraph 13, the paragraph says: Although none of these
14 entities other than Rose are parties to the lease -- meaning
15 none of the Señor Frog's parties are -- I was involved in
16 Rose's side of the negotiations and bargained for notice and
17 cure provisions that would require TI to notify Operadora and
18 SFLV's counsel of a breach on the part of Rose to allow for
19 direct cure payments by Operadora to SFLV. Do you see that?

20 A Yes, sir.

21 Q That's not true, is it?

22 A What's not true?

23 Q What you didn't -- you weren't involved, and you
24 didn't bargain for the notice and cure provisions. You just
25 testified that you had nothing to do with the --

1 A Wait. Wait. Wait. I was involved with Rose's
2 contract, yes, sir.

3 Q Okay.

4 A It's my contract.

5 Q Okay. I understand, and you testified that you were
6 involved with Rose's contract with --

7 A Yes.

8 Q -- the amended sublease?

9 A It's exactly what it says here.

10 MR. SHEEHAN: Okay. Well, we'll let Your Honor
11 determine that. No further questions, Your Honor.

12 THE COURT: Redirect?

13 MR. VAN: Yes, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. VAN:

16 Q Mr. Krouham, how many times have you met Brad
17 Anthony? Today?

18 A I think today.

19 Q When was the first time you met Mr. Ruffin
20 [phonetic]?

21 A Mr. Ruffin?

22 Q Yeah.

23 A 2011.

24 Q So you negotiated -- you were in a meeting with
25 Mr. Ruffin and planning the conceptualization of this deal,

1 correct?

2 A Yes, sir.

3 Q You were involved either directly or through your
4 counsel with the drafting of the original lease, correct?

5 A Yes, sir.

6 Q In fact, it's because of your counsel that Operadora
7 was listed as a party that needed to receive notice, correct?

8 A Yes, sir.

9 Q In fact, isn't it true that with regard to the fifth
10 amendment, Randy Fieldstone --

11 A Ronald Fieldstone.

12 Q -- yeah -- Ronald Fieldstone, he indicated that you
13 were not going to sign it unless notice went to him?

14 A Yes, sir.

15 Q So you were involved in the negotiations of all of
16 these amendments, maybe not directly, but either you were
17 advised of it, correct?

18 A I was involved, but not directly with Treasure
19 Island.

20 Q Okay. So you were aware of everything that was going
21 on?

22 A Sure.

23 Q All right. Let's go back to Exhibit 8.

24 THE WITNESS: I thought I was free, Your Honor.

25 THE COURT: No, you're never free while you're in

1 that chair.

2 THE WITNESS: Almost there.

3 BY MR. VAN:

4 Q This issue, this Exhibit A, there's a question about
5 whether you ever agreed to cure this construction matter. You
6 weren't part of the construction side of this equation, were
7 you?

8 A No.

9 Q So this would be a Rose issue, correct?

10 A Yes.

11 Q Do you know if that's been cured?

12 A Yes.

13 Q Okay. Let's go to Exhibit 29. Do you know what an
14 attornment agreement is?

15 A 29?

16 Q Yeah, Exhibit 29. Do you know what an attornment
17 agreement is?

18 A In English, no, sir. In Spanish, yes.

19 Q Now, if you can look on page 2, Paragraph A at the
20 top, who is the prime landlord in this? Do you know?

21 A Treasure Island.

22 Q Okay. So this agreement is saying that in the event
23 that they sell it that it's not going to -- it's not going to
24 affect your lease, correct?

25 A Correct.

1 Q If you can go to Paragraph 30 -- excuse me --
2 Exhibit 30, explain to me originally you -- the lease included
3 the upstairs and the downstairs, correct?

4 A Originally, yes, sir.

5 Q And you were part of that. You ran the upstairs and
6 the downstairs?

7 A Yes, sir.

8 Q In fact, isn't it accurate that the kitchen is
9 upstairs?

10 A It is.

11 Q And so even though you don't rent the bigger space
12 upstairs, you rent the kitchen space?

13 A Yes.

14 Q You certainly can't function downstairs without an
15 upstairs?

16 A No. No, sir.

17 Q All right. And then was there an agreement -- what
18 was the agreement then to why to carve out that one section?
19 Why did you and Rose come to that agreement to carve that out
20 and just allow it for events and other matters?

21 A Because we wanted to lower the rent.

22 Q Between you and Rose?

23 A And Rose, yes, sir.

24 Q Okay. Not between you and TI, you still paid the
25 same amount to them?

1 A No, sir. We pay -- we pay less.

2 Q Okay. And that was an agreement that you entered
3 into between TI and Rose -- or that was an agreement that was
4 entered into between TI and Rose?

5 A Yes.

6 Q Okay. Do you know when that -- when you went to just
7 the downstairs? Do you remember when that was?

8 A 2014.

9 Q That's the sublease?

10 A Yes.

11 Q Okay. Now, there was questions that said that you
12 were paying rent to Rose, and then Rose was supposed to pay
13 rent to TI, correct?

14 A Yes, sir.

15 Q Did you have -- in the event that Rose did not, you
16 still had the ability to cure that?

17 A Yes, sir.

18 Q And you would have cured that, correct?

19 A Yes, sir.

20 Q Okay. If you can go to Exhibit 30, and we're going
21 back to page 9, Paragraph D.

22 A D?

23 Q D as in dog. Now, they had you read the second
24 paragraph. The first paragraph says: Prime landlord -- which
25 is Treasure Island --

1 A No, sir, it's -- it's in --

2 Q I'm sorry. Page 7.

3 A Oh, 7.

4 Q No, Exhibit 30.

5 A Page 7.

6 Q Page 7.

7 A Yeah, I went to page 9. I'm sorry. Yeah.

8 Q Okay. I probably said 9. I apologize. Page 7,
9 Paragraph 9. Paragraph 9D, it says -- the first sentence says:
10 Prime landlord -- which is Treasure Island -- is obligated to
11 provide subtenant -- that's Señor Frog's --

12 A Yes.

13 Q -- with simultaneous notice of any landlord default
14 under the prime lease as outlined in Exhibit D, correct?

15 A Correct.

16 Q So under the terms of this deal, you understood that
17 the prime landlord was obligated to give you notice of any
18 default?

19 A Yes, sir.

20 Q And I've asked it again -- I asked it before, and I'm
21 going to ask it again. In May of 2015 when the default notice
22 was sent at the end of May 28th, were you in a situation
23 economically where you could have paid for the default?

24 A Yes, sir.

25 Q Now, in that same paragraph, it says that you have

1 the right to do this four times, correct?

2 A Yes, sir.

3 Q Was that a negotiated term that you had?

4 A That's a negotiation between Rose and us.

5 Q Okay. Let's go to Exhibit 38. Now, you remember the
6 original lease. It has an obligation that notice goes to
7 Operadora, correct?

8 A Yes, sir.

9 Q And you remember in Exhibit 28 -- that's the fifth
10 amendment to the lease -- there's an obligation that notice
11 goes to Operadora, correct?

12 A Yes, sir.

13 Q Okay. Can you tell me where on this Exhibit 38 you
14 see any reference to Operadora?

15 A No, there's no reference.

16 Q Operadora was not given notice, correct?

17 A No, sir.

18 Q All right. And this is the default notice, correct?

19 A Yes, sir.

20 Q And on this day, had you been given this, were you in
21 a situation where you could have paid that rent?

22 A Yes, sir.

23 Q Okay. How well did you know Najam Khan?

24 A 2011, sir.

25 Q Did you know him well though?

1 A No, I met him with Mr. Ruffin.

2 Q Okay. So you met -- how many times did you meet with
3 Mr. Ruffin?

4 A Like three or four times, sir.

5 Q Okay. Has anybody at Treasure Island ever called you
6 up and said, hey, we'd like comps; we'd like something; we'd
7 like something at Señor Frog's?

8 A Yes, not me, but my managers. Yes.

9 Q And your managers would contact you?

10 A Definitely.

11 Q Did your managers ever contact you and say, hey, we
12 got a phone call from Treasure Island, and we're in default?

13 A No, never.

14 Q So the concept of making a phone call that
15 Mr. Sheehan was espousing, that never occurred to you?

16 A No, and they have my phone number.

17 Q So they have your number. They've never called you.
18 They've never said, hey, by the way -- and, in fact, under the
19 terms of the lease they never gave you notice?

20 A No, and Najam Khan has my phone number.

21 Q Okay. Let's go to Exhibit 35 -- wait, let me ask a
22 follow up to that. Now, Najam Khan, what does he do for the
23 company?

24 A I think he's the CEO for Treasure Island.

25 Q Okay. So he could have called you and said, hey,

1 we've got a problem?

2 A Yes.

3 Q Okay. All right. Exhibit 35.

4 A Yes.

5 Q This has to do with the food issue. Can you explain
6 to me -- was this cured?

7 A Yes, sir.

8 Q When was it cured?

9 A As soon as we received this letter.

10 Q You wrote the check?

11 A Yes, sir.

12 Q Why was it -- when you were explaining that you said
13 that you didn't have the money, what did that mean? What did
14 you mean by that?

15 A Las Vegas restaurant didn't have the money.

16 Q But you had money in other accounts for other venues?

17 A Yes, sir, we have -- yeah, we have a big business.

18 We send money from Mexico, and we cure it.

19 Q So how long -- after this is on June 2nd, do you
20 know how long after that it was cured?

21 A I can't tell you if it was one day or three days, but
22 it was immediately cured.

23 Q Okay. All right. So in your deposition the question
24 was asked because we didn't have the money to pay, you were
25 referencing only the Nevada Señor Frog's?

1 A Definitely, yes, sir.

2 Q And so you took money from another venture -- another
3 venue in order to pay this --

4 A From our headquarter companies.

5 Q Okay. Let's talk about Exhibit 50.

6 A Yes.

7 Q That's a letter from the attorney -- excuse me an
8 e-mail?

9 A Yes.

10 Q Were you consulted on this before she responded by
11 Abigail Watts-Fitzgerald, you personally?

12 A No, sir.

13 Q Okay. So this is a response that she did without
14 your permission?

15 A Yes, sir.

16 Q And on this, at the time of -- on June 1st of 2015,
17 you weren't -- you weren't in default mode; you were in
18 termination mode, correct? Your belief was you'd been
19 terminated?

20 A Yeah.

21 Q Okay. And so your attorney didn't understand that
22 you had never gotten a copy of the default notice?

23 THE COURT: How would he know --

24 THE WITNESS: Exactly, sir.

25 THE COURT: -- what his attorney knew? He already --

1 you just got him to testify this was unauthorized.

2 MR. VAN: Fair enough.

3 BY MR. VAN:

4 Q Did you ever have a discussion with your attorney,
5 with Abigail Watts-Fitzgerald about the need for a default
6 notice?

7 A No, sir.

8 Q Okay. And so she never had your permission to send
9 that e-mail?

10 A No.

11 Q Let's go to your affidavit, page 3, Paragraph 13.

12 A Page 3?

13 Q Yeah, page 3 of your affidavit.

14 A Oh, on the affidavit.

15 Q I'm sorry. It's Exhibit 59.

16 A Thank you. Which paragraph?

17 Q Paragraph 13 on page 3, top of page 3.

18 A Yes, sir.

19 Q Would you read that paragraph to yourself.

20 A Yes, sir.

21 Q Okay. Is your testimony the same today as is set
22 forth in this affidavit?

23 A Yes, sir.

24 Q And so it's your testimony that you were involved in
25 Rose's side of the negotiations and that you -- that you would

1 be required to receive notice, that you never received notice
2 and that you actually strengthened the notice provisions as a
3 result of amendment 5, and that if there were any issues you
4 could work out a financial reconciliation with Rose in the
5 event there was a problem?

6 A Yes.

7 Q And that was your understanding of the negotiations
8 of the terms of the deal?

9 A (No audible response.)

10 Q And you on that day in May of 2015, through other
11 sources, you had the means within which to cure any default
12 that was out there?

13 A Yes, sir.

14 MR. VAN: Okay. Nothing further, Your Honor.

15 THE COURT: Any further cross-examination?

16 MR. SHEEHAN: Nothing, Your Honor.

17 THE COURT: Thank you, sir. We appreciate your time.

18 THE WITNESS: Thank you very much, Your Honor.

19 THE COURT: Have a safe flight.

20 THE WITNESS: Thank you so much.

21 THE COURT: Okay. Next.

22 MR. SHEEHAN: It's Brad Anthony.

23 MR. VAN: Your Honor, I'm going to ask if Mr. Krouham
24 can be excused. I think he's got about 30 minutes.

25 THE COURT: I told him he could go, and have a safe

1 flight.

2 MR. VAN: Oh, I didn't hear that. I apologize.

3 THE COURT: I said have a safe flight.

4 MR. VAN: Okay.

5 THE COURT: Because you told me he had a flight.

6 MR. VAN: Okay.

7 THE COURT: That's why you called him out of order.

8 MR. VAN: That's correct.

9 THE COURT: I pay attention.

10 MR. VAN: You just like that, don't you? You're
11 enjoying this part of this conversation.

12 THE COURT: Yeah.

13 (Colloquy off the record.)

14 (Plaintiff's witness, Brad Anthony, sworn.)

15 THE CLERK: Thank you. Please be seated, and please
16 state and spell your name for the record.

17 THE WITNESS: Brad Anthony. B-r-a-d, A-n-t-h-o-n-y.

18 DIRECT EXAMINATION

19 BY MR. SHEEHAN:

20 Q Mr. Anthony, what do you do for a living?

21 A I'm a general counsel with Treasure Island.

22 THE COURT: And, sir, even though you're a lawyer,
23 since you are currently a witness, you are entitled to M&Ms if
24 you would like them.

25 THE WITNESS: Thank you.

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1 THE COURT: Okay.

