**IN THE SUPREME COURT OF THE STATE OF NEVADA**



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| ROSE, LLC, a Nevada Limited Liability Company,<br><br>Appellant,<br><br>v.<br><br>TREASURE ISLAND, LLC, a Nevada Limited Liability Company,<br><br>Respondents | Supreme Court Case No. 71925<br>District Case No. A719105 |

# RESPONDENT TREASURE ISLAND LLC'S ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Treasure Island, LLC has no parent company and is not publicly traded. There is no publicly traded company that owns more than 10% of the stock of Treasure Island, LLC.

The attorneys who have appeared on behalf of Respondent in this court and in district court are:

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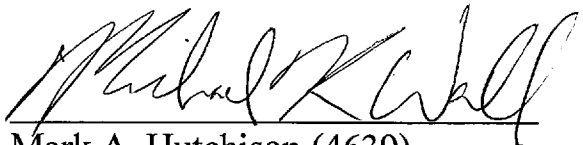
These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 25 day of October, 2017.

HUTCHISON & STEFFEN, PLLC



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## JURISDICTIONAL STATEMENT

Although appellant's jurisdictional statement fails to so demonstrate, it is respondent's belief that this Court's appellate jurisdiction has been properly invoked.

However, the orders that were entered below that are appealable are the judgment entered on December 21, 2016 (assuming the findings of fact and conclusions of law was not a final judgment), 5 AA 1046; NRAP 3(A)(b)(1), and the district court's post-judgment order and judgment granting attorney's fees, entered on January 10, 2017. 5 AA 1051; NRAP 3(A)(b)(8).

The final judgment entered on January 10, 2017, is a nullity. 5 AA 1056. *See Campos-Garcia v. Johnson*, 130 Nev. Adv. Op. 64, 331 P.3d 890, 891 (2014) ("When district courts, after entering an appealable order, go on to enter a judgment on the same issue, the judgment is superfluous.").

Appellant's amended notice of appeal lists multiple non-appealable orders as the subject of this appeal. 5 AA 1058. Technically, entry of the final judgment does not render unappealable prejudgment orders appealable, but to the extent appropriate, prejudgment rulings may be reviewed as part of an appeal from a final judgment. *See Mardian v. Greenberg Family Trust*, 131 Nev. ___, 359 P.3d 109, 111 (2015). The issues raised in appellant's opening brief are properly before this Court as part of appellant's appeal from the final judgment.

In the opening brief, appellant has not specifically challenged the district court's award of attorney's fees. Thus, if the underlying judgment is affirmed, the award of attorney's fees should also be affirmed.

## ROUTING STATEMENT

Respondent agrees with appellant that this matter is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(5). This appeal presents routine issues, the record is brief, and appellant seeks correction of alleged error. Therefore, respondent suggests that this case should be assigned to the Court of Appeals for resolution.

## STATEMENT OF THE CASE

This is an appeal from a final judgment entered following a bench trial granting declaratory judgment in favor of respondent in a landlord-tenant dispute involving termination of a lease for non-payment of rent. 5 AA 1046. It is also an appeal from a post-judgment judgment awarding respondent attorney's fees and costs. Eighth Judicial District Court, Clark County, Department XI, the Honorable Elizabeth Goff Gonzalez, District Judge.

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## INTRODUCTION[1]

This is a simple case. Rose, LLC ("Rose") entered into a lease with Treasure Island, LLC ("Treasure Island"). Rose defaulted on its payment obligations under the lease. Treasure Island sent Rose a notice of default, affording Rose an opportunity to cure. Rose received a copy of that notice of default and asked Treasure Island if Rose could have additional time to cure the default, beyond the ten (10) day cure period provided for in the lease. Treasure Island informed Rose that it would not allow additional time. Rose chose not to cure during the ten day cure period. Treasure Island then terminated the lease pursuant to an express provision allowing for termination under the circumstances. The district court upheld termination of the lease.

So why are we here?

We are here because Rose's attempt to create a technical breach of the lease based on the manner in which Treasure Island served notice of the default failed below. Claiming the allegedly-flawed notice was the reason for the default, and not Rose's failure to timely pay the rent or to cure after it received actual notice of the default, Rose tried (and still tries) after the fact to create a legal issue as to the

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[1]Because this section is intended as argument, no citations to the record appear here. Citations to the record supporting the assertions of this introduction will be set forth in the appropriate sections of the brief, *infra*.

sufficiency of the notice. Rose insisted that the notice provisions of the lease and an amendment to the lease, when read together, provide for a particular form of notice, and that Treasure Island's failure to strictly comply with the lease as amended results in the forfeiture of Treasure Island's remedy as a matter of law, the facts, circumstances of the default, receipt of actual notice, and the lease notwithstanding.

And why not? On appeal, Rose cannot possibly mount a sufficiency of the evidence challenge to the district court's findings of fact, which are fatal to Rose's appeal. Instead, Rose attempts to construct a legal argument to justify its own breach of contract, and to portray the entire case as Treasure Island's breach of contract.

The district court was not fooled by Rose's misdirection arguments. We trust this Court will also see how simple this case is, and will affirm the termination of Rose's lease based on Rose's willful failure to pay rent.

## STATEMENT OF FACTS

Appellant's statement of the facts begins with the assertion that the lease agreement between Rose and Treasure Island was entered into during a low point in the Las Vegas real estate market and is unattractive to Treasure Island, raising the red herring argument that Treasure Island wanted out of the lease and thus

acted with ulterior motives in terminating the lease for what Rose characterizes as a hyper-technical application of the default provisions of the lease.[2] AOB at 3. Rose says the termination was done as a "pretext." AOB 65. That it was done in bad faith. *Id.* Rose emphasizes that the lease was renewable for 30 years, but ignores that it was only in its fourth year, and that Rose and its subtenant were chronically in arrears on monies owed to Treasure Island, including rent. 3 AA 657-58. Rose cites no testimony or other evidence from the record for the reckless assertion that Treasure Island terminated the lease in bad faith, and there is none, other than the idle speculation Rose has been asserting as fact from the inception of this case.[3]

**A. Background Facts.**

On April 13, 2011, Rose entered into a lease agreement with Treasure Island for the use of real property located on Las Vegas Boulevard in Las Vegas. 1 AA 34. The Agreement requires annual rent payable in monthly installments,

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[2]One can hardly call termination for the non-payment of rent a hyper-technical application of a lease. Payment of rent on time is a tenant's first and most fundamental obligation under any lease.