2 BY MR. SHEEHAN:

3 Q Did you work in private practice for Mr. Morris
4 before that?

5 A Yes.

6 Q So you've been a lawyer in Las Vegas for how long?

7 A About 10 years.

8 Q In good standing with the Nevada Bar?

9 A Yes.

10 Q All right. Can you turn behind --

11 MR. SHEEHAN: I'm going to make this just as brief as
12 possible, Your Honor, and just go to the highlights.

13 BY MR. SHEEHAN:

14 Q Turn behind Tab 1. Are you familiar with this lease
15 agreement?

16 A I am.

17 Q And pursuant to the lease agreement, if you turn to
18 page 3, there are monetary obligations on behalf of the tenant,
19 correct?

20 A I'm sorry. Page 3?

21 Q Page 4. I'm sorry. Section 3.

22 A Yes.

23 Q And tell me the types of obligations that were due,
24 for example, under Paragraph 3A there. There is --

25 A There's a base rent due under 3A. There's a

1 percentage of gross sales due under 3B, and then somewhere else
2 in here, there is a -- in 3.4, there is a repayment obligation
3 for a contribution we provided Rose at the inception of the
4 agreement.

5 Q Okay. So there's three types of payment due under
6 the lease?

7 A Yes.

8 Q Minimum month base rent, percentage rent, and a
9 repayment for the construction loan?

10 A Correct.

11 Q And with respect to the percentage rent they -- best
12 described in Section B there, and then in Section C it says
13 that: Within 30 days at the end of each calendar quarter
14 during the lease term, tenant shall deliver landlord a written
15 statement setting forth the amount of the tenant's gross sales
16 and shall concurrently therewith pay the percentage rent,
17 correct?

18 A That is what it says, yes.

19 Q All right. So in essence, for January, February and
20 March of 2015, it is the tenant's obligation to provide within
21 30 days the calculation of what is owed for that time frame,
22 and then deliver the check concurrently therewith?

23 A Yes.

24 Q All right. Treasure Island didn't have any role in
25 coming up with that number?

1 A Correct.

2 Q And did Treasure Island pay the percentage rent for
3 January, February and March of 2015 -- I'm sorry -- on time by
4 April 30th?

5 A Rose did not.

6 Q I'm sorry. Rose. Okay. And had they been in
7 default with respect to -- excuse me -- late with each of those
8 three types of payments in the past?

9 A Yes.

10 Q Okay. As of May or April 30th, how many times --
11 April 30th, 2015, how many times was Rose late on its minimum
12 monthly rental obligations up till that point?

13 A I believe approximately eight times.

14 Q Okay. And you've looked at the records to find all
15 this stuff out?

16 A Yes, I have.

17 Q Okay. And how many times were they late with the
18 percentage rent prior to that date?

19 A Again eight times.

20 Q And how many times were they late with the loan
21 reconstruction payment?

22 A Nine times prior to that date.

23 Q So this was causing Treasure Island -- this wasn't
24 the first time they were late?

25 A It was not.

1 Q They had been chronically late?

2 A That's a fair assessment.

3 Q Now, that even began as early as, for example, August
4 of -- August 31st of 2012. If you turn behind Tab 8, you had
5 to write a letter concerning them being delinquent with respect
6 to the construction costs, correct?

7 A Yes.

8 Q The construction part of it. Now, on August 31st,
9 behind Tab 8, you did in fact send out a letter regarding that,
10 correct?

11 A I did.

12 Q Now let's go back to the lease behind Tab 1 and go to
13 the default provisions on page 16, Section 15, page 16.

14 A Okay.

15 Q All right. And if a defendant -- it says basically
16 in 15.1 that: If a tenant shall fail to pay any installment of
17 rent, and the failure continues for 10 days after your
18 landlord's written notice, then that is an event of default,
19 correct?

20 A Yes.

21 Q And then under the remedies Section 15.2, what does
22 it say are the remedies of Treasure Island upon the occurrence
23 of an event of default? Do you see where it says 15.2: Upon
24 the occurrence of an event of default, in addition to any other
25 rights or remedies provided for herein and barring inequity,

1 and without barring election of any other remedy, landlord and
2 sole option shall have the following rights under 15.2.1. What
3 does the first sentence say?

4 A Landlord may terminate this lease and tenant's estate
5 hereunder by written notice of such termination provided,
6 however, that a mere giving by landlord of a notice to --

7 Q Okay. That's fine, Mr. Anthony.

8 A Okay.

9 Q All right. Now, when they were late -- meaning Rose
10 was late with the payments in 2015, did you send a default
11 notice to Rose?

12 A Yes.

13 Q Turn behind Tab 38.

14 A Okay.

15 Q Have you ever seen this letter before?

16 A I have.

17 Q Okay. Did you draft it?

18 A I did.

19 Q Okay. Is this the default notice that you were
20 talking about?

21 A Yes.

22 Q And did you CC Elizabeth Gold with this by e-mail?

23 A I did.

24 Q And does it specifically notice that -- that the
25 letter constituted the notice required under 15.1 of the lease

1 agreement?

2 A Yes.

3 Q And does it specifically advise them that if you're
4 not paid within 10 days of the date of the letter they'll be in
5 default?

6 A Yes.

7 Q And pursuant to the contract, if they don't pay
8 within that 10 days, does Treasure Island have the right to
9 terminate?

10 A Pursuant to 15.2.1, yes.

11 Q All right. Do you know whether -- and this was a
12 sent attention Gary Dragul, and CCed to Elizabeth Gold e-mail,
13 correct?

14 A Correct.

15 Q Okay. And did you personally e-mail Ms. Gold this
16 letter here?

17 A I did.

18 Q Okay. And do you know whether or not Rose received a
19 copy of this default notice?

20 MR. VAN: Object to form.

21 THE COURT: Overruled.

22 THE WITNESS: I do.

23 BY MR. SHEEHAN:

24 Q And how do you know that?

25 A Because I received a phone call from Elizabeth Gold

1 shortly after I sent the letter -- or the e-mail rather. I'm
2 sorry.

3 Q And so that was on or about May 14th or 15th?

4 A Around that date, yes.

5 Q And what did Ms. Gold tell you?

6 A Ms. Gold informed me that Mr. Dragul was --

7 MR. VAN: Object. Hearsay.

8 THE WITNESS: Sorry?

9 MR. VAN: Objection. Hearsay.

10 THE COURT: Sustained.

11 BY MR. SHEEHAN:

12 Q Okay. In response to this letter, did you ever give
13 Rose any extension of time to pay?

14 A No.

15 Q If you turn to the next page, Tab 39.

16 A Okay.

17 Q You sent the notice by Federal Express; is that
18 correct?

19 A Yes.

20 Q Okay. And it was signed for by an F. Neal; do you
21 know who that is?

22 A Yes.

23 Q Is that -- who is that?

24 A That's Francie. That's their receptionist.

25 Q Okay. And did -- following the receipt of this

1 notice by Rose, did Rose pay the outstanding amounts due?

2 A Eventually.

3 Q I'm sorry. By -- before -- during the 10-day-cure
4 period?

5 A No.

6 Q So as a result, did Treasure Island exercise its
7 right to terminate the lease pursuant to the express language
8 of the lease?

9 A Yes.

10 Q Behind Tab 40, is that a copy of the termination
11 notice?

12 A Yes.

13 Q And do you believe that the notice that was provided
14 to Rose was sufficient under the parties' agreement?

15 A Provided to Rose, yes.

16 Q Rose did attempt to wire the money after the
17 termination, correct?

18 A They did.

19 Q But they could've wired that money on time or during
20 the 10-day-cure period, correct?

21 A I presume so.

22 Q Did they?

23 A They did not.

24 Q Have they paid -- they paid -- they hired a
25 contractor to do their own work at the property, correct?

1 A Yes.

2 Q Have they paid that contractor in full?

3 MR. VAN: Object to the form. Relevance.

4 THE COURT: Overruled.

5 THE WITNESS: They have not.

6 BY MR. SHEEHAN:

7 Q Are you aware that they were in mediation involving a
8 lawsuit with that contractor just a couple days ago or a week
9 ago?

10 A Yes.

11 Q All right. Obviously if you had to do it all over
12 again -- well, strike that. Can you turn to behind Tab 5.

13 MR. VAN: I'm sorry. Which one?

14 MR. SHEEHAN: Tab 5.

15 THE COURT: Tab 5.

16 THE WITNESS: Okay.

17 BY MR. SHEEHAN:

18 Q Oh, excuse me. Not Tab 5, behind Tab 8.

19 A Okay.

20 Q All right. Have you seen this letter before?

21 A I have.

22 Q Did you draft it?

23 A I did.

24 Q All right. And this was informing them that they
25 were delinquent with respect to the repayment of construction

1 moneys, correct?

2 A Yes.

3 Q And it was sent to Rose LLC, attention Susan
4 Markusch, and also CCed to Operadora, correct?

5 A It was.

6 Q And by the way though, under the fifth amendment to
7 the lease agreement, which is behind Tab 28 --

8 A Okay.

9 Q -- the tenant's notice address is updated and does
10 not include any reference to Susan Markusch under Paragraph 11,
11 correct?

12 A Correct.

13 Q She was taken out?

14 A That's how I read it.

15 Q And by the way, all of your negotiations -- who
16 signed the original lease?

17 A Elizabeth Gold.

18 Q Who signed all the amendments?

19 A Elizabeth Gold.

20 Q Who was the person that you e-mailed to negotiate all
21 these things with?

22 A Elizabeth and Gary.

23 Q If Her Honor were go through this whole book, she
24 would see Elizabeth and Gary on all the correspondence,
25 correct?

1 A Yes.

2 Q All right. But nevertheless, you did notice -- under
3 the original lease there wasn't a mention of Susan Markusch,
4 correct?

5 A In the original lease there was a mention of Susan
6 Markusch. In the fifth amendment there was no longer a mention
7 of Susan Markusch.

8 Q Right. Okay. So on August 31st you sent it to
9 attention Susan Markusch, and you also copied Operadora
10 Anderson's?

11 A Yes, we did.

12 Q Now, after Rose got this, did you get a communication
13 from Rose?

14 A I did.

15 Q Tell me about that.

16 A In early September I received a phone call from
17 Mr. Dragul, and --

18 MR. VAN: Object to form. Hearsay.

19 THE COURT: Overruled.

20 THE WITNESS: -- and we discussed the pushing off the
21 initial repayment -- or one of the repayment obligations on the
22 construction loan that we had given them, and during the course
23 of the conversation he had requested that in the future all
24 such communications come directly to him and not copy anyone
25 else because he was the guy that was going to deal with this.

1 Now, because he was our tenant, we chose to accommodate that
2 request.

3 BY MR. SHEEHAN:

4 Q So he specifically said that it be sent attention
5 Gary Dragul and also that Operadora not be CCed, carbon copied?

6 A He did not use the words you're using. He said, Send
7 them directly to me. I'm the person that's going to handle
8 these. Don't send them to anybody else.

9 Q Okay. And is that what you did?

10 A Yes.

11 Q Turning behind Tab 9.

12 A Okay.

13 Q Does this in fact reflect what Mr. Dragul asked you
14 to do?

15 A Yes.

16 Q And so as a result of that conversation, that's when
17 you started sending the notices attention Gary Dragul, and not
18 carbon copying Operadora, correct?

19 A Correct.

20 Q Did Mr. Dragul ever tell you after receiving this
21 notice or any other notice that you should have sent it to
22 somebody else, either including Ms. Markusch, Operadora
23 Anderson's or anybody else?

24 A Only in May 2015.

25 Q In other words, not until after the termination?

1 A Correct.

2 Q And there were several other letters that were sent,
3 correct?

4 A Yes.

5 Q If you turn behind Tab 10, this is another letter
6 that reflects that it was Elizabeth Gold that was doing the
7 negotiations with you?

8 A Yes.

9 Q And if you turn behind Tab 13, it's another letter to
10 Mr. Dragul, correct?

11 A It is.

12 Q He never told you that you needed to send it
13 elsewhere, correct?

14 A He did not.

15 Q And Treasure Island has in fact -- you saw the e-mail
16 from Señor Frog's counsel, wanted to make sure Treasure Island
17 intended to fulfill its obligations under the lease, and that
18 was their concern, and you instructed your counsel to convey to
19 Señor Frog's back in May, right after the termination that in
20 fact Treasure Island would live up to its obligations to
21 negotiate -- to do something with the sub -- I'm sorry -- that
22 Treasure Island was not terminating the sublease, correct?

23 A Correct. We would negotiate directly with Señor
24 Frog's in the future.

25 Q And you understand that Señor Frog's may make a claim

1 that they weren't provided notice, and therefore their sublease
2 needs to remain in effect as is?

3 A I do understand that they have that argument.

4 Q You are not seeking to terminate Señor Frog's rights
5 in this particular litigation; you're only seeking to terminate
6 Rose, correct?

7 A That is correct.

8 Q And by the way, you do understand that Rose's
9 sublease -- you've read Rose's sublease with Señor Frog's?

10 A I have.

11 Q -- only comprises one half, the bottom floor plus the
12 kitchen, correct?

13 A That's the standard space for the sublease, yes.

14 Q So at a minimum, you would definitely want to
15 terminate Rose's lease --

16 A In the remainder of the upstairs space, yes.

17 Q Now, you -- prior to all this happening in January
18 of 2015, there was this big issue with the food repayment. Do
19 you recall that --

20 A I do.

21 Q -- testimony and recall the incidents?

22 A Yes.

23 Q Okay. And this certainly bothered Treasure -- well,
24 let me put it this way. Let me rephrase it. Let's turn behind
25 Tab 35.

1 A Okay.

2 Q So this was a letter actually that was sent out by
3 Treasure Island, and did you actually write this letter?

4 A Yes -- well, Jeri Griffis, our CFO, signed it.

5 Q Right. But this letter was copied to Operadora
6 because it was actually Operadora's deal, correct?

7 A Yes. There was no agreement between Treasure Island
8 and Señor Frog's -- I'm sorry -- Treasure Island and Rose to
9 provide any food or beverage service or items.

10 Q Nevertheless, you felt that Rose was responsible for
11 its subtenants?

12 A Correct.

13 Q And you asked -- and by the way, you have done
14 several favors for Rose throughout this lease --

15 MR. VAN: Object to the form.

16 BY MR. SHEEHAN:

17 Q -- by extending --

18 THE COURT: Overruled.

19 BY MR. SHEEHAN:

20 Q -- deadlines to pay and renegotiating when the
21 construction moneys were repaid, offering to buy the food for
22 its subtenant and so on and so forth, correct?