[3]Although Rose's counsel tried to make the argument that the lease was not a good one for Treasure Island based on his speculations, 3 AA 734-39 (over granted objections based on relevance), Anthony (Treasure Island's attorney and sole witness at the trial) testified that the lease was advantageous to Treasure Island. 3 AA 736. I found no other testimony on this subject in the record.

and additional rent based on the gross sales on the premises, payable quarterly. 1 AA 37. Section 15.1 of the lease provides that Rose "shall be deemed to be in default of this Lease if . . . [ROSE] shall fail to pay any installment of Rent or any other amount or charge required to be paid by [Rose] to [Treasure Island] pursuant to the terms of this Lease, and such failure continues for ten (10) days from [Treasure Island's] written notice to [Rose] that any such Rent installment or other amount or charge is due." 1 AA 49. Section 15.2.1 of the lease provides that if Rose does not cure a default in the payment of rent within the ten-day notice period, Treasure Island "may terminate this Lease and [Rose's] Estate hereunder by written notice of such termination." 1 AA 49.

Section 19.6, part of the miscellaneous provisions, states regarding notices:

> 19.6 Notices. Any notice or other communication required or permitted to be given by a party hereunder shall be in writing, and shall be deemed to have been given by such party to the other party or parties (a) on the date of personal delivery, (b) on the date delivered by a nationally recognized overnight courier service when deposited for overnight delivery, © on the next Business Day following any facsimile transmission to a party at its facsimile number set forth below; provided, however, such delivery is concurrent with delivery pursuant to the provisions of clauses (a), (b) or (d) of this Section 19.6, or (d) three (3) Business Days after being placed in the United States mail, as applicable, registered or certified, postage prepaid addressed to the following addresses (each of the parties shall be entitled to specify a different address and/or contact person by giving

notice as aforesaid):

If to Landlord: Treasure Island, LLC

[omitted]

If to Tenant:

Rose, LLC
8301 E. Prentice Ave., Suite 210
Greenwood Village, CO 80111
Attn: Susan Markusch
Facsimile: 303-221-5501
E-mail: susan@gdare.com

With a copy to:

Operadora Andersons S.A. de C.V
Boulevard Kukulkan km 14.2
Cancun, Mexico
C.P. 77500 Zona Hotelera

1 AA 55-56. Rose's appeal is based primarily on its emphasis of the line "Attn: Susan Markusch."

The lease was amended five times. 1 AA 299-311 (amendments to lease). Only the fifth amendment to the lease is relevant to Rose's arguments on appeal, which was signed on April 30, 2014. 2 AA 315. That amendment included the following provision regarding notice:

> 11. The Parties agree that for purposes of Section 19.6 of the Lease, Tenant's notice address is updated to 5690 DTC Boulevard, Suite 515, Greenwood Village, CO 80111, and that copies of notices

> sent to Tenant per the Lease shall also be sent to Subtenant addressed to: Operadora Andersons S.A. de C.V, Boulevard Kukulkan km 14.2, Cancun, Mexico, C.P. 77500 Zona Hotelera, and to Subtenant's counsel, addressed to: Ronald R. Fieldstone, Esq. and Susan Trench, Esq., Arnstein & Lehr LLP, 200 South Biscayne Boulevard, Suite 3600, Miami, Florida 33131.

1 AA 68; 2 AA 314.

If Rose is to be believed, the most important purpose of the fifth amendment was to secure enhanced notice rights in case of default in the payment of rent. To any objective observer, this change was administrative, and had little significance prior to its aggrandizement in this case. It was merely notification of an address change for Rose and Rose's subtenants. 4 AA 825.

On or about June 11, 2011, Rose had entered into a sublease for a portion of the leased premises with Operadora Andersons's as the subtenant. 1 AA 8. On May 6, 2014, Rose entered into an amended sublease agreement with Operadora Anderson's. 2 AA 317. Operadora Anderson's operates a number of restaurants worldwide, including a chain known as Señor Frog's. 3 AA 605-06. Section 9(d) of the amended sublease requires Rose to immediately forward any notice it receives from Treasure Island to Señor Frog's. AA 828-29.

What precipitated the fifth amendment in early 2014 was that Señor Frog's was experiencing reduced income from sales because of construction that was

ongoing at Treasure Island, and Treasure Island wanted to eliminate its popular pirate show that brought foot traffic to Señor Frog's. Rose wanted and negotiated a reduction of rent in consideration for removing from the lease Treasure Island's obligation to continue the show. The contemporary emails regarding the negotiation for the fifth amendment are included in the appendix at 2 AA 380-423. They demonstrate that the primary purposes of the amendment were "rent reduction and removal of the show language." 2 AA 392. While other matters were apparently also discussed, *id.*, nothing in the emails suggests that enhanced notice provisions was among those considerations. 2 AA 380-423. Conspicuous by its total absence is a single word regarding notices and address changes. *Id.* The "enhanced notice provisions" Rose and Señor Frog's allegedly bargained for are a creation of after-the-fact aggrandizement and misrepresentation to create an escape from the consequences of Rose's breach of contract in failing to pay the rent.[4]

By its own admission, Rose failed to meet its obligation to pay the quarterly rent owed April 1, 2014, despite having received that rent from its subtenant Señor Frog's/Operadora. 4 AA 777-78. On May 14, 2014, two weeks

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[4]Rose claims multiple times that it bargained for enhanced notice provisions in consideration for allowing Treasure Island to cancel the pirate show. This is simply untrue.

after the rent was due, Treasure Island sent Rose a ten-day notice advising Rose that if it did not pay the rent within ten days, it would be in default. 1 AA 172. The notice was sent to Rose to, 5690 DTC Blvd., Suite 515, Glenwood Village, CO 80111, via Federal Express. *Id.* That is the notice address set forth in the parties' last amendment to the lease. 1 AA 68 (quoted above).

It is noteworthy that the last amendment regarding the notice address for Rose did not include any particular individual to whom the notice should be sent. Treasure Island sent the notice to the attention of Rose's President, Gary Dragul, pursuant to express directions from Dragul, as will be set forth, *infra.* *Id.* It was copied by email to Elizabeth Gold, Rose's legal counsel. *Id.*

Between May 14, 2015, and May 28, 2015 (over ten days), Rose did not cure the default despite being given the ten-day notice. 3 AA 662. On May 28, 2015, Treasure Island exercised its right to terminate the lease. 1 AA 200.

**B. Procedural Facts.**

On May 28, 2015, Treasure Island commenced this action by filing a complaint raising a claim for breach of the lease (non-payment of rent) and seeking a declaration that Treasure Island had a right to terminate the lease.[5]

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[5]Appellant cries that Treasure Island filed its complaint on the same day it sent its letter to Rose terminating the lease, and implies that this is somehow evidence of bad faith. *See, e.g.*, 3 AA 708-09; 725-27. That Treasure Island

1 AA 2. On July 26, 2015, Rose filed an answer and counterclaim. 2 AA 5. In the counterclaim, Rose sought a declaration that the termination of the lease was improper because Treasure Island had not sent the notice of default to Susan Markusch, with a copy to Rose's subtenant, Señor Frog's and counsel for Señor Frog's. 1 AA 9-10. Rose claimed that the failure to send the notice to Susan Markusch with a copy to Señor Frog's was a breach of the lease and a breach of the covenant of good faith and fair dealing. *Id.* On November 16, 2015, Rose filed an amended counterclaim, raising the same claims. 1 AA 93.

Thus, the issue that was joined in this case, and that remains the sole issue this Court needs to address on appeal, is whether the notice that Rose actually received was effective. Stated another way, the issue is whether the failure to address the notice "attn: Markusch," with a copy to Señor Frog's, should excuse Rose's failure to pay rent.

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promptly sought a declaration that it had acted properly is not evidence of bad faith. Nor does it support Rose's continued speculation that Treasure Island terminated the lease based on an ulterior motive. Treasure Island terminated the lease because Rose failed to pay rent. Rose could have prevented the termination, if the lease was as favorable as Rose claims, by paying its rent on time, or, at the very least, before the ten-day cure period had elapsed. Rose elected not to pay.

### C. The Trial.

A bench trial was conducted by Judge Gonzalez on October 6 and October 7, 2016. 3 AA 583. Approximately sixty exhibits were entered into evidence, 3 AA 585, but many of them have not been included in the appendix. It must be presumed the exhibits support the decision of the district court. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 600, 172 P.3d 131, 133 (2007) ("[W]e reiterate our oft-stated rule that appellant bears the responsibility of ensuring an accurate and complete record on appeal and that missing portions of the record are presumed to support the district court's decision.").

Only three witnesses testified. 3 AA 583.

The first witness, taken out of order, was defense witness David Krouham, CEO of Grupo Anderson, which is in partnership with companies owning restaurants all over the world. 3 AA 605. Grupo Anderson owns the restaurant chain Señor Frog's. 3 AA 606. Krouham testified that although Señor Frog's was not party to the lease between Rose and Treasure Island, it was listed under both the original agreement and the fifth amendment for notices. 3 AA 607-11. Señor Frog's received notice of the termination of Rose's lease, but did not receive the notice of default. 3 AA 612. Krouham testified that Señor Frog's would have cured Rose's default had it received the notice of default. *Id.* Krouham testified

that under its sublease with Rose, Rose was supposed to give Señor Frog's notice within 24 hours if it ever received a notice of default, but Rose did not do so in this case. 3 AA 615-16; 627-28.

On cross-examination, Krouham testified that Señor Frog's had never offered to Treasure Island that it would cure any default of Rose. 3 AA 619. Krouham testified further regarding the terms of a "Subordination, Non-disturbance and Attornment Agreement" between Rose, Treasure Island *and* Señor Frog's. 3 AA 619. That agreement does not appear in the appendix. Nevertheless, that agreement does not require notice of a default in the Rose lease to Señor Frog's, and it contains the provision: "To the extent that the lease agreement is terminated by prime landlord due to a default by landlord tenant and subtenant is not in default on the amended sublease, subtenant and prime landlord will enter into negotiations for a new leasing agreement for either the sublease the premises or the entire premises." 3 AA 621 (as read into the record). Krouham would have been fine with Treasure Island taking over its sublease from Rose. 3 AA 622. In fact, it was Krouham's understanding that should Rose default, Señor Frog's would deal directly with Treasure Island as its landlord. *Id.* This contradicts Krouham's assertion that he would have cured Rose's default.

Krouham testified further that Señor Frog's paid the quarterly rent to Rose on time, and that Rose had an obligation to send this rent to Treasure Island, but failed to do so. 3 AA 624-27. There was conflicting evidence whether Señor Frog's could have cured the default because it was experiencing financial difficulties at the time. 3 AA 631-36. Also, when Krouham was informed of the termination of Rose's lease, he had his lawyer send an email to Treasure Island that did not suggest that Krouham was interested in curing Rose's default. 3 AA 637. Instead, the email was to clarify that Señor Frog's' sublease would continue with Treasure Island:

> This e-mail will confirm our discussions. The letter from Mr. Wirthlin, [that's the termination letter on May 28th to Rose LLC and Operadora] was sent to my client for notice purposes only under Section 11 of the fifth amendment to the lease agreement between Rose LLC and Treasure Island LLC.
>
> As we discussed under Section 9 of the fifth amendment, my client, Señor Frog's, is not affected by default by Rose LLC as to prime tenant. As we further discussed, Rose LLC is disputing the default. You have confirmed with me that your client does not plan on taking any action until the dispute with Rose LLC is resolved, whether by court action or settlement between the parties. None of this will impact adversely on my client, which will be permitted to continue its subtenancy. If your client prevails and terminates Rose LLC's tenancy, at that point you would then negotiate a lease directly with my client in accordance with Section 9 of the fifth amendment.