23 A Yes.

24 Q And when you went to Rose and you said -- and
25 Operadora, and you said that all this money was owed, first of

1 all did that take you -- strike that. Rose responded behind
2 Tab 36 by saying it wasn't their problem, correct?

3 A That is correct.

4 Q And how did that sit with Treasure Island?

5 A Poorly.

6 Q Now, you also heard Mr. Krouham just recently say
7 that they paid these outstanding amounts either that day or the
8 next day or whatever, when they got this, near this date. As
9 of January 15th, you wrote another letter; that's behind tab
10 37, correct?

11 A Yes.

12 Q All right. And, in fact, not only were they behind
13 for August and September food payments, but they were also
14 behind for October, correct?

15 A Correct.

16 Q And let's look behind Tab 37. Is this another
17 example of a default notice that you sent to Mr. Dragul?

18 A Yes.

19 Q All right. And, in fact, he was -- you mentioned
20 that Rose was in default for a \$50,000 payment, and also for a
21 \$75,000 live-entertainment-tax payment, correct?

22 A Correct.

23 Q And then you also mentioned that the food was over
24 300,000 that Señor Frog's owed?

25 A Yes, that's true.

1 Q And again Mr. Dragul didn't tell you don't send it to
2 just me and not copy Operadora or include Susan Markusch,
3 correct?

4 A That's correct.

5 Q Let's turn over to behind Exhibit 42, please.

6 A Okay.

7 Q All right. And let's take a look at the second to
8 last paragraph. This is the letter when Rose is saying that
9 the Treasure Island lease notice was ineffective because you
10 didn't copy Operadora, but what does the second to last
11 sentence of Paragraph 8 state in this agreement?

12 A Treasure Island nevertheless contacted Rose's
13 subtenant directly on May 28th, 2015, in an apparent attempt to
14 circumvent or assume the benefits that inure to Rose under the
15 sublease.

16 Q So they basically threatened you with tortious
17 interference for sending on May 28th --

18 A For copying them on a notice -- or termination
19 letter. I'm sorry.

20 Q Is that correct?

21 A Yes.

22 Q So on the one hand they're saying you should've
23 copied Operadora, but the second saying because you did send a
24 letter to Operadora you've tortiously interfered with our
25 relationship with the subtenant?

1 A Yes.

2 Q So as a result of that, the only communication that
3 you've had with -- you've been careful -- and the only
4 communication you've had with -- Treasure Island has had with
5 Señor Frog's is just confirming that you're not terminating
6 Señor Frog's?

7 A Yes. It was a communication between our outside
8 counsel and their outside counsel essentially.

9 Q But you're the one that --

10 A I directed it to be done.

11 Q By the way since -- let me rephrase that. And the
12 payments were not accepted afterwards because you terminated
13 the lease, correct?

14 A Yes.

15 Q But there was a case law that said that because
16 this -- because litigation goes on while this is being
17 determined, there was a case that said that you could accept
18 the rents without jeopardizing determination --

19 A Yeah, the case said we had the right to accept that
20 rent during the pendency of litigation.

21 Q Before you accepted any rent, you wanted to make sure
22 that the Court was on board with that --

23 A Correct --

24 Q -- and did a Court order?

25 A -- that it wasn't going to preclude -- that it wasn't

1 going to waive any of our arguments.

2 Q But we have in fact accepted the rent once that order
3 was entered; have we not?

4 A Yes, and ever since. Yes.

5 Q Ever since. So there is -- you know, we haven't
6 refused to accept any rent as of today?

7 A Correct.

8 Q But they have been late even since then with
9 payments, correct?

10 A Yes.

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

12 THE COURT: Cross-examination.

13 You have 17 minutes.

14 MR. VAN: That's fine. I just -- I'm guessing I'm
15 not going to get through before the lunch break.

16 THE COURT: That's a different issue. Then we'll
17 break for lunch.

18 CROSS-EXAMINATION

19 BY MR. VAN:

20 Q Mr. Anthony, because of your elevated status as an
21 attorney, you get M&Ms. So I'm guessing then that you are the
22 attorney for -- that was involved in the drafting of the lease
23 agreement, correct?

24 A Yes, sir, though I do notice that I didn't get
25 offered coffee like Mr. Krouham. I'm assuming it's because I

JD Reporting, Inc.

1 was --

2 THE COURT: Oh, I'm sorry. Would you like coffee?

3 THE WITNESS: No, thank you, Your Honor.

4 THE COURT: Okay.

5 MR. VAN: Well, you know, the Judge is very selective
6 with the M&Ms.

7 THE COURT: All witnesses get M&Ms.

8 MR. VAN: Well, okay.

9 BY MR. VAN:

10 Q Now I'm going to go through Exhibit 1. We're going
11 to start with Exhibit 1.

12 A Okay.

13 Q Now, in the recital section, it says that: A
14 landlord desires to lease to tenant the leased premises for the
15 operation of a bar, lounge, restaurant and/or nightclub upon
16 the terms and conditions as set forth herein, correct?

17 A That's correct.

18 Q And that from the very outset this was an issue of --
19 it was to be a Señor Frog's, correct?

20 A Yes.

21 Q Okay. Do you know if Mr. Krouham met with
22 Mr. Ruffin?

23 A Yes.

24 Q Were you in that meeting?

25 A I was not.

1 Q Do you know how many times they met?

2 A A few. I don't know an exact number, no.

3 Q And do you know what -- so from the very outset the
4 understanding was that Operadora Anderson, Mr. Krouham would be
5 involved in this lease agreement?

6 A The restaurant to be operated was going to be a Señor
7 Frog's.

8 Q And that Mr. Krouham was the owner of Señor Frog's?

9 A In Mexico, yes.

10 Q Okay.

11 A But our understanding was that Mr. Dragul was the
12 domestic partner for Señor Frog's, and he was going to be our
13 point of contact.

14 Q Okay. But they were partners?

15 A Yes.

16 Q Okay. Now, you don't dispute that the term of the
17 lease is essentially 30 years?

18 A I do not.

19 Q Okay. Now, Paragraph 19.3, it indicates that
20 noncompliance from either party does not constitute a waiver of
21 the terms and conditions, correct?

22 A Yes.

23 Q You put that provision in the lease?

24 A I'm sorry?

25 Q Are you the one that drafted this lease?

1 A It was myself and Elizabeth Gold back and forth.

2 Q Okay. But you agreed to these terms?

3 A Yes.

4 Q All right. And it's my understanding -- it's my
5 recollection at least -- let's go to Paragraph 19.6, perhaps
6 the most important provision in this lease. Any notice or
7 other communication required or permitted to be given by a
8 party hereunder shall be in writing, correct?

9 A I disagree strongly with your assessment of this as
10 the most important paragraph in this lease --

11 Q Fair enough. Fair enough.

12 A -- but --

13 Q But --

14 A Go ahead.

15 Q But under the terms of notice, that was my -- sorry.
16 That was my assertion. Is it true that any notice or other
17 communication required or permitted to be given by a party
18 hereunder shall be in writing?

19 A Yes.

20 Q And shall be deemed to have been given by the party
21 to the other party, and then it lists a number of ways,
22 correct?

23 A Yes.

24 Q And then at the very end it says: Address to the
25 following addresses, and one of them is Treasure Island,

1 attention Najam Khan with a copy to you; and then the second
2 one, if to the tenant, to Rose, attention Susan Markusch, and
3 then with a copy to Operadora Anderson, correct?

4 A Yes.

5 Q And as we go through this, I want to find out how
6 many correspondence actually complied with that requirement.
7 Is that an important requirement?

8 A It was boilerplate language.

9 Q So it doesn't matter?

10 A It matters.

11 Q Okay. Is it a provision of this lease?

12 A Yes.

13 Q Okay. It's the notice provision in this lease,
14 correct?

15 A Yes.

16 Q All right. And this is the entire agreement. It
17 supersedes any other agreements, correct?

18 A Yes.

19 Q All right. Now --

20 A That would be Section 19.7.

21 Q -- 19.9: No supplement, modification, waiver or
22 termination of this lease shall be binding unless executed in
23 writing by both parties, correct?

24 A Yes.

25 Q Can you show me, do you know, are you aware of any

1 document out there signed by both parties that changes the
2 notice provision other than the fifth amendment to the lease?

3 A No.

4 Q So there is no agreement out there. You didn't
5 prepare an amendment. There are five other agreements -- or
6 five other amendments after this document. None of them say it
7 goes to Gary Dragul?

8 A None of them say that. There is no sixth amendment.

9 Q Okay. And further on in that paragraph, it says:
10 Nor shall such waiver constitute a continuing waiver unless
11 otherwise expressly provided. Is there any express provision
12 anywhere that changes the obligation to send notice to Rose --
13 other than the fifth amendment -- to Rose and Operadora
14 Anderson?

15 A I'm sorry. Say that again.

16 Q Is there any location expressly providing a change
17 other than the fifth amendment to that notice provision?

18 A There is no written document that would constitute a
19 continuing waiver.

20 Q Okay. Let's go to Paragraph 15.2.

21 A Okay.

22 Q And upon the occurrence of an event for default in
23 addition to any other rights provided for herein in law and
24 equity and without barring the election, landlord may terminate
25 this lease, and then there's a requirement for a cure

1 provision, correct?

2 MR. SHEEHAN: Where are you at, Counselor?

3 MR. VAN: Sorry. Page 15 -- page 16, Paragraph 15,
4 the default provisions.

5 BY MR. VAN:

6 Q Let me go up to 15.1.

7 A I mean, 15.3 is the right to cure.

8 Q Sorry. Please back up. Let me clarify. 15.1.2?

9 A Okay.

10 Q Now, is there a requirement in there that you provide
11 notice?

12 A 15.1.2?

13 Q Yes.

14 A Yes.

15 Q Under right to cure?

16 A Yes.

17 Q And the terms for that notice are as are set forth in
18 Paragraph 19, correct?

19 A Yes.

20 Q Did you comply with those notice terms?

21 A With respect to Rose, yes. With respect to Señor
22 Frog's, no.

23 Q Okay. With respect to Rose, did you send a notice to
24 Susan Markusch?

25 A Ever? Yes.

1 Q With regard to this default?

2 A No.

3 Q All right. And there's -- well, I'll get to that in
4 a minute. And this agreement was signed by Mr. Ruffin,
5 correct?

6 A It was.

7 Q So let's go to Exhibit 4.

8 A Okay.

9 Q The first sentence -- it's from you, correct? It's
10 an e-mail from you?

11 A It is.

12 Q And in that it says -- at the very end of it it says,
13 I spoke with Mr. Ruffin. Neither of us understands why
14 Paragraph 3 would present a problem to your people. This
15 is Elizabeth Gold you're referring to, correct?

16 A Yes.

17 Q And then it references, Or the people in Cancun,
18 correct?

19 A Correct.

20 Q So obviously the people in Cancun are very important
21 with regard to this lease and these amendments, correct?

22 A I'm not sure that this signifies that. I'm sorry.

23 Q Why would you reference the people in Cancun then?

24 A Because this is in context. There had been a back
25 and forth between myself and Ms. Gold regarding the second

1 amendment, and she may have brought up the people in Cancun as
2 having a problem with this, and so we said, We're not sure why.

3 Q Okay. But for the mere fact that they have -- that
4 they're negotiating this and this is an issue for them, that
5 means that they're involved in this transaction, correct?

6 A Not on our side. On their side.

7 Q Okay. But you were aware of the fact that the people
8 in Cancun had input with regard to this?

9 A Yes.

10 Q Okay. Thank you. Let's go then to Paragraph 5 --
11 excuse me -- Exhibit 5.

12 A Okay.

13 Q There's a default notice on January 31st, 2012, and
14 it says: As you may be aware, Señor Frog's has failed to meet
15 its rental obligations. If your contract is only with Rose,
16 why are you sending a letter suggesting that Señor Frog's has
17 failed to meet its rental obligations under the lease?

18 A Señor Frog's was the trade name of the space.

19 Q Okay. But it's Señor Frog's that we're talking.
20 Those are the people in Cancun, correct?

21 A No, Operadora Anderson's are the people in Cancun.

22 Q Okay. And they're the owners and operators of Señor
23 Frog's?

24 A Locally, worldwide perhaps, yeah.

25 Q Okay. Now, this very lease, this very notice, right

1 out of the chute, did this comply with the notice terms of the
2 original lease?

3 A Now, as I explained to you in my deposition, this
4 letter was not right out of the chute. This letter was January
5 31st, 2014.

6 Q Excuse me, sir. It says January 31st, 2012.

7 A I'm aware of what the letter says. I explained to
8 you at my deposition. I'll explain it to the Court today that
9 there is an error on the date of this document.

10 Q So you're saying that there's a two-year error in a
11 notice, that somebody puts down 2012 instead of 2014?

12 A Yes, there was a clerical error in the drafting of
13 this notice.

14 Q Okay. But Señor Frog's is responsible at this point
15 in time?

16 A No. Gary Dragul is responsible at this point in
17 time.

18 Q Okay. Jerry Griffis says, Señor Frog's has failed to
19 meet its -- not Rose's -- its rental obligations?

20 A Señor Frog's is the name of the restaurant inside
21 Treasure Island.

22 Q Okay. And so Operadora Anderson that is required to
23 get notice in Cancun is just Gary Dragul?

24 A As of January 31st, 2014, that was post my
25 conversation with Gary Dragul in 2012 --

1 Q Sir, that's not what I'm asking you. Under the --

2 THE COURT: Mr. Van.

3 MR. VAN: Yes.

4 THE COURT: You can't interrupt, and you can't talk
5 over him.

6 MR. VAN: Okay. I apologize.

7 THE COURT: Because otherwise we get a really awful
8 record.

9 MR. VAN: All right. I apologize.

10 THE COURT: So I'm going to break for lunch, and I'll
11 see you guys at 1:15.

12 MR. VAN: All right. Thank you, Your Honor.

13 (Proceedings recessed 11:54 a.m. to 1:19 a.m.)