3 AA 638-39 (as read into the record). Finally, Krouham admitted that he had not

bargained for notice provisions in the Rose/Treasure Island lease; he was not involved in the negotiations for that lease. 3 AA 641-42. He bargained in the Rose/Señor Frog's lease for notice from Treasure Island. *Id.*[6]

Brad Anthony, general counsel for Treasure Island, testified regarding the rent obligations under the lease. 3 AA 654-56. He testified that Rose did not pay the percentage rent due for the first quarter of 2015, which was due on April 30, 2016. 3 AA 657. He further testified that Rose was "chronically" late on its payment obligations. 3 AA 657-58;[7] 688-89. When Rose failed to pay its rent, Anthony sent a default notice to Rose on May 14, 2015. 3 AA 659. Anthony sent the default notice to Gary Dragul, President of Rose. *Id.* Out of an abundance of caution, Anthony also sent the notice to Rose's only other officer and general counsel, Elizabeth Gold, by e-mail. 3 AA 660; 664. Gold negotiated and signed the lease and all of the amendments to the lease. *Id.* Anthony knew Gold received the notice because on May 15, 2015, the day after the notice was emailed to her,

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[6]Counsel tried to rehabilitate Krouham's testimony on this point, 3 AA 643, but the point was made that Krouham did not negotiate directly for rights in the Rose/Treasure Island lease.

[7]Not only was Rose late on its monthly rental payment eight times, it was delinquent in other payments owed to Treasure Island multiple times. *Id.*

Gold telephoned Anthony regarding the notice. 3 AA 661; 744.[8] Gold requested an extension of time to pay the rent, and Anthony refused. 3 AA 661. Rose's receptionist, Francie, received and signed for the notice of default, which was sent via Federal Express. *Id.* Rose did not tender the rent within the ten-day cure period. 3 AA 662. Treasure Island terminated the Lease. *Id.*

Anthony testified that in the fifth amendment to the lease, Susan Marusch was not included in the notice provision, and he read that as removing her as a person to be notified. 3 AA 664. Treasure Island had initially sent out notices to Rose attention Markusch (with a copy to Operadora). Anthony testified that in early September, 2012, during a telephone conversation with Dragul regarding a prior delinquency notice, Dragul asked Anthony to send all future notices to his attention only, and not to copy Operadora/Señor Frog's. 3 AA 666; 685-86. Specifically, Dragul said: "Send them directly to me. I'm the person that's going to handle these. Don't send them to anybody else." *Id.* Thereafter, for a period of years, Anthony sent all notices under the lease directly to Dragul only, without a

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[8]In an affidavit attached to the trial brief, Anthony averred: "I am certain that Ms. Gold received the email since she called me shortly after I sent the May 14th default notice. During that conversation she asked for additional time to make the overdue payment and even mentioned that Mr. Dragul was out of the office attending to his sick brother. I told her I could not grant any extension." 1 AA 159 ¶9.

copy to Operadora. *Id.* Multiple communications were sent to Dragul without being copied to Markusch or Operadora. Dragul never complained or told Anthony to serve notices on others. 3 AA 666-72 (referencing examples). As a result, the May 14, 2015 default notice was sent to Rose at the correct address, attention Gary Dragul, as Rose's President had requested.

The testimony of Gary J. Dragul, President of Rose, was evasive and contrived.[9] As for the instruction to send notices to him only, Dragul remembered the conversation differently from Anthony. 4 AA 762. Anthony was having difficulty regarding construction issues, and Dragul told him to "call me" with regard to such issues. 4 AA 762-63. He did not tell Anthony not to send notices to Markusch because notice to her was important to Dragul with respect to all of his properties. *Id.* Dragul testified that notice to Señor Frog's was the major consideration of the fifth amendment to the lease, 4 AA 768; 776-77, but this testimony is not supported by the emails and contemporaneous documents. 2 AA 380-423 (discussed *supra*).

Dragul claims that he did not personally receive or learn of the notice of default that was received in Rose's office on May 15, 2015, because he was either

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[9]This is my personal assessment based on my reading of a cold transcript. This Court may judge the testimony for itself, but the district court, as trier of fact, found Dragul's testimony to lack credibility. 4 AA 926.

visiting sick family or was at a convention. 4 AA 769; 770-71. It was unclear when Dragul actually learned of the default, but he never denied that both Gold and his office received the notice on or before May 15, 2015.[10]

Everyone in Dragul's office was too busy to deal with something as trivial as a notice of default in rent, because the convention is the Super Bowl of their business, and they were all attending and then recuperating for the long weekend that followed, including attending a 450 person birthday party for Dragul's wife.[11] 4 AA 772-75.

Dragul claims the first time he learned of the default was on May 28, 2015, when Krouham telephoned him after having receive notice of the termination of

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[10]One cannot cite to the lack of testimony. But this Court may review Dragul's entire testimony to confirm that he never denied that actual notice was received by his office. Also, he was evasive when asked about when he was informed of the default. *See, e.g.*, 4 AA 832-33. In addition, he testified that Gold never told him she did not get a copy of the notice of default by email, but tried to rationalize this by asserting that if she did not get it, she would not have known she did not get it. 4 AA 873. Dragul knew by the time of trial that Treasure Island was claiming to have sent the notice to Gold by email, and his pretending that he did not know whether she got the email is evidence of deceit.

[11]Interestingly, Markusch and the accounting staff were not attending the convention. 4 AA 876. It strains credulity that Markusch was not informed of the notice of default on the day it was delivered to the office.

the lease. 4 AA 775.[12] This he blames on the alleged deficiency in the notice of default, rather than on the incompetence of every person in his office to relay such important information to him. *Id.* On cross-examination, Dragul was confronted with contrary deposition testimony that he learned of the notice of default from someone in his office, and he denied his own testimony. 4 AA 880-82. The trial testimony that Dragul did not know about the default during the cure period was incredible and self-serving, and was rejected by the district court. 4 AA 926.

Dragul did not know why the rent was not paid, but insisted 100% it would have been paid if only Markusch had been included on the notice of default. 4 AA 777-78. Again, the credibility of this self-serving assertion is contradicted by other evidence in the record.

Dragul tried to pay late after receiving the letter of termination, but Treasure Island exercised its right to refuse late payment. 4 AA 781-82.

Rose had an obligation under its sublease with Señor Frog's to notify Señor Frog's within 24 hours of receiving any notice of default, but it did not do so. 4 AA 828-29. When asked about this obligation, Dragul refused to answer. *Id.*

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[12]But there was strong evidence that Dragul knew about the default before that date. *See* 4 AA 851-54 (Dragul cross-examined on this point based on inconsistent deposition testimony).

Markusch had signing authority for Rose and could have sent the rent in response to the notice. 4 AA 793 ("Susan Markusch is in charge of making payments. That's her job, 100 percent."). But Dragul never testified that Markusch and Gold did not have actual notice of the default; he only argued that the notice was defective because it was not sent to Markusch's attention. And apparently no one else at Rose is responsible enough to have recognized the importance of such a notice, and to bring it to Dragul's and Markusch's attention. Dragul was evasive in his testimony on this point. 4 AA 832-33.

There was also evidence that appellant has not included in the record[13] that Markusch attempted to make a partial payment after the notice was delivered. 4 AA 833-35. Dragul admitted that a partial payment was attempted on or about May 16, 2015. *Id*; 4 AA 844. No one ever explained why a partial, rather than full payment was attempted. Dragul speculated that Markusch may have done this on her own without knowledge of the notice, because she might have noticed (as the controller on whom he is so dependant) that the rent had not been paid.

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[13]Exhibits 66, containing the check, was admitted into evidence. 4 AA 894. In its brief, Rose claims the letter and check were not produced or entered into evidence, but then cites only to Dragul's denial that he saw the check. AOB 15. The district court sustained the objection to Dragul's testimony specifically because evidence regarding the check had been received, and Dragul's testimony was untrue based on the prior testimony. 4 AA 869. Of course, had Rose included the exhibits in the appendix, there would be no doubt on this issue.

4 AA 833; 870.[14] Why Markusch would have sent partial payment if she noticed on her own that the rent was delinquent is anybody's guess.[15] Either way, Dragul admitted that Markusch knew the rent had not been paid, but she did not pay it.[16]

Conspicuous by their absence from trial were Gold and Markusch. Although their testimony would have been critical on a number of issues (primarily, Dragul would not have been able to pretend that Rose did not receive the notice of default), Rose did not present either of its "star witnesses" to support the story told by Dragul.

The district court ruled in favor of Treasure Island. 4 AA 926-27. On November 7, 2016, the district court entered detailed findings of fact and

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[14]Importantly, Dragul testified that he did not know whether Markusch had received a copy of the notice of default before she attempted the partial payment. 4 AA 871. This seems incredible, because after the notice of termination, Dragul certainly would have discussed all of the circumstances with Markusch. His lack of memory and knowledge was overtly contrived.

[15]It was her job, "100%" to make payments. 4 AA 793. So if Markusch knew rent had not been paid, and there was no shortage of funds, as Dragul insisted, 4 AA 778, why did she not pay the rent? Dragul testified: "Q. [H]ad notice been properly made to Susan – A. It would've been handled, correct." 4 AA 794-95. Obviously, this testimony cannot be credited.

[16]Drugal testified: "Our system is set up so that Susan catches everything. I mean, she has a team that works for her. They're trained very well. We do this every day in our business." 4 AA 795. The system failed. Susan knew of the default, but did not make the payment.

conclusions of law. 4 AA 929. On December 21, 2016, the district court entered a final judgment, 5 AA 1046, and on January 10, 2017, the district court entered an order and judgment granting attorney's fees. 5 AA 1051. This appeal followed.

## SUMMARY OF ARGUMENT

The case is simple. Rose did not meet its rental payment obligations. Rose was sent and received a ten day notice, which afforded it an opportunity to cure. Rose chose not to cure. Treasure Island terminated the Lease.

The evidence showed and the district court found that Rose's President received a copy of the May 14, 2015 notice of default; it was delivered and received to his attention at his office. Rose's only other officer and General Counsel, Elizabeth Gold, received a copy of the notice of default by e-mail. Rose's Comptroller, Susan Markusch, received a copy of the notice and attempted a partial payment two days after the notice was sent. Because Rose cannot argue that it did not receive actual notice, it claims a deficiency–not in the content of the notice–but in the identity of the persons to whom the notice was sent.

Assuming for the sake of argument that there was a technical non-compliance with the notice provisions of the lease as amended, the district court upheld the termination for five separate reasons. Each reason is sufficient on its own to support the decision that Rose cannot deny the efficacy of the notice it

actually received.

First, the default notice was sent to the attention of the proper person, Rose's President, Gary Dragul, based on his express instructions. Even if the notice was not sent to the attention of the proper person, there was substantial compliance by Treasure Island when the notice was sent to and received by both Dragul and Gold, Rose's only executive officers.

Second, assuming the notice was not sent to the attention of the right person, Rose was estopped from denying the efficacy of the notice. Specifically, Dragul had instructed Treasure Island to send any future default notices to him and him alone. The elements of estoppel exist in this case.

Third, Rose waived any right to claim that the notice was deficient, having been sent only to the attention of Dragul and not Markusch, because Dragul specifically told Treasure Island to send the notice to Dragul alone.

Fourth, Treasure Island was still entitled to judgment based on the unclean hands doctrine. Specifically, Rose could not take the rental monies it received from its subtenant and not turn them over to Treasure Island, tell Treasure Island to send default notices to Dragul alone, fail to send the default notice it received to the subtenant when it had an independent contractual obligation so to do, but still argue that its default and failure to cure was somehow excused.

Fifth, the district court properly concluded that Rose could not raise the claim that Treasure Island did not notify the subtenant of the default, because that claim belongs to the subtenant.

The argument in the opening brief is an attempted end run around the true issues of this case. Whether notice was sent to Markusch is truly a red herring, but it is the only argument Rose has, so Rose is riding that horse for all it is worth. Unfortunately for Rose, the strict compliance argument is both factually and legally unsupportable. The district court was not fooled. This Court should likewise not be hoodwinked by the superficial attempts of Rose to escape the consequences of its own intentional default.