14 BY MR. VAN:

15 Q Mr. Anthony, if you could go to Exhibit 5, please, I
16 think that's where we were.

17 THE COURT: 5?

18 MR. VAN: 5, yes.

19 THE WITNESS: Yes, sir.

20 BY MR. VAN:

21 Q Under the term -- now, this is the document that you
22 say was actually dated January 31st, 2014, not 2012. That's a
23 typo. That's your testimony, correct?

24 A That is.

25 Q Okay. Under the terms of the amendment in 2014, the

1 fifth amendment, does this include the parties that need to
2 have notice with regard to this document?

3 A The amendment in 2014 had not yet been executed on
4 January 31st.

5 Q Okay. So the fifth amendment -- the notice
6 provisions of this one would've been the original lease notice
7 provisions?

8 A Yes.

9 Q And does it comply with the notice provisions in the
10 original lease?

11 A It does not copy Señor -- Operadora. I'm sorry.

12 Q Okay. And it also -- it does not -- it does not
13 address itself to Ms. Markusch?

14 A It does not address itself to Ms. Markusch.

15 Q Okay. Now, there were other amendments, correct?
16 There's a third amendment, a fourth amendment?

17 A A first amendment and a second amendment, yes.

18 Q Okay. Let me address your attention to Exhibit 7.

19 A Okay.

20 Q Do you remember what that was about?

21 A I do not.

22 Q Okay. This involves the Señor Frog's restaurant, but
23 there's no reference to either Rose or Operadora, correct?

24 A Incorrect.

25 Q Okay. Is it a -- there's a forward on this? I don't

1 see it, a forward --

2 A Oh, no. I'm sorry. I thought you said does it
3 reference it.

4 Q Oh, I'm sorry.

5 A Yeah.

6 Q I meant was it forwarded to either Operadora or Rose?

7 A It does not appear to have been.

8 Q Okay. Let's go to Exhibit No. 8.

9 A Okay.

10 Q Exhibit No. 8 has to do -- what does that have to do
11 with? Do you know?

12 A Yes.

13 Q Okay.

14 A This has to do with moneys that were owed by Rose to
15 a -- to his contractor. Subcontractors in the project had
16 threatened to begin lienning Treasure Island which would have
17 been a violation of the lease agreement. We were writing
18 pursuant to the lease agreement to advise them that if they
19 allowed liens to accrue on the property that we were going to
20 deem it in material default.

21 Q Okay. Do you know -- and this actually -- this
22 letter, August 31st of 2012, this was after your agreement
23 with -- your verbal agreement that you kind of had with
24 Mr. Dragul, correct?

25 A Incorrect. Mr. Dragul spoke to me in early September

1 of 2012.

2 Q All right. So this one, this letter, Exhibit 8, does
3 this comply with the lease number one -- the original lease?

4 A To the letter.

5 Q So we understood how to do that. We just didn't do
6 it on other letters in the future?

7 A We accommodated Mr. Dragul's request in the future,
8 yes.

9 Q Okay. Exhibit 9, do you remember this letter?

10 A I do.

11 Q What was this letter about?

12 A Shortly after the letter referenced in Exhibit -- was
13 it 8 we were just talking about?

14 Q Uh-huh.

15 A As I mentioned before, Mr. Dragul called
16 telephonically and spoke with me. During that conversation he
17 requested that we postpone some repayment obligations on the
18 two and a half million dollar construction loan that we had
19 given them and discuss the subcontractor lien issue.

20 Q Now --

21 A During the course of that conversation is also when
22 he requested that we send directly to him without copies to
23 other parties. So in this letter, we were discussing -- I'm
24 sorry. We were memorializing that conversation.

25 Q So this is the construction loan for the TI

1 improvements, correct?

2 A For the TI improvements.

3 Q Yes. What was the purpose of that construction loan?

4 A Gary told us he needed two and a half million dollars
5 to make the project happen. We gave him two and a half million
6 dollars.

7 Q Okay. And what was to make the project happen? What
8 does that mean?

9 A He wanted to improve the space, to remodel the
10 exterior, to, you know -- I honestly have no idea what they
11 spent the money on. What I know is that they asked for two and
12 a half million dollars from Treasure Island. We gave them very
13 good terms on it, and we gave them a check.

14 Q Okay. And has that loan been repaid?

15 A Not in full, no.

16 Q How much of that loan has been repaid?

17 A The majority of it. I believe there's still just
18 over a year left in payments.

19 Q Have they been late on the payments of those liens?

20 A Frequently.

21 Q Okay. When you say frequently, when was the loan
22 due -- excuse me. When is the loan payment due?

23 A When is the loan payment due?

24 Q Correct.

25 A We have to look at the -- it's been amended so many

1 times. I can't tell you right away. It's due monthly. I can
2 tell you that much.

3 Q Okay. And when you say it's late, do you mean late
4 as of the original payment, or late after the cure period
5 payment?

6 A Well, the payment is due on a day. If it's not paid
7 on that day, it's late. If it's not paid after we give, you
8 know, notice that it's late, then it's a default. Now, so I'm
9 not saying they're in default under any of them. I'm saying
10 they've been late on them 13 times.

11 Q Okay. So when you're talking about late, you're
12 talking about if it was due on the first of the month, if they
13 paid it on the third of the month, they would be then late, but
14 they're not in default. They just --

15 A Right.

16 Q -- move into the default provision?

17 A Correct.

18 Q Okay. With regard to that analysis, how many times
19 has either -- has Rose been late outside of the default period
20 for the base rent number?

21 A Over the default period?

22 Q No. No. You have the default day.

23 A Right. So within --

24 Q So within the cure period.

25 A Okay. Base rent, eight times.

1 Q They have been late outside of the day it was due,
2 but they cured it before the cure period?

3 A Yes.

4 Q Okay. So the only time you've ever hit default is
5 this one time?

6 A That wasn't even the base rent this time either.

7 Q Okay. I understand that. So base rent, they've
8 never been late?

9 A Well, they've been late.

10 Q Well, let me rephrase that. With regard to base
11 rent, they have been late in paying, but never later than the
12 cure period?

13 A Correct.

14 Q Okay. With regard to the percentage rent issue, how
15 many times have they been late beyond the cure period?

16 A Just this time.

17 Q This one time. With regard to the construction
18 payment, how many times have they been late after the payment
19 date to the -- between the payment day -- or after the cure
20 period? Have they ever defaulted -- have they ever defaulted
21 on the construction loan?

22 A No.

23 Q Okay. So as I understand your testimony -- because
24 the questions were in artfully asked -- with regard to the base
25 rent, they have been late eight times, but always paid it

1 within the cure period, within that 10-day period?

2 A Yes.

3 Q With regard to the percentage rent issue, they have
4 paid it every time with the exception of one, which is what's
5 the subject of this matter?

6 A Yeah, they've been late again eight times --

7 Q Fair enough.

8 A -- but only one has extended past the default period,
9 yes.

10 Q The cure, okay. Fair enough. And with regard to the
11 construction issue, it's the same deal. They have been late in
12 paying, but always paid it before the cure period expired?

13 A Correct. They've been late 13 times, but they have
14 never gone beyond the 10-day cure period.

15 Q And how many times have you sent default notices to
16 them?

17 A Several.

18 Q Do you know how many? Because I don't -- I see one.
19 In all the things that we've talked about, eight times here,
20 eight times here, 13 times here --

21 A Yeah, I would say --

22 Q -- actually two. I was inaccurate. Two times where
23 I've seen default letters go out.

24 A I'd say at least half a dozen, maybe 10.

25 Q Okay. And you have -- but those documents have never

1 been produced or provided?

2 A I have not reviewed the entire produced file in this
3 case. I sent over my correspondence folder, and I have, you
4 know, 60-something pieces of correspondence between the two
5 parties.

6 Q Okay. I'll proffer to you that in here there's two.
7 Do you know of any others that are not in this binder?

8 A If there are only two, then, yes, I do. I do know of
9 others, yes.

10 Q Okay. And they were not provided?

11 A If this binder is the world of what was provided, the
12 entire world, then I suppose -- I suppose not.

13 Q Okay.

14 A Although -- I'm sorry.

15 Q Now, there was an issue about this construction loan
16 issue. You said that you were aware of the fact that Austin
17 was in negotiations with Rose with regard to the construction;
18 is that correct?

19 A I don't feel that was my testimony. Say that again.

20 Q Okay. There was testimony that came up a minute ago
21 about how there was a mediation that was being handled between
22 Austin and Rose --

23 A Oh, just recently, yes.

24 Q Yes.

25 A I'm aware.

1 Q How did you become aware of that?

2 A I received a phone call from Don Williams.

3 Q And what did you say to Mr. Williams?

4 A I do not recall the specifics of the conversation.

5 Q Okay. Did you talk to Mr. Williams about that
6 particular issue?

7 A About the particular issue regarding the construction
8 payments?

9 Q That was the subject of that mediation.

10 A Perhaps.

11 Q Did you tell him anything with regard to that? Did
12 you give him any direction?

13 A Not -- no. No.

14 Q Didn't talk to him at all?

15 A I spoke to him. I didn't give him any direction. No
16 it's not my -- it's not my case.

17 Q Okay. Did you tell him about what TI's position was
18 with regard to that case?

19 A With regard to that case?

20 Q Yes.

21 A Our position was -- I mean, we had no position. Our
22 position was, you know, good luck getting paid.

23 Q Okay. Who does the construction, the majority of the
24 construction work at TI?

25 A Austin General Contracting.

1 Q Isn't it true that when this project was being
2 constructed that TI advised Rose that they had to use Austin?

3 A Not that I'm aware of.

4 Q Okay. Do you know what the construction costs were
5 on this project?

6 A I do not.

7 Q Do you know what the construction overruns were on
8 this project?

9 A I do not.

10 Q Do you know what the change order amounts were on
11 this project?

12 A Not currently. I used to, but not currently.

13 Q Okay. Now, if you can look at Exhibit 10, please.

14 A Yes, sir.

15 Q This is a letter from Elizabeth Gold, correct?

16 A Yes.

17 Q Now, the content is not that important to me as much
18 as who did she provide notice to? Now, under the terms of the
19 lease, the original lease, it says that she is to provide
20 notice to Najam Khan and to yourself. If you look on this
21 document, did she provide -- is this letter consistent with the
22 notice provisions in the lease?

23 A Yes.

24 Q Exhibit 11.

25 A Okay.

1 Q Exhibit 11 is a notice that there's an issue with
2 regard to a catwalk platform that was constructed at Señor
3 Frog's restaurant. Does this letter comply with the
4 requirements of notice under the original lease?

5 A It was not sent to Señor Frog's, and it was not sent
6 to Susan Markusch.

7 Q Okay. Exhibit 12, just quickly again, it's a fourth
8 amendment. It's more issues that are being resolved with
9 regard to the parties, correct?

10 A I think this modified the repayment schedule for the
11 construction loan.

12 Q Okay. Let's go to Exhibit 13. Exhibit 13 has to do
13 with a security issue at -- the security force at Señor Frog's.
14 Does this letter comply with the notice requirements of the
15 original lease?

16 A This letter complies with the way Mr. Dragul asked us
17 to send it to him, but it does not reply -- it does not comply
18 with the written lease, correct.

19 Q Because it didn't go to Sharon, and it didn't go to
20 Operadora?

21 A Susan.

22 Q I mean Susan. Sorry. Correct? Correct?

23 A Correct.

24 Q All right. Now, exhibits -- if you can look at
25 Exhibit 16 through -- it appears to be 16 through 19. Those

1 appear to be e-mails going back and forth between the parties
2 with regard to the terms that will be incorporated into the
3 fifth amendment. I just want to know if that's correct. I
4 don't want to go through them because the document speaks for
5 itself.

6 A That is what it appears to be, yes.

7 Q Okay. Now, Exhibit 19, if you go to the second page.

8 A Sure.

9 Q March 25th, 2014, there's an e-mail from Gary
10 Dragul, and it's addressed to Brad Anthony, although the name
11 is redacted, but it says Brad. I'm assuming that's you. Do
12 you remember -- do you remember receiving this document?

13 A Yes.

14 Q Okay. And in that it says -- the first line, it
15 says: We appreciate your interest in working with us to make
16 this work for the next 28 years. Is that your understanding of
17 the expectations of the tenant with regard to the duration of
18 this lease? At that time?

19 A Sure. Those were their expectations, sure, 28 years.

20 Q Okay. Did you have -- did you have Elizabeth Gold's
21 contact information in your phone?

22 A No.

23 Q So you didn't know how to -- you couldn't get a hold
24 of her separately?

25 A Oh, absolutely I could. I had it on my computer.

1 Q Okay. So on your computer you had it just not on
2 your phone?

3 A Yeah, I never imported it into my phone.

4 Q Okay. Now, if you can please look at Exhibit 28.

5 A All right.

6 Q Do you recognize that document?

7 A This is the fifth amendment to the lease.

8 Q Okay. And that's -- whose signature is that on
9 page 5?

10 A That's Phil Ruffin and Elizabeth Gold.

11 Q Okay. Now, it's my understanding that -- if you look
12 at this it says that: It's the parties' desire to further
13 amend the agreement between the parties. So as you look at
14 this thing, this is a living document. I mean, it starts out,
15 and then we've had five amendments now, correct?

16 A Yes.

17 Q All right. And let's look at Paragraph 1. So you're
18 going to amend Paragraph 2.3 with regard to the term, and it's
19 going to extend the term of this lease for four additional
20 periods of five years, correct?

21 A Yes.

22 Q Okay. What if they would've come back and said, you
23 know what, at the end of the fifth year said, oh, we want to
24 extend it for six or seven more years?

25 A I'm sorry?

1 Q Could you have used this provision -- could they have
2 used this provision to extend beyond the four years that's in
3 the original agreement?