## DISCUSSION

### I. Standard of Appellate Review.

Relying on the premise that all notice provisions in a lease must be strictly construed and complied with or the right of termination is lost, Rose argues for a hyper-technical reading of the lease, the fifth amendment to the lease, and to the notices given. Rose does this because Rose wants this case to be about the construction of the language of the lease only, so that the standard of review can be *de novo*. Rose wants this Court to ignore the district court's findings–in particular those that would preclude Rose from claiming it had a right to any

notice other than the notice it got–and the district court's opportunity to view the evidence and judge the credibility of the witnesses. This case is not about construction of the language of a contract. It is about whether Treasure Island complied with the lease in terminating Rose's interest when Rose thumbed its nose at its rent obligations. This involves a host of factual issues, which must be determined by a trier of fact.

"Where the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence." *Dickstein v. Williams*, 93 Nev. 605, 608, 571 P.2d 1169, 1171 (1977) (quoted in *Trident Const. Corp. v. W. Elec., Inc.*, 105 Nev. 423, 427, 776 P.2d 1239, 1242 (1989), and *Havin Roberson, Ltd. v. Sahara & Tenaya, LLC*, No. 65613, 2016 WL 1109353, at *1 (Nev. Mar. 18, 2016)). "The district court's factual findings . . . will be upheld if not clearly erroneous and if supported by substantial evidence." *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013) (internal quotation marks omitted). *See Nguyen v. Boynes*, 396 P.3d 774, 779 (Nev. 2017).

The district court's factual findings are not clearly erroneous as a matter of law, and its conclusions of law, which are subject to *de novo* review, *Bedore v. Familian*, 122 Nev. 5, 9–10, 125 P.3d 1168, 1171 (2006), are correct. There was conflicting evidence regarding some aspects of the testimony in this case, including whether Rose was late on prior payment obligations, what instructions Dragul gave Anthony regarding to whom notice should be sent, and when Dragul became aware of the default.[17] That is why the district court's assessment of credibility is key to this case. The district court's findings of fact, although based on conflicting evidence, are most certainly supported by substantial evidence.

## II. Treasure Island Provided Proper Notice of Default in Compliance With the Notice Provisions of the Lease and the Fifth Amendment.

Although Rose's brief has many sub-parts, Rose makes only two substantive arguments as to why the district court's decision should be overturned. First, Rose insists that the notice to Rose was not effective because it was not sent "attention Susan Markusch." Second, Rose argues that the notice was deficient because it was not copied to Operadora/Señor Frog's. Contrary to Rose's conclusion that it

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[17]In the opening brief, Rose has marshaled only the evidence supporting its view of the facts. This analysis is upside down. It is the evidence that supports the decision that must be substantial, not the contrary evidence that the district court was free to reject on grounds of credibility.

"never received the notice of default that it contracted for" [sic] AOB 67, there is no doubt in the record before this Court that Rose received actual notice of the default.[18] So Rose is left with a feigned argument that a technical defect in the notice vitiates the notice entirely, because it is "not the notice contracted for." *Id.*

Rose believes strict compliance with the lease should be required, and that because the notice was technically deficient, Treasure Island's contractual right to terminate the lease based on Rose's failure to perform its quintessential obligation under the lease, to pay rent, should be forfeit.[19] While strict compliance with the substantive provisions of notice requirements may be required, Rose has cited no case for the proposition that a purely technical defect in notice (if there is one) that affects no substantial rights is held to that standard.

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[18]What Rose contracted for was the opportunity to be advised of any default and a ten day period to cure that default. There is no legitimate dispute that Rose actually received a notice advising it of its past due rental payment obligations and was given a ten day period to cure those overdue obligations. Thus, Rose was not deprived of any contractual right.

[19]Rose does not want the court to require strict compliance with the lease when it comes to Rose's obligations. It wants strict compliance with Treasure Island's obligations only, because that would save Rose from a forfeiture of its lease rights. But Rose is not concerned about the forfeiture of Treasure Island's lease rights, specifically, the right of termination when rent is wrongfully withheld.

To support its argument that strict compliance is required, Rose cites secondary authorities that collect cases related to general propositions of law. Rose states the general proposition from AmJur , C.J.S., and Williston that notice provisions in contracts should be strictly enforced, and then string cites from those authorities case law with headnotes that seem to support their argument. AOB 20-21. Not one case with facts even remotely similar to the facts of this case has been cited, and this pattern is consistent throughout the opening brief.

The cases cited by Rose do not arguably support Rose's position.[20] *See Moore v. Prindle*, 80 Nev. 369, 370, 394 P.2d 352, 353 (1964) (forfeiture provisions in a contract were not enforced because the notice provision in the contract was not reasonable); *Humphrey v. Sagouspe*, 50 Nev. 157, 254 P. 1074, 1079 (1927) (no arguable application to the issues in this case); *Bickerstaff v. SunTrust Bank*, 332 Ga. App. 121, 125, 770 S.E.2d 903, 907 (2015), rev'd on other grounds, 299 Ga. 459, 788 S.E.2d 787 (2016) ("As a rule, any notice requirement must be reasonably construed. And substantial compliance with a notice provision may present an issue for the [trier of fact] if the evidence appears to be 'in the spirit' of the contract provision."); *Lincoln Terrace Assocs., Ltd. v. Kelly*, 179 N.C.

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[20]The cases do not support the proposition for which they have been cited. The entire opening brief is burdened with similar string citations of cases for general propositions to support arguments that do not fall within the propositions.

App. 621, 628, 635 S.E.2d 434, 438 (2006) (eviction of tenant based on damage to property was improper where the notice of breach did not inform the tenant that the basis for eviction was damage to property); *Arlen Realty, Inc. v. Dozier*, 393 So. 2d 489, 491 (Ala. Civ. App. 1980) (eviction invalid where no notice of default and cure period was given as required by lease); *Woodall v. Pharr*, 119 Ga. App. 692, 694, 168 S.E.2d 645, 648 (1969), aff'd, 226 Ga. 1, 172 S.E.2d 404 (1970) (lease required both a notice of default including a cure period and a notice of termination; neither notice was given; letter from lawyer did not comply with notice provision); *Schindler Elevator Corp. v. Tully Const. Co.*, 139 A.D.3d 930, 931, 30 N.Y.S.3d 707, 709 (N.Y. App. Div. 2016) (in a construction contract setting, where the contract itself required strict compliance with notice provisions as to cure periods, and no notice was given, the court enforced the strict compliance provision of the contract); *Mendelsohn v. Port Auth. Trans-Hudson Corp.*, No. 11-CV-03820 ADS, 2012 WL 3234107, at *8 (E.D.N.Y. Aug. 3, 2012) (in construction context, where additional payments were allowed based on strict compliance with notice provisions and those notice provision were expressly made a condition precedent to payment in the contract, the contract provision was enforced, citing similar cases); *Hardy v. McGill*, 137 Idaho 280, 283, 47 P.3d 1250, 1253 (2002) (a contract of sale could not be forfeited where no notice of

default had been served as required by the contract).