4 A Could they have -- I don't understand the question.

5 Q Could they have used this provision to extend the
6 lease longer than four terms?

7 A No.

8 Q All right. With regard to Paragraph 2, it spells out
9 the thirty-three, two, fifty, and that's the amount that's
10 currently paid on the base rent, correct?

11 A Yes.

12 Q And under the -- let me clarify this as well. Under
13 the original lease, who was responsible for preparing the
14 accounting, that went back and said, okay, here's how much we
15 owe you on this percentage rent?

16 A I'm sorry. The operation?

17 Q Yes. Señor Frog's, correct?

18 A Well, I don't want to get into an argument about who
19 that means.

20 Q Fair enough.

21 A But the operation.

22 Q The tenant?

23 A Yes, the tenant.

24 Q Who did it?

25 A I don't know.

1 Q You don't know whether Señor Frog's prepared that or
2 whether TI prepared it?

3 A I do not.

4 Q Okay. So you don't know whether it was shipped from
5 Señor Frog's saying here's how much the percentage rent is, and
6 this is how much we want to pay, and then Treasure Island
7 audited that, or whether it was vice versa that Treasure Island
8 prepared it and sent it to Señor Frog's and says here's how
9 much money you owe?

10 A I know that in the past we have audited financials
11 that they have given us. So my presumption would be as to the
12 former, but I have no factual knowledge of that.

13 MR. VAN: Okay. Just one second, Your Honor.

14 THE WITNESS: Sure.

15 BY MR. VAN:

16 Q In Paragraph 4, it says that: In addition to the
17 foregoing, the tenant may use upon receiving -- that the lease
18 premises as set forth herein in no instance shall tenant's
19 complimentary use operate as a sports bar, private club,
20 separate nightlife venue or put -- permit any use not
21 specifically permitted in Section 7.1. So if Señor Frog's had
22 said, you know what, we would like to go start Señor Frog's
23 sports bar, would that be a prohibited event?

24 A Yes.

25 Q Okay. So we're going to strictly construe that

1 paragraph --

2 A Oh, I'm sorry. This was with Rose not Señor Frog's.

3 Q Okay. With Rose then, with Rose. Could Rose put in
4 a Señor Frog's sports bar?

5 A No.

6 Q All right. And then with regard to Paragraph 5, it
7 says it has to be open 11 hours a day. Did you strictly
8 enforce that provision?

9 A I'm not sure if we have or not.

10 Q All right. Now let's get down to on page 3,
11 Paragraph C -- I'm sorry -- Paragraph 9C.

12 A Okay.

13 Q And it says: Any notices required or permitted to be
14 given under this agreement shall be in writing and personally
15 deliver -- and then it goes through the means -- to the parties
16 at the addresses listed in the first paragraph of this
17 agreement or such other addresses as the parties may designate
18 in writing as provided herein for the purpose of receiving
19 notice under this agreement, correct?

20 A That's what it says, yes.

21 Q Okay. Then we go to Paragraph 11, and in
22 Paragraph 11 it says that: We're changing the notice address
23 as updated to 5690 DTC Boulevard, Suite 515, Greenwood Village,
24 Colorado; that's for Rose, correct?

25 A Yes.

1 Q All right. In there does it say that we are taking
2 out Ms. Markusch as the identifying party?

3 A It doesn't include her.

4 Q I understand that, but she is included in the first
5 one, and all that we're doing it says is we're changing that,
6 the tenant's notice address, not the party, not the care-of
7 party, not the identifying party, we're not changing that by
8 this agreement, are we?

9 A It does not say to, no.

10 Q Okay. And this agreement doesn't reference the fact
11 that Gary Dragul is the only point of contact from now on, does
12 it?

13 A It does not.

14 Q All right. And then it also adds that we have new
15 tenant requirements or new notice requirements with regard to
16 the subtenants Operadora, and it needs to go to Operadora at
17 the same address but also to Ronald Fieldstone and Susan
18 Trench, correct?

19 A It does say that, yes.

20 Q All right. If you could go to Exhibit 31. Now, this
21 is a notice, isn't -- tell me what this document is.

22 A This document appears to be a letter sent by our
23 Financial Controller Mekeeyon Kim [phonetic]. I'm sorry. What
24 exhibit was the fifth amendment; do you know?

25 Q 28.

1 A Thank you. All right. This is a letter sent --
2 excuse me -- subsequent to the fifth amendment advising them
3 that there would be a new minimum monthly rent due on July
4 1st and advising them that they would have a debit balance of
5 thirty-three, two, fifty for a minimum monthly rent. I am just
6 reading this letter. I did not, you know, prepare this letter
7 or anything like that.

8 Q Okay. Does this letter comply with the requirements
9 of either the original lease or the sub -- excuse me -- the
10 amendment, amendment No. 5?

11 A No, but in response to that, further I would say
12 that, you know, I neglected to say that this is sent to Andrew
13 Solomon, who's a Director of Special Products -- or projects --
14 I'm sorry -- at GDA Real Estate Services LLC.

15 Q Okay. But that doesn't meet the requirements,
16 correct?

17 A No. No, I just wanted to clarify who it was to.

18 Q Okay. And so when we talk about the notice
19 provision, it says: Any notice or other communication is
20 what's in the original lease. So this one didn't comply with
21 either the original lease or the fifth amendment?

22 A Okay.

23 Q Is that correct?

24 A I'm sorry. It was a two-part question. I missed
25 what you said about the original lease.

1 Q Okay. This lease -- or this letter, does this comply
2 with the notice provisions in the original lease?

3 A No.

4 Q Does it comply with the notice requirements in the
5 fifth amendment to the lease?

6 A No.

7 Q Let's go to Exhibit 33. Do you know what this
8 document is?

9 A Yes.

10 Q What is this document?

11 A This is a letter that I wrote to Mr. Solomon
12 regarding one of their hip-hop nights they were having for a
13 short time in the space that had put the property at risk.

14 Q Okay. And on this document, does this document
15 comply with the original lease document, the notice provisions?

16 A No.

17 Q Does it comply with the fifth amendment notice
18 requirements?

19 A No, but --

20 Q Okay.

21 A -- with respect to these events --

22 Q That's fine.

23 A -- we were instructed --

24 Q That's all I need.

25 A -- by Mr. Dragul --

1 Q Exhibit 35, do you know what that document is?

2 A That is a demand for the food that they were late
3 paying in early 2015, late 2014.

4 Q Okay. And under the terms of the original lease
5 agreement, does this comply with the notice requirements, with
6 the original lease?

7 A Materially, yes. It goes to Mr. Dragul and Elizabeth
8 Markusch, but everything else is -- oh, I'm sorry. And the
9 address is wrong compared to the original lease.

10 Q Okay. But this one does comply. With the exception
11 of Mr. Dragul, other than that, it at least goes to Operadora,
12 correct?

13 A Yeah, I mean, it complies materially with Rose, and
14 it complies exactly to Operadora and Arnstein and Lehr
15 [phonetic].

16 Q Well, materially meaning it doesn't go to
17 Ms. Markusch; it goes to --

18 A Yes.

19 Q -- Mr. Dragul?

20 A Yeah.

21 Q But it goes to them. It goes to somebody at Rose?

22 A Right. They got it.

23 Q It does not comply with going to the controller at
24 Rose though?

25 A It did not go to Ms. Markusch, no.

1 Q Okay. Now let's go to Exhibit 37. Do you recognize
2 this letter?

3 A Yes.

4 Q I wanted to draw your attention to subparagraph 3.

5 A Okay.

6 Q That's a food issue, correct?

7 A Yes.

8 Q Why was that not forwarded to Operadora?

9 A They had already received it in the prior letter.

10 Q So, but it's a different letter, correct?

11 A It is.

12 Q A different date?

13 A Yes.

14 Q Deals with other issues?

15 A It does.

16 Q It does not comply with the notice requirements of
17 the original lease?

18 A It didn't go to Operadora because of the other
19 issues.

20 Q I understand that, but on the other lease, doesn't
21 all notices and all writings have to go to Operadora?

22 A A copy should be provided to Operadora, yes.

23 Q Okay. Under the terms of this, aren't you saying
24 that they may be in default?

25 A That Rose may be in default, yes.

1 Q Okay. And under the terms of the original lease, if
2 there's an issue with regard to default, it needs to go to
3 Operadora, correct?

4 A A copy should be provided to Operadora, correct.

5 Q And that did not occur here?

6 A It did not.

7 Q And that did not occur -- the notices that are set
8 forth in the fifth amendment also apply to this. They did not
9 go to the appropriate --

10 A To Arnstein and Lehr, no, they did not go there.

11 Q All right. 38, on May 14th of 2015, this notice
12 went out, correct?

13 A Yes.

14 Q And you signed this document?

15 A I did. I wrote this document.

16 Q Okay. Did this document comply with the terms as set
17 forth in the original lease?

18 A In the original lease, no.

19 Q Okay. Did this document comply with the terms set
20 forth in the fifth amendment to the lease?

21 A With respect to Rose, yes. With respect to Señor
22 Frog's, no -- I'm sorry --

23 Q And you are taking it --

24 A Operadora.

25 Q And you're taking a position that because they

1 changed the address it also meant that you could change the
2 person that you put on notice; is that correct?

3 A I'm taking the position that we were accommodating
4 Mr. Dragul's request to send it to him.

5 Q Now, I think I asked this question. I apologize if
6 I'm redundant on this. If you can go to Exhibit 1.

7 A The lease?

8 Q The lease, yeah. Paragraph 19.9.

9 A 19.9?

10 Q 19.9, yes.

11 A Okay.

12 Q There is no written agreement where Mr. Dragul signed
13 it saying you can send stuff to me and not to anyone else?

14 A And therefore it was not binding on us, correct, but
15 we honored his request. It wasn't binding on us, but we
16 honored it.

17 Q Now, I think in your testimony you testified that --
18 when you say it was not binding, what do you mean?

19 A Well, that's what it -- 19.9 says, right?

20 Q Yeah, that --

21 A That it shall not be binding unless in writing signed
22 by both parties.

23 Q Okay. So there is nothing binding which means that
24 you still need to comply with the terms of the original lease?

25 A Sure.

1 Q Okay. Exhibit 39, you were asked a question. Who's
2 F. Neal, and I think you said that --

3 A Oh, Neal. I thought you said needle. Yeah, I'm
4 sorry.

5 Q Neal, yes.

6 A Yeah.

7 Q And I think you said that's a receptionist, correct?

8 A Francie.

9 Q Do you believe that a receptionist has the ability to
10 write the checks for the company?

11 A No.

12 Q Okay. And you're not suggesting that Ms. Neal has
13 the authority to accept this document on behalf of Rose?

14 A I'm not suggesting or not suggesting that. I have no
15 opinion on that matter. I do know she signed for virtually
16 every package we sent to them.

17 Q All right. If we can look at Exhibit 40.

18 A Okay.

19 Q This is a document dated May 28th, 2015. Does this
20 document comply with the terms of the first lease?

21 A You keep saying terms of the first lease, but that
22 was amended by the fifth amendment. So --

23 Q I understand that. But I'm just saying the first,
24 the original lease. I'm getting to that.

25 A So, no --

1 Q Okay.

2 A -- it did not comply with the original lease.

3 Q Okay. Does it comply with the terms of the fifth
4 amendment?

5 A Yes.

6 Q Okay. With the exception of the Gary Dragul issue
7 that we've been having --

8 A Well --

9 Q -- throughout?

10 A It went to their --

11 Q Fair enough?

12 A It went to their amended address, and it went to the
13 other parties as requested in the fifth amendment.

14 Q It just did not include Ms. Markusch?

15 A Correct.

16 Q All right. When did you hire Fennemore Craig?

17 A I believe May 28th, right around there.

18 Q Okay. Do you know what day the lawsuit was filed
19 with regard to this case?

20 A I don't know the exact date, no.

21 Q Okay. It was filed on May 28th, 2015.

22 A Okay.

23 Q So the letter saying: We are electing to terminate
24 and the lawsuit were filed on the same day?

25 A Okay.

1 Q The letter was received on the 29th, correct -- or
2 the letter -- if you looked at the FedEx, which is 41 --

3 A Okay.

4 Q -- does it appear that it was received thereafter?

5 A It was signed -- I'm sorry. Where? By whom?

6 Q If you -- well, look at on the bottom of Bates No.

7 TLLC 00006 -- I think it's 6 or 86 -- 6 --

8 A 68 for Rose's?

9 Q For -- for -- correct --

10 A Yes.

11 Q No, for Ronald Finestone.

12 A Fieldstone.

13 Q Fieldstone.

14 A I'm sorry. So we're on Bates 0084?

15 Q Yeah -- well, let's go -- let me make it easier.

16 A Sure.

17 Q Bates 4 goes to whom?

18 A Ronald Fieldstone.

19 Q Okay. And that was on June 1st, correct?

20 A Yes.

21 Q Okay. And then there was one for Ronald Fieldstone
22 on May 29th.

23 A Yes, delivered on May 29th, and signed for by J.
24 Estrada.

25 Q Okay. And then the next one is Gary Dragul on

1 May 29th?

2 A Gary Dragul, May 29th, signed for by F. Neal, yes.

3 Q Okay. And then May 30th, Operadora Anderson's, the
4 next page?

5 A And, yes, correct.

6 Q Okay. Now, do you have anything other than this --
7 we've got the one issue with regard to that FedEx with
8 Ms. Neal. Do you have anything else to suggest that either
9 Rose or Operadora, particularly Operadora, that Operadora
10 received any other notice prior to May 29th?

11 A Operadora?

12 Q Yes, Operadora?

13 A No.

14 Q So their first notice of breach or default would've
15 been the termination notice?

16 A Potentially.

17 Q And Operadora did not -- was not given the
18 opportunity to cure under the terms of the original lease?

19 A I am unaware of any opportunity to cure in the
20 original lease that inures to Operadora, but that aside, no.

21 Q Okay. Now, there was a -- if you could turn to
22 Exhibit 42.

23 A Okay.

24 Q Have you ever seen that letter before?

25 A Yes.

1 Q Okay. So what we know is that Rose, Operadora, they
2 received their letters 28th, 29th, somewhere in that time
3 frame -- or 29th -- sorry?

4 A The termination letter, correct.

5 Q The termination letter, yeah. And on that same day
6 there's a response, correct?

7 A Yes.

8 Q And that response, does that identify -- does that
9 comply to the original lease agreement as far as terms for
10 notice?

11 A Yes.

12 Q Okay. And it thereby would comply with the terms
13 of --

14 A We never updated our notice in the fifth amendment.

15 Q Okay. Isn't it true that on May 29th you also
16 received a wire transfer for the full amount to be paid?

17 A We received one at the end of May or beginning of
18 June.

19 Q Okay.

20 A I don't know if it was the 29th.

21 Q Who made the decision to not accept that payment?

22 A The property.

23 Q Who's the property?

24 A It was a joint decision. We decided not to accept
25 the payment because of the potential to waive the arguments in

1 the lawsuit.

2 Q Who's the we?

3 A Mr. Ruffin asked for my opinion and privileged.

4 MR. VAN: Your Honor.

5 MR. SHEEHAN: Well, Your Honor, that --

6 MR. VAN: Here we go.

7 MR. SHEEHAN: The attorney-client privilege --

8 THE COURT: It is privileged.

9 MR. SHEEHAN: -- is with me.

10 MR. VAN: Huh?

11 THE COURT: He said it's privileged.

12 MR. VAN: I understand that, Your Honor, and this

13 is --

14 MR. SHEEHAN: The attorney-client privilege is with
15 me, Your Honor --

16 MR. VAN: This is the reason why we've been trying to
17 get Mr. Ruffin here.

18 THE COURT: I understand what you're saying, Counsel,
19 and I've already rejected your request.

20 MR. VAN: Okay.

21 THE COURT: You can ask additional foundational
22 questions if you'd like.

23 MR. VAN: Okay.

24 BY MR. VAN:

25 Q Who was in that meeting?

1 A Myself and Mr. Ruffin.

2 Q Those were the only two people in that meeting?

3 A I'm sorry. What meeting?

4 Q The meeting where you decided to reject the payment.

5 MR. SHEEHAN: Objection to the extent it calls for
6 attorney-client privilege between myself and --

7 MR. VAN: I'm asking who else was in the meeting.

8 THE COURT: This is only foundational information.

9 MR. SHEEHAN: Okay.

10 THE COURT: Not the substance of the discussion.

11 If you remember who else was in the meeting, sir,
12 please tell us. If you don't, that's okay. Tell us you don't
13 remember.

14 THE WITNESS: Yeah, I'm not -- I'm not certain it was
15 just myself and Mr. Ruffin. I do not remember anybody else
16 being there, but I'm not sure.

17 BY MR. VAN:

18 Q Okay.

19 A Except to the extent that, you know, at one point
20 there was a meeting where Mr. Sheehan was involved as well.

21 MR. SHEEHAN: Your Honor, I just want to again
22 object. We've been very lenient in going forward, and we have
23 a good relationship, and kind of no one subjected on relevancy
24 grounds, but this is totally irrelevant to the issues here
25 today as to why we didn't accept the money after the fact, but

1 that being said --

2 THE COURT: Okay. So we're still on foundational
3 questions only, but there was one meeting where Mr. Sheehan was
4 there.

5 THE WITNESS: Yes.

6 THE COURT: That's still here, still taking the
7 attorney-client privilege, right?

8 THE WITNESS: Yes.

9 THE COURT: Still invoking that, good, okay.

10 MR. VAN: Okay.

11 THE COURT: Just so we're clear.

12 BY MR. VAN:

13 Q Does Mr. Sheehan have the authority to reject a
14 payment for Treasure Island?

15 A No.

16 Q Do you have the authority to reject a payment for
17 Treasure Island?

18 A No.

19 Q Okay. Do you know if -- can you go to Exhibit 53,
20 please.

21 A Yes.

22 Q Now, in 53 there's a letter. What was this letter?

23 A This was advising them that they were not current on
24 their 7 percent quarterly rent.

25 Q And this is post-termination?

1 A This is post a lot of things.

2 Q Okay. Does this letter comply with the terms of the
3 original lease?

4 A Absolutely. Well, I'm sorry. No. No.

5 Q Absolutely works really well for me --

6 A Well, but it's inaccurate --

7 Q -- does Susan --

8 A -- so I'm sorry.

9 THE COURT: Wait. One at a time, please. I have a
10 court reporter -- court recorder, and she can only take down
11 one of you.

12 Did you want to finish?

13 MR. VAN: I've seen her take down two or three all at
14 one time. I think she's pretty good that.

15 BY MR. VAN:

16 Q Is Ms. Markusch listed on this?

17 A She is, but the address is wrong, and Arnstein and
18 Lehr is copied where they shouldn't have been under the
19 original lease.

20 Q Okay. But Operadora Anderson was listed, correct?

21 A Yes.

22 Q And Ms. Markusch now is being identified again,
23 correct?

24 A Yes.

25 Q So despite the fact that you recognized in October

1 that she would be required to be on the notice provisions, you
2 did not list her in May, correct?

3 A Well, this is October of that same year, May '15,
4 October '15. This is post the letter from Rose saying you need
5 to include Ms. Markusch on these letters. So we said fine.

6 Q That request that you include Ms. Markusch on the
7 notice is no change from the original lease agreement, is it?

8 A No.

9 Q All right. Now, you indicated that in your testimony
10 that in fact you had an e-mail conversation with Elizabeth
11 Gold, or an e-mail with Elizabeth Gold with regard to a
12 telephone call that you and she had asking for some additional
13 time, correct?

14 A You're backwards.

15 Q Okay. Help me out then.

16 A Whenever I sent the letter on May 14th, 2015, I
17 wanted to make sure they had, you know, ample time to cure.

18 Q Okay.

19 A Okay. I had had a pretty solid relationship with
20 Gary and Elizabeth prior to this, and I wanted to give them a
21 chance. So I sent them out via email to Elizabeth so she had
22 the extra day. I received a phone call subsequent to that
23 where she discussed the request -- well, yeah, she discussed
24 the request for more time and informed me that Gary was
25 traveling to care for his brother.

1 Q Okay. Where's that e-mail?

2 A Probably on my computer.

3 Q Why has it not been produced?

4 A I don't know that it hasn't.

5 Q Why is it not --

6 A I mean, it's not this folder --

7 Q Okay. Well --

8 A -- if that's where we're going next.

9 Q -- I'll proffer to you it's never been produced.

10 A Okay.

11 Q Why would that document not be there?

12 A I don't know.

13 Q If you can look at Exhibit 55, the letter from
14 Arnstein and Lehr from Susan Trench that is replying to a
15 loan-repayment letter. Do you know anything about this
16 loan-repayment letter?

17 A I do.

18 Q Where is that loan-repayment letter?

19 A I don't know.

20 Q So another letter that hasn't been produced in this
21 litigation. Do you know if you were asking Mr. Fieldstone and
22 Ms. Trench personally to pay some amount of money back?

23 A I know I was not asking Ms. Fieldstone -- I'm
24 sorry -- Mr. Fieldstone and Ms. Trench to pay money back.

25 Q Where's the letter?

1 A In my office in a copy form, sure.

2 Q Now, if you read that letter, it says: We -- meaning
3 Ms. Trench and Mr. Fieldstone -- are at somewhat at a loss as
4 to -- as we did not borrow money from Treasure Island and are
5 not parties to the referenced lease agreement. Did you ever
6 loan money to Ms. Trench?

7 A No.

8 Q How about Mr. Fieldstone?

9 A No.

10 Q With regard to the people at Treasure Island, who do
11 you believe is the most familiar with the lease and the lease
12 agreements?

13 A Me.

14 Q Okay. Isn't it true that when you go to the original
15 lease and you look at it that Rose is only -- is only in
16 default after it fails to cure the breach after the appropriate
17 10-day period?

18 A It depends what kind of default you're talking about.

19 Q Payment. Sorry. Payment -- well, no strike that.
20 Don't they have a 10-day period to cure once you notify them of
21 the default?

22 A What default? Because I'll explain -- if you would
23 like me to, I'll be happy to explain.

24 Q Sure. Go ahead.

25 A For monetary defaults, they have a 10-day cure

1 period, right?

2 Q Uh-huh.

3 A For nonmonetary defaults, they have a 30-day cure
4 period. So I guess, yeah, 10 is the lesser included amount of
5 30 yes, but --

6 Q Okay. So for economic -- for monetary defaults, they
7 have to pay -- cure within 10 days; for nonmonetary, they have
8 30 days?

9 A Yes.

10 Q After notice?

11 A Yes.

12 Q Okay. Do you know where Mr. Dragul was on May 17th,
13 18th of that year?

14 A I was told he was traveling to visit his sick
15 brother.

16 Q I'm talking about ICSC convention. Do you know if he
17 was here in town for that?

18 A I don't know where he was, no.

19 Q Okay. Do you know whether he met with Najam Khan on
20 those days?

21 A I do not, no.

22 Q Do you know if you spoke with him?

23 A I was not part of the conversation if it occurred,
24 no.

25 Q Okay. This agreement that you say that you have with

1 Mr. Dragul to change the lease or change the notice provisions,
2 when exactly did that occur?

3 A Early September 2014.

4 Q How --

5 A No, I'm sorry. Whoa. 2012. 2012.

6 Q How did that occur?

7 A Telephonically, and it's not so much an agreement as
8 it was a request and an accommodation.

9 Q Okay. Can you explain for me all of the
10 inconsistencies with regard to mailing about who was getting
11 mail for what? There is no consistency.

12 A Mr. Dragul received 90-odd percent of all letters
13 sent out, and including the ones that have not for some reason
14 been produced in this. Now, Mr. Solomon, Mr. Dragul requested
15 that we send him specifically operational issues for certain
16 elements of the operation. So we accommodated that request.

17 Q And is it your custom to amend contracts orally?

18 A It's our custom to accommodate tenants that we're
19 trying to maintain a good relationship with.

20 Q Okay. Is it your custom to amend contracts orally?

21 A I just answered that.

22 Q No, you said that you accommodate. I'm just
23 asking -- you're -- I'm trying to figure out if you believe
24 that there is an amendment to the --

25 A No. No. No.

1 Q Okay. So there isn't an amendment to the original
2 lease?

3 A Just an accommodation, no amendment, yes.

4 Q Okay. Isn't it your obligation -- well, what is your
5 obligation as general counsel? What do you do?

6 A I oversee the legal matters for the company.

7 Q Okay. And as an attorney, you're familiar with the
8 Statute of Frauds?

9 A Yes.

10 Q Now, tell me what the Statute of Frauds says with
11 regard to amending complaints -- what does the Statute of
12 Frauds say in comparing an oral change to a written contract?

13 MR. SHEEHAN: Objection. Vague and ambiguous.

14 THE COURT: Overruled. I'm a lawyer. He knows
15 what's vague and ambiguous.

16 MR. SHEEHAN: Well, I don't even understand this
17 whole thing. Unless you put the Statute of Frauds statute in
18 front of him, and I don't know the Statute of Frauds by heart;
19 I know that.

20 THE WITNESS: I don't have it memorized, but as I
21 recall to the best of my ability, it gives precedence to the
22 written agreement.

23 BY MR. VAN:

24 Q Did you tell Mr. Ruffin about your oral agreement
25 with Mr. Dragul?

1 A I'm sorry. That was over four years ago. I'm trying
2 to -- trying to recall.

3 Q Okay.

4 A I may have.

5 Q Okay.

6 A But again not an agreement, just a request that we
7 were willing to accommodate.

8 Q So what would be -- what would be the precedential
9 position, either the written document or the accommodation?

10 MR. SHEEHAN: Objection to the extent it calls for a
11 legal conclusion.

12 THE COURT: Overruled.

13 THE WITNESS: The written document would control.

14 BY MR. VAN:

15 Q Did you have an opportunity to look at the trial
16 brief before it was filed?

17 A Ours?

18 Q Yes.

19 A Or your -- no, obviously not yours. Yes. Yes.

20 Q Never know. Are you familiar with the fact that
21 during the trial brief, in the trial brief that Treasure Island
22 indicates that it has complied with the notice provisions as to
23 Rose, but simply failed to notify Operadora?

24 A I don't recall everything that was written in the
25 trial brief. Is there a -- has it been admitted? Is it --

1 Q Yes, it's -- I don't remember which exhibit it is.

2 MR. MARSHALL: It's Exhibit 60 -- 61 maybe.

3 MR. VAN: 60?

4 MR. MARSHALL: 61.

5 MR. VAN: Oh, sorry.

6 BY MR. VAN:

7 Q 61.

8 A Okay.

9 Q Is that accurate?

10 A Somewhere in 61 does it say that? It may.

11 Q Page 5.

12 A Oh, I'm sorry. I didn't hear you say page 5.

13 Q No, and I didn't say it.

14 A Oh, okay.

15 Q I'm getting there.

16 A I don't see what you said anywhere on page 5.

17 Q Look at lines 3 and 4. When the notice sent to Rose
18 is examined --

19 A Page 5?

20 Q Page 5.

21 A Would put Rose in breach; however, the lease --

22 Q Page 5, lines 3 and 4. When the notice sent to
23 Rose --

24 MR. SHEEHAN: Mr. Anthony, you must be looking at the
25 wrong exhibit.

1 THE COURT: I think you guys are on different
2 documents.

3 MR. VAN: I'm looking at their trial brief.

4 THE WITNESS: I'm sorry. 61?

5 MR. VAN: 61.

6 THE COURT: No -- 61.

7 THE WITNESS: 61 is your copy in this book?

8 MR. VAN: Oh, well, then there's apparently an issue
9 with the numbering.

10 THE WITNESS: So there you go. So what --

11 MR. VAN: Hold on one second.

12 THE WITNESS: 61.

13 MR. VAN: Sorry. There is one out of order, Your
14 Honor. It's 58 in his book. It's at 61.

15 THE COURT: 61 in my book.

16 MR. VAN: Okay. We'll make sure we get those
17 straightened out.

18 THE WITNESS: Do you want me to do it real quick?

19 THE COURT: No. No.

20 THE WITNESS: Okay. Don't touch it.

21 THE COURT: The clerk touches it. Let's not -- yeah,
22 let's stay out of that. Let's not get in trouble with Dulce.

23 MR. VAN: You'll lose your arms.

24 BY MR. VAN:

25 Q Line 3.

1 A Page 5?

2 Q Yes, page 5. When the notice sent to Rose is
3 examined, the fact is that Treasure Island complied with the
4 notice requirements as far as Rose is concerned?