Rose relies heavily on cases generally disfavoring forfeitures "in different circumstances." AOB 24. Treasure Island does not dispute the general proposition that forfeitures are not favored. However, the context is all that matters to such decisions, so general cases about strict compliance and forfeitures in other contexts–in this case, mechanic's lien cases and construction cases–are of little relevance.

Strict compliance with the mechanic's lien statute was *not* required in *Hardy Cos. v. SNMARK, LLC*, 126m Nev. 528, 536, 245 P.2d 1149, 1155 (2010), in order to avoid a forfeiture. Rose reasons by analogy that strict compliance should therefore *be* required in this case to avoid a forfeiture, *i.e.*, its forfeiture of its lease for failure to pay rent. In other words, in Rose's estimation, the lynchpin of *Hardy Cos.* was not the rejection of strict compliance that would render an unfair result, it was the avoidance of a forfeiture. That argument is an extreme exercise in artful redrafting of the opinion. Without this sleight of reasoning, one would naturally read *Hardy Cos.* to reject strict compliance arguments that lead to unfairness, as would be the case here.

Rose ignores that the context of *Hardy Cos.* is not analogous to this case, and that strict compliance would result in the forfeiture of Treasure Island's rights

in this case, which would be a result unfair to Treasure Island for the sole purpose of rescuing Rose from its own malfeasance. For Rose, strict compliance by Treasure Island with the notice provisions of the lease should be required to protect Rose's rights, but strict compliance with the lease should not be required of Rose in favor of Treasure Island, again, to protect Rose's rights. Such an argument would excuse the untimely payment of rent and every other tenant default in every case, to the extreme prejudice of landlords. The landlord's contracted for interests in the obligations of the lease are no less valuable to the landlord than are the leasehold interests to the lessee.

In truth, the issue in this case is not about strict construction of the lease's notice provisions. If it were, the fifth amendment removed the requirement of notice to Markusch, strictly speaking, and so Rose's argument is hoisted on its own petard. Treasure Island would never suggest that the obligation in the lease to give effective notice should not be enforced. And in cases such as those relied on by Rose, where the failure to comply with contractual notice provisions resulted in failure of notice, strict compliance with the contract (*i.e.*, strict compliance with the substantive requirement to give notice, not strict compliance with some irrelevant technicality), may be the proper remedy, depending on the circumstances. But the foreign caselaw relied on by Rose does not support the

proposition that an injustice should be perpetrated in the name of equity every time a recalcitrant lessee can find that a lessor failed to dot an I or cross a t. Especially when the lessee is simply wrong in his assertion that the notice requirement was not met.

In this case, the lease required notice. The provision setting forth the addresses for notices was not the notice provision. The substantive provision was that notice and a period for cure would be given to the tenant.[21] Rose was unquestionably given notice and a period for cure, as required by the lease. The provision stating the person to whose attention the notice was to be addressed was administrative in nature. Notice was given to and received by Rose. The record admits of no other interpretation. Rose's post-breach assertion that the attention line of the address was a substantive right for which it bargained is as ludicrous as it is over-played.

Even if the attention line in the address were to be considered substantive in nature, that line was not included when the lease was amended. There is no

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[21]The lease provides: "15.1 Tenant shall be deemed to be in default of this Lease if . . . 15.1.1 Tenant shall fail 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 that any such Rent installment or other amount or charge is due." 1 AA 139.

indication in the fifth amendment that notice to Markusch was still required, and Dragul's subjective opinion that the person was not changed is contradicted by the documents: A second address was substituted for the first, with no requirement (consistent with the practice of the parties) that notice be sent to Markusch, or any other particular person. The district court found that the notice was compliant with the lease and amendment, and that Rose was precluded from arguing that it was not. Each basis relied on by the district court for the conclusion that the notice given was sufficient under the circumstances of this case is supported by substantial evidence in the record, and each is independently sufficient to support the decision.

## III. The District Court Did Not Err in Finding that the Notice Substantially Complied with The Lease and the Amendment.

The district court concluded that "Treasure Island substantially complied with any notice obligations to Rose." 4 AA 941, ¶ E (relying on *Hardy Cos. v. SNM4RK, LLC*, 126 Nev. 523, 536 (Nev. 2010) (substantial compliance with notice provisions is met when the owner has actual knowledge and is not prejudiced.")). The district court found that "Rose had actual knowledge of the notice and the opportunity to cure the default during the ten-day notice period."

*Id.*[22] Rose has not cited any case authority for the specific proposition that a notice requirement must be strictly complied with as to the specific individual who is supposed to be on the attention line when both the principal person entitled to notice and the individual designated to receive notice had actual notice, and there was nothing substantively wrong with the content of the notice, nor can they. Thus, the district court did not err in applying a substantial compliance standard to the specific issue presented by this case. *Cf. U.S. Bank National Association on behalf of Holders of Home*, ___So.3d ____ (Fla. D. Ct. App. Fla. 2017) (2017WL2272285) (in forfeiture of home case, substantial compliance with a notice provision was sufficient); *Lopez v JP Morgan Chase Bank* 187 So. 3d 343, 345 (Fla. Dist. D Ct. App. Fla. 2016) (holding in forfeiture case, "substantial compliance or performance is performance of a contract which, while not full performance, is so nearly equivalent to what is bargained for that it would be unreasonable to deny the promisee the benefit of the bargain.").[23]

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[22]The district court made multiple findings that Rose obtained actual notice of the default. 4 AA 935 ¶¶ 27 through 38. These findings are supported by substantial evidence.