5 A Yes, it says that.

6 Q Okay. And I think your testimony is they did not put
7 Operadora on notice, correct?

8 A Correct.

9 Q Okay. And I think in the trial brief it says -- who
10 is Michelle Knoll?

11 A She is our either Senior or Executive Vice President
12 of Marketing and Public Relations.

13 Q Are you aware of the fact that when Mr. Dragul was in
14 town on May 17th and 18th he had contact with Michelle Knoll
15 with regard to some signage issues?

16 A No.

17 Q Okay. And under the terms of the original lease,
18 because Mr. Dragul was having communication with Michelle Knoll
19 and with Najam Khan, could they have delivered -- hand
20 delivered the notice of breach to him?

21 A Could they have, yes.

22 Q Who gave Fennemore Craig the permission or the
23 authority to send the May 28th letter out?

24 A I did.

25 Q Okay. Are you aware that the complaint in this case

1 was also filed on the 28th?

2 A You've said that.

3 Q Okay. And you don't know?

4 A As I told you before, I don't know.

5 MR. VAN: Okay. I'd just ask the Court to take
6 judicial notice of the filing date of the complaint.

7 THE COURT: Hold on. Let me see if I can do that
8 real quick.

9 MR. VAN: Okay.

10 THE COURT: My screen says it was filed May 28th,
11 2015.

12 MR. VAN: Okay.

13 BY MR. VAN:

14 Q Now, that was the same day that the default letter
15 went out, correct?

16 A Incorrect.

17 MR. MARSHALL: Termination.

18 BY MR. VAN:

19 Q Okay. What's the date of that letter?

20 A May 14th, 2015.

21 Q I apologize. The termination letter. You're right.
22 The termination letter.

23 A Correct.

24 THE COURT: The time of filing of the complaint is
25 6:07:20 p.m.

1 BY MR. VAN:

2 Q Okay. So the termination letter went out on the
3 28th. The lawsuit -- and we could expect that it wouldn't
4 arrive there till the 29th going through FedEx, I mean, they're
5 fast, but not that fast. So the termination letter and the
6 complaint were both filed before it was received by Rose,
7 correct?

8 A Yes.

9 Q Okay. In the trial brief, page 3, lines 22 and --
10 excuse me -- 20 through 23 --

11 A Okay.

12 Q Wait a second. I'm probably on the wrong one myself.

13 (Colloquy off the record.)

14 BY MR. VAN:

15 Q Okay. I'll come back to that. If you had to
16 quantify right now today the economic damage that Treasure
17 Island has been caused as of today because you did finally
18 accept the rents, correct?

19 A Yes.

20 Q What is the economic damage today -- as we sit here
21 today, what is Treasure Island's economic damage?

22 A I haven't -- I haven't considered that before. Yeah,
23 I haven't considered it before. I don't know.

24 Q Okay. Sorry. Go back to Paragraph 3 -- I
25 apologize -- page 3 of your Exhibit 58.

1 A Yes.

2 Q Okay. Treasure Island exercised its right to
3 terminate the lease by letter May 28th. Rose disputed that
4 Treasure Island had the ability to terminate the lease claiming
5 that one or more notices were defective. As a result, this
6 litigation was filed to confirm that the lease was properly
7 terminated, correct?

8 A That is what it says.

9 Q Okay. So the letter was received on the 29th, and
10 the assertion is that Rose is claiming that its notices were
11 defective, but despite the fact that they hadn't even received
12 it yet, correct?

13 A Yes.

14 Q Okay. Now, sorry, let's go back to the issue. What
15 are the economic damages that Treasure Island --

16 A I have not considered that before. I don't know.

17 Q But you have been paid current on all the rent?

18 A Yes, Rose's -- Rose is -- well, wait a minute. What
19 day are we at, October something? Yeah, I think we're all
20 current right now.

21 Q Today, as we sit here right this second, we're
22 current?

23 A I believe so.

24 Q Okay. Did you ever tell Rose that you wanted to take
25 its position on their lease from them and deal directly with

1 Señor Frog's?

2 A Did I ever tell -- say that again.

3 Q Did Treasure Island ever take the position that it
4 wanted to take over Rose's lease with Señor Frog's?

5 A No.

6 Q Okay.

7 A Treasure Island did take the position that once the
8 lease was terminated with Rose that it would negotiate directly
9 with Señor Frog's.

10 Q Okay. Let me --

11 (Colloquy off the record.)

12 MR. SHEEHAN: Wait a second. This is -- this is
13 settlement discussions?

14 THE WITNESS: Yep.

15 MR. VAN: Yeah, it is.

16 MR. SHEEHAN: Then I'm going to object.

17 MR. VAN: Okay. That's fine. Go ahead and object.

18 THE COURT: The objection is sustained.

19 MR. VAN: Well, wait. Hold on.

20 THE COURT: Settlement discussions aren't
21 admissible --

22 MR. VAN: I understand that. I'm not --

23 THE COURT: -- in front of me --

24 MR. VAN: I'm not --

25 THE COURT: -- the fact finder.

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1 MR. VAN: I'm not presenting it with regard to
2 settlement discussions. He has just taken the position that
3 they did not want to take their position.

4 THE COURT: Counsel, if it is in fact settlement
5 discussions, it would be inappropriate for me as your fact
6 finder to know about those discussions, even if it is something
7 you would otherwise be able to impeach the witness with.

8 MR. VAN: Okay.

9 THE COURT: Next issue.

10 MR. VAN: Your Honor, what I'd like to do is refresh
11 his recollection on an e-mail.

12 THE COURT: You can refresh his recollection on
13 anything you want.

14 MR. VAN: Thank you. May I approach?

15 THE COURT: You may.

16 THE WITNESS: I already know the e-mail you're
17 talking about.

18 MR. VAN: Okay.

19 THE WITNESS: Yeah, thanks.

20 BY MR. VAN:

21 Q If you can look at the last sentence of that e-mail.

22 A Yes.

23 Q And that's an e-mail -- that's your e-mail address,
24 correct?

25 A It's my e-mail --

1 THE COURT: Counsel, you said you were going to
2 refresh his recollection.

3 THE WITNESS: Yes. Yep.

4 MR. VAN: Sure. Fine.

5 THE COURT: You can't do anything else if that's all
6 you're doing.

7 BY MR. VAN:

8 Q Does that refresh your recollection as to whether you
9 would take the position that you wanted to take their position?

10 A We wanted to take their position in terms of a direct
11 relationship with Señor Frog's, not in terms of a sublease
12 relationship or anything like that.

13 Q Okay. So if you were to take the position today that
14 you wanted to take the position of Rose, would you extend the
15 exact same terms to Señor Frog's as are in your lease agreement
16 with Rose?

17 A When you say take the position of Rose, do you mean
18 in terms of a direct relationship --

19 Q Correct.

20 A -- with them?

21 Q If you were --

22 A So if we were to begin to -- if we were to engage
23 Señor Frog's today to renegotiate the new -- the lease --

24 Q Don't need to renegotiate. All that I'm saying is
25 would you -- would you offer them the exact same terms that

1 they have with Rose?

2 MR. SHEEHAN: Objection. Relevance, Your Honor.

3 THE COURT: Sustained.

4 MR. VAN: Your Honor, the reason I'm asking this
5 question is because they opened the door, and they've said more
6 than once, We want to negotiate directly with them. We want to
7 offer them a lease. I'm trying to figure out if they're going
8 to offer them the exact same lease.

9 THE COURT: What difference does it make?

10 MR. VAN: Fair enough.

11 BY MR. VAN:

12 Q Isn't it true that the property adjacent to this
13 property has been leased out?

14 MR. SHEEHAN: Same objection, Your Honor.

15 BY MR. VAN:

16 Q To CVS?

17 MR. SHEEHAN: This is totally irrelevant to the
18 matters before us.

19 THE COURT: Sustained.

20 MR. VAN: Your Honor, this has to do with the
21 reasoning and the basis behind the failure to comply. We
22 believe that this was a set up.

23 THE COURT: I know you do.

24 MR. VAN: Okay. And --

25 THE COURT: Okay. So let's keep going on a different

1 issue.

2 BY MR. VAN:

3 Q What is the current square footage rent for the Señor
4 Frog's location?

5 MR. SHEEHAN: Objection, Your Honor. This is down
6 the same path. It's irrelevant.

7 THE COURT: The square footage rent of the existing
8 lease is not irrelevant.

9 If you know, you can answer.

10 THE WITNESS: It's difficult to calculate because of
11 the 7 percent percentage rent.

12 BY MR. VAN:

13 Q Okay. What about the base rent? What's the base
14 rent?

15 A The base rent currently pursuant to the fifth
16 amendment is 33,250 a month.

17 Q And what's the square footage?

18 A 18,135 feet.

19 THE COURT: I'm actually impressed. Good job.

20 THE WITNESS: I think.

21 BY MR. VAN:

22 Q Give me that number again. 18,000 what?

23 A Well, I mean, check the lease. It's 18,135 off the
24 top of my head.

25 Q Okay. And it's 33 --

1 A 33,250.

2 Q Okay. Oh. Wait. You've got to times that by --
3 hold on. This is the slow part for me. Give me one second.

4 (Colloquy off the record.)

5 BY MR. VAN:

6 Q So the base rent number would be \$22 a foot,
7 ballpark?

8 A Sure.

9 Q Well, I want --

10 A Well, I mean, I --

11 Q Fair enough. No, I'm going to -- I just want to put
12 for the record I took 33,250 divided by 18,135, times it by 12,
13 and I got \$22 a foot?

14 A Okay.

15 Q Is that a good rate for Strip property right now?

16 MR. SHEEHAN: Again, Your Honor. I don't know what
17 the relevance of this is and especially since it doesn't
18 consider in the percentage rent, but it's totally irrelevant to
19 the notice issues before us.

20 THE COURT: Overruled.

21 THE WITNESS: Again, would \$22 a square foot be good
22 rent? No.

23 BY MR. VAN:

24 Q Would it be good rent for the tenant?

25 A Sure.

1 Q Okay.

2 A But that's not what they're paying.

3 Q Based upon the percentage rent, do you know what that
4 number would be?

5 A Higher.

6 Q \$50 a foot?

7 A I --

8 Q There's no way to calculate because it's going to
9 fluctuate, correct?

10 A Yes.

11 Q So we have to guess based upon the amounts that have
12 been paid, correct?

13 A That makes sense.

14 Q Okay. So I'm going to have somebody smarter than
15 me -- Gary Dragul -- figure this part out, and I'm going to ask
16 you the questions and let him do it. So you've got the base
17 rent number. We've got that down. On May 28th, 29th, 2015,
18 there was a check that was to be --

19 (Colloquy off the record.)

20 BY MR. VAN:

21 Q -- okay. There was a check to be paid for a hundred
22 and nineteen thousand, two, ninety-nine, correct?

23 A That represented two months, yes.

24 Q Okay. That was two months?

25 A Yes.

1 Q Not three?

2 A Not three.

3 Q Okay.

4 MR. SHEEHAN: Well, let's save you the trouble,
5 Counselor, and \$56 a square foot, fine. You can --

6 MR. VAN: Okay.

7 BY MR. VAN:

8 Q Is that fair, somewhere in the range of \$56 a foot?

9 A Sure.

10 Q Okay. Is that still a good lease amount for a tenant
11 on The Strip?

12 A I can't speak to the rest of The Strip, Mr. Van.

13 Q Okay. Is that a good lease amount for Treasure
14 Island?

15 A Yes, that's a -- I would say yes.

16 Q Okay. By comparison to the CVS store next door, how
17 does that rank?

18 A A good amount.

19 Q Okay. Do you remember having your deposition taken?

20 A I do.

21 THE COURT: And I'm going to ask you the same thing I
22 asked Mr. Sheehan. Do you have the original?

23 MR. VAN: I do not, Your Honor.

24 THE COURT: So do you want me to have Dulce publish
25 the copy that's in my book?

1 MR. SHEEHAN: Yes, we'll stipulate.

2 MR. VAN: Yes, ma'am.

3 THE COURT: Which number --

4 THE CLERK: 57.

5 THE COURT: 57. Let me get it out.

6 MR. VAN: It's, yeah -- well, it's 57 in my book.

7 It's 57 in your book. I'm not sure what it is in his.

8 MR. SHEEHAN: Can we just do Mr.--

9 THE COURT: He's not going to look in his book
10 because he's going to --

11 MR. VAN: That's true. Fair enough.

12 THE COURT: -- look at the published copy.

13 And I do have to break in about half an hour, guys.
14 I do not know how long Justice Hardesty will keep me.

15 MR. SHEEHAN: Mr. Van, can we just stipulate to Mr.
16 Dragul's at this time for the same thing, publishing the copy
17 in the book?

18 MR. VAN: Sure.

19 MR. SHEEHAN: And that is Exhibit --

20 THE COURT: Sir, here's your deposition. It's been
21 published.

22 THE WITNESS: Thank you, Your Honor.

23 MR. VAN: I just want to know what the Court would've
24 said if I said, no, I'm not going to stipulate for
25 Mr. Dragul's. No, the look was good. That would -- okay.

1 THE COURT: It would have been that we would have
2 gone back to the one we were talking about before, and we
3 would've had an issue because we're going to play the same all
4 day long.

5 MR. VAN: I'm kidding.

6 THE COURT: So I've published Mr. Dragul's as well.

7 BY MR. VAN:

8 Q If you could look on page 14.

9 MR. SHEEHAN: What exhibit is this?

10 MR. VAN: This is 57, Mr. Anthony's deposition.

11 BY MR. VAN:

12 Q It's Exhibit 57, page 14, lines 14 through 19.

13 A All right.

14 Q What's the square footage payment that's being paid
15 by CVS?

16 A I don't know.

17 Q Okay. So if -- let me just read this: I guess I'm
18 asking for, I guess -- maybe I understand that you wouldn't
19 know the exact.

20 And then your response is: I think when -- I think
21 when we rented out the construction to CVS and the -- it says
22 marble, but I'm -- Marvel exhibit are either currently occupied
23 or going to be occupied very shortly, that the price per square
24 foot was a couple hundred dollars, I think, a square foot,
25 maybe 400. Do you remember saying that in your deposition?

1 A I do.

2 Q Okay. Now, the current lease as it exists would
3 expire in 2041, correct?

4 A Assuming that all four extensions were opted in on,
5 yes.

6 Q Okay. Do you have -- are you familiar with any of
7 the payments that are made, have been made on this property?
8 Are you the right guy for that or not?

9 A I'm sorry. I am --

10 Q If I were to say to you that from June 14th to
11 December 30 -- excuse me -- June 1st, 2014, to December
12 30th, 2014, if I were to give you a number, would you be able
13 to tell me whether that was an accurate number on payments that
14 had been made and received?

15 A Not off the top of my head, no.

16 Q Okay. So June 1st, if a payment is due -- if the
17 payment is technically due on the 1st, the cure period would
18 expire when?

19 A That depends.

20 Q From economic?

21 A Well, that still depends.

22 Q Oh, it depends on when the -- what would it depend
23 on?

24 A When the letter was sent.

25 Q Okay. So the letter is the triggering factor?

1 A Yes.

2 Q Okay.

3 A Well, and I'm sorry. I may have misanswered that.

4 Can you ask the question one more time.

5 Q If rent is technically due on the 1st, then it would
6 be past due based upon the trigger on --

7 A Well, no. Okay. I'm sorry. It would be past due on
8 the 2nd. It would be in default after the letter -- 10 days
9 after the letter was sent.

10 Q Okay. Is it true that -- or do you know whether Gary
11 Dragul ever contacted Treasure Island and asked if he could pay
12 in advance?

13 A I don't.

14 Q Okay. Is there any reason why Treasure Island would
15 not allow him to pay in advance?

16 A For the base rent or for the percentage sales?

17 Q For the base rent.

18 A I have no idea, not that I can think of here.

19 Q Okay. And then just to go back one issue. What is
20 your understanding with regard under the terms of the lease who
21 was responsible for preparing the percentage rent calculations?
22 That's Exhibit 1.

23 A That would be in Section 3-point something.

24 MR. SHEEHAN: 3.1C if I may help.

25 THE WITNESS: Thank you.

1 I would say it was the tenant's responsibility.

2 BY MR. VAN:

3 Q Okay. Let's go up to 3.1B very quickly.

4 A Sure.

5 Q What would be excluded? I see things that are
6 included. What would be excluded?

7 A No, those are all exclusions.

8 Q Okay. So, sorry. So what would be -- so it's just
9 gross sales is --

10 A It's gross sales, minus the base rent, minus the
11 following -- what is that -- well, it started as 13, went down
12 to 12 in an early amendment.

13 Q Okay. So there's 13 in here?

14 A Yeah, but then it was amended very quickly to 12.

15 Q Okay. What was taken out? Do you --

16 A The 13th.

17 Q Oh, themed goods and -- so you didn't sell any items
18 for Treasure Island's matters in Señor Frog's?

19 A Part of Señor Frog's operation is retail sales.

20 Q Uh-huh.

21 A And we wanted to make sure we were capturing part of
22 the rent for that.

23 Q Okay. So you excluded it --

24 A Right.

25 Q -- so that it would be included in the gross number?

1 A Correct.

2 Q Got it, okay. So did you have the ability to comp
3 food sales at Señor Frog's? Did Treasure Island? Did any of
4 the hosts at Treasure Island?

5 A I think we addressed that in a subsequent amendment.
6 Yeah, in amendment 1, which would be Tab 2.

7 Q Say that again.

8 A The first amendment.

9 Q Okay.

10 A Section 7.10 gave us -- gave us those rights, yeah.

11 Q And --

12 A Which is --

13 Q Oh. You amended it in the first amendment?

14 A Yes, correct.

15 Q Okay. And that allowed you to comp?

16 A That allowed hosts to comp somebody that wanted to go
17 to Señor Frog's, and they would bill us back for the expense.

18 Q Okay. And do you know what that process was by
19 which -- I mean, so you've got this gross sales number. That
20 shouldn't be too hard. Strike that. This will be an easier.
21 Whose point-of-sale system was Señor Frog's using?

22 A I believe they're using InfoGenesis, which is ours.

23 Q Okay. So all the information would go to the Señor
24 Frog's accountants, and then they would go and deduct all of
25 these items, 1 through 13 then 1 through 12, and then they

1 would come up with a number. Were there ever any discrepancies
2 or disputes with regard to that?

3 A At least one that I am aware of, but potentially.

4 Q Okay. Who would've been the person that was involved
5 in that?

6 A The Treasure Island finance team.

7 Q Yeah, but who was the -- if Señor Frog's was trying
8 to get this coordinated, who would they deal with? The finance
9 team, but who's in charge of the finance team?

10 A Well, I don't know who on the finance team they would
11 deal with. Our CFO's in charge of the finance team.

12 Q Who's the CFO?

13 A Jerry Griffis.

14 Q Okay. So if there was a dispute, the Señor Frog's
15 accountants would then go to Jerry Griffis, and they would
16 haggle and work something out between them or --

17 A I don't know.

18 MR. VAN: Your indulgence, Your Honor.

19 THE COURT: Okay.

20 MR. VAN: All right. Your Honor, I have nothing
21 further.

22 THE COURT: Thank you.

23 MR. SHEEHAN: I should be real quick, Your Honor.

24 THE COURT: That'd be lovely.

25 MR. SHEEHAN: I know you've got a 3 o'clock call. I

1 don't see a clock in here. Where is the --

2 THE COURT: We don't have a clock in here.

3 UNIDENTIFIED SPEAKER: It's 20 to 3.

4 THE COURT: It's 2:38.

5 MR. VAN: I'm sure glad you don't do the 10-minute
6 rule here. That would be a quick trial.

7 THE COURT: I do the 10-minute rule, but not on
8 trials.

9 MR. VAN: No, it's called the Peak-10-minute rule
10 because I keep hitting him every time I see him because of it.

11 THE COURT: Today it was the Ferrario team.

12 MR. SHEEHAN: I've seen others, too.

13 REDIRECT EXAMINATION

14 BY MR. SHEEHAN:

15 Q Sir, is there any doubt that you got a phone call
16 from Elizabeth Gold following the May 14th default?

17 A No.

18 Q So she obviously received that letter?

19 A We spoke about it.

20 Q And she specifically said she got the letter, and she
21 wanted to talk to you about it, correct?

22 A Yes.

23 Q So although that e-mail somehow fell through the
24 cracks -- and I don't know why it didn't make it into the
25 exhibit books -- there's no doubt that the phone call was made?

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1 A No.

2 Q There's no doubt that they got that notice?

3 A No doubt.

4 MR. SHEEHAN: No further questions.

5 THE COURT: Anything else, Mr. Van?

6 MR. VAN: One question.

7 RECROSS-EXAMINATION

8 BY MR. VAN:

9 Q Did you follow that up with an e-mail of any sort?

10 A No.

11 MR. VAN: Nothing.

12 THE COURT: Okay. Anything else?

13 MR. SHEEHAN: No.

14 THE COURT: All right. Sir, you can step down.

15 THE WITNESS: Thank you.

16 THE COURT: Who's your next witness?

17 MR. SHEEHAN: Pass.

18 THE WITNESS: I'm sorry, Your Honor. My deposition?

19 THE COURT: Leave it there.

20 THE WITNESS: Yes, ma'am.

21 THE COURT: So before you pass, I need you to do what
22 I make everybody else do, which is come over and make sure that
23 all the exhibits you think are in are in. Since you stipulated
24 to all of them except the depos, I think it's a pretty easy
25 exercise, but I'm going to make you do it anyway.

1 MR. SHEEHAN: Certainly.

2 (Pause in the proceedings.)

3 MR. SHEEHAN: Thank you, Your Honor.

4 THE COURT: So you can confirm that you rest?

5 MR. SHEEHAN: Yes.

6 THE CLERK: (Inaudible).

7 THE COURT: Apparently there's one more thing.

8 THE CLERK: Is the trial -- is Rose's trial brief 58
9 or 61?

10 MR. SHEEHAN: 61.

11 MR. MARSHALL: It should be 61.

12 THE CLERK: I'll switch it.

13 MR. VAN: We will go up at break or whenever --

14 THE COURT: Dulce will fix it.

15 THE CLERK: Okay. I'll fix it.

16 MR. VAN: Okay.

17 THE COURT: She has the exhibit list --

18 MR. MARSHALL: The index, the binder index --

19 THE COURT: -- which controls.

20 MR. MARSHALL: -- at the front should be accurate.

21 So that should have 61.

22 THE COURT: She's going to make the exhibit list
23 match the exhibits.

24 MR. VAN: I'd make him do it with her.

25 THE COURT: No, she can -- he can watch.

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1 All right. So they've rested.

2 Mr. Van, you're up.

3 MR. VAN: Your Honor, I'd like to file a motion for
4 dismissal as a matter of law.

5 THE COURT: You may.

6 MR. VAN: NRCP 52(c) there is no way that the breach
7 of lease -- or the breach of contract claim can proceed forward
8 and that or -- their claims can proceed forward. The reason is
9 simply this. We have their witness -- they have rested -- who
10 has said on numerous occasions, I never complied with the
11 underlying documents in giving notice, and one of the
12 provisions was they had to give notice to Operadora as well as
13 to Susan Markusch of Rose.

14 The reason that that is so imperative is Mr. Dragul
15 flies around. That's what he does. He's the face of the
16 country -- company. They have 2 million square feet of rental
17 space --

18 MR. MARSHALL: 8 million.

19 MR. VAN: -- 8 million feet of rental space in nearly
20 every state. There's a reason that we put her on there. It's
21 so that any issues with regard to breaches come to her. The
22 argument that, oh, well, we're going to change the address,
23 therefore, that means we don't have to give notice to her
24 anymore is shallow at very best. The argument that oh, well,
25 I'm trying to accommodate someone; therefore, I am going to

1 amend the very term -- notice terms of the lease fall short.

2 There is absolutely no way that they can meet their
3 standard, Your Honor. This is a critical provision. It was a
4 bargained-for issue, and you heard Mr. Krouham say, It was an
5 issue for me because I was putting \$7 million into this deal.
6 I wanted notice, and he also said, I was ready, willing, able,
7 prepared to satisfy that to cure that default if it ever came
8 up.

9 And the day after that all of this happened, despite
10 all the other issues, there was an attempt to cure. The checks
11 were in the mail. They wired it. They refused it. They wired
12 it. They refused it. They sent it overnight. They refused
13 it. They came to this Court -- and despite the fact that they
14 knew the case law, they came to this Court and said, Well, we
15 want your blessing that we can accept this. There's no way
16 that their claim can survive. Secondly, with regard to what
17 our -- Your Honor, there's just no way that their claims can
18 survive.

19 THE COURT: Okay. Anything else that you want to
20 add?

21 MR. VAN: No, Your Honor.

22 THE COURT: All right. Mr. Sheehan.

23 MR. SHEEHAN: Your Honor, I'd like to first of all
24 incorporate all of my arguments set forth in the trial brief.

25 THE COURT: Okay.

1 MR. SHEEHAN: And there's many, but it's almost
2 repeating the opening argument. Again, the case is very clear.
3 They cannot assert the Operadora notice provision. I've cited
4 a ton of cases in there; they have cited none. The whole
5 Operadora thing is a red herring to begin with.

6 Second of all, I think you saw the evidence showing
7 that Operadora didn't say we would pay this thing on a realtime
8 basis. They said, Okay, we just want to make sure you're not
9 terminating our lease, and we'll negotiate with you when the
10 time comes. They didn't say to us in the e-mail you failed to
11 notice us, and therefore the termination is inappropriate, and
12 we would've paid and done that. That was only three months ago
13 when Mr. Van had got them in, but the e-mail from Abigail --
14 it's Exhibit 50 -- speaks for itself, makes it clear.

15 Second of all --

16 THE COURT: Regardless of whether she had specific
17 authority or not.

18 MR. SHEEHAN: Yes, and I think we all know that no
19 lawyer writes a letter without the thing, but more than that,
20 Your Honor, his deposition testimony, which he confirmed again
21 today at page 28, if you read Mr. Krouham's deposition
22 testimony at page 28, he said that the letter does -- did
23 accurately reflect their position. So I'll ask you to please
24 take a look at that 28 when you make the final ruling on this
25 case because it clearly says that.

1 THE COURT: Anything else, Mr. Van?

2 MR. SHEEHAN: I have a whole bunch more, but I've got
3 a feeling that I can sit down.

4 THE COURT: Thank you.

5 The motion's denied.

6 Your first witness.

7 MR. VAN: Mr. Dragul.

8 THE COURT: Mr. Dragul, if you'd come forward,
9 please.

10 (Defense witness, Gary Dragul, sworn.)

11 THE CLERK: Thank you. And please state and spell
12 your name for the record.

13 THE WITNESS: Gary J. Dragul. G-a-r-y, and last name
14 is D as in David, r-a-g-u-l.

15 THE COURT: Thank you, sir. And, sir, you'll notice
16 that there are M&Ms in the dispenser, water in the picture. If
17 you should need M&Ms, please feel free to have as many as you
18 want. Don't let any of the lawyers have any. If you'd like
19 some coffee, let us know.

20 THE WITNESS: Thank you. Do I get the coffee
21 offering?

22 THE COURT: We can get you some coffee.

23 THE WITNESS: No.

24 THE COURT: Do you want some coffee?

25 THE WITNESS: No, I'm good. I'm good. No, I'm good.