[23]Making a "good for the goose, good for the gander" argument, Rose asserts that it substantially complied with its obligation to pay rent when it tendered the rent after the lease had been terminated. AOB 62. Rose labels its failure to pay rent a "technicality." AOB 63. The failure to pay rent can hardly be equated with the failure to include a name on the attention line of an address on a

Further, courts have rejected strict compliance notice arguments where the evidence is clear that actual notice was given. *See Stonehenge Land, Co. v. Beazer Homes Investments, LLC.*, 893 N.E. 2d 855, 863 (Ohio Ct. App. 2008) ("Where there is evidence of actual notice, technical deviation from a contractual notice requirement will not bar the action for breach of contract brought against a party that had actual notice."); *Polizzotto v. D'Agostino*, 129 So. 534, 536 (La. 1930) ("[M]ere informalities do not violate notice as long as they do not mislead, and give the necessary information to the proper party."); *Bd. of Comm'rs v. Turner Marine Bulk, Inc.*, 629 So. 2d 1278, 1283 (La. Ct. App. 1993) ("Where adequate notice is in fact given and its receipt is not contested, technicalities of form may be overlooked."). In this case, Rose received actual notice and suffered no harm even if the notice was technically deficient because it was not addressed to the attention of Markusch and was not sent to Operadora.

Rose cannot show prejudice from the notice being sent to Dragul (and Gold) instead of Markusch. Rose received the notice but chose not to cure. The Nevada

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notice, especially where the latest version of the lease did not require that name to be in the address. The entire argument is based on the false assertion that Rose attempted payment immediately upon learning of the default. Of course, the evidence demonstrates that Rose knew of the default but made no attempt to cure until after termination of the lease. If the premise is false, the conclusion will not be correct.

Supreme Court recently stated (in another context) that "[s]trict compliance does not mean absurd compliance." *Einhorn v. BAC Home Loan Servicing, LP*, 128 Nev. ___, 290 P3.d 249, 254 (Adv. Op. 61, 2012). It would be absurd to invalidate Treasure Island's notice because it was not sent attention Markusch.

## IV. The District Court Did Not Err in Determining That Rose Cannot Claim the Notice of Default Was Not Sent to the Proper Parties.

### A. The Notice Provision of the Lease was Orally Amended.

The district court found that "the parties agreed that any further notices would be sent solely to Dragul." 4 AA 934 ¶ 13. Although Dragul denied he had given that instruction, the district court was free to rely on the more credible testimony of Anthony (and the supporting trial exhibits) that the instruction was both given by Dragul and followed by Treasure Island without complaint for a period of years. *See* Trial Testimony, set forth *supra.* As a result, the district court found as a matter of law that the parties had orally modified the lease. *See Joseph F. Sanson Inv. Co. v. Cleland*, 97 Nev. 141, 142, 625 P.2d 566, 567 (1981) ("[P]arties to a written contract may orally modify it and parol evidence of the subsequent agreement is not summarily excluded . . . . *Silver Dollar Club v. Cosgriff Neon*, 80 Nev. 108, 389 P.2d 923 (1964); *Holland v. Crummer Corp.*, 78 Nev. 1, 368 P.2d 63 (1962).").

Rose argues that because there was a merger clause, stating the contract could only be modified in writing, the oral modification is not enforceable. However, as noted by the court in *Silver Dollar Club*, oral modifications are allowed despite provisions stating that the contract can only be modified in writing. In *Silver Dollar,* the Nevada Supreme Court stated:

> Parties may change, add to, and totally control what they did in the past. They are wholly unable by any contractual action in the present to limit or control what they may have wished to do contractually in the future. Even where they include in the written contract an express provision that it can only be modified or discharged by a subsequent agreement in writing, nevertheless their later oral agreement to modify or discharge the written contract is both provable and effective to do so."

*Id.* at 111, 924 (citing Simpson on Contracts, Section 63 at 228).

Rose argues, nevertheless, that the oral modification is void because of the statute of frauds. That argument is without merit. First, the argument was not raised before the district court. It was not included in Rose's trial brief, it was not raised by counsel at the trial (including opening and closing arguments), and it was not raised at any pretrial hearing. Therefore, it cannot be raised on appeal. *Old Aztec Mine, Inc. v Brown*, 97 Nev. 49, 623 P2d 981 (1981).

Further, the oral modification does not concern any substantive part of the "lease or sale of any lands." NRS 111.210. It concerns only an administrative

provision regarding the address to be included on a notice of default. Thus, the oral amendment does not itself implicate any statute of frauds issue. *See Tri-Pac. Commercial Brokerage, Inc. v. Boreta*, 113 Nev. 203, 206, 931 P.2d 726, 728 (1997) ("Pursuant to NRS 111.220, the substantial parts of the contract must be embodied in writing with such a degree of certainty so as to make clear and definite the intention of the parties without resorting to oral evidence." (citing *Stanley v. Levy & Zentner Co.*, 60 Nev. 432, 446, 112 P.2d 1047, 1053 (1941) and quoting Restatement of Contracts § 207 (1932)). Rose has not cited and cannot cite any caselaw for the proposition that a minor agreement (itself not subject to the statute of frauds) regarding the person to whom a notice is to be sent cannot be entered into between the parties because the substantive portions of the lease are subject to the statute of frauds. Instead, in characteristic style, Rose cites and relies on secondary authorities and string cites for general propositions of law inapplicable to the facts of this case.

In addition, there was part performance (Treasure Island's future notices were sent to the attention of Gary Dragul after the modification without objection), and there are writings indicating that the agreement was made (notices and letters that were not sent to Susan Markusch). Further, estoppel takes the issue out of the statute of frauds (as found by the district court and discussed, *infra*). *See*

*Schreiber v. Schreiber*, 99 Nev. 453, 663 P.2d 1189 (1983) (part performance and estoppel takes issue out of statute of frauds).

### B. Rose is Estopped From Asserting that Notice to Dragul Does Not Satisfy the Lease and Amendment.

The District Court correctly ruled that Rose is estopped from arguing that the notice of default should have been sent to Markusch. Prior to Dragul's conversation where he told Anthony to send all future notices to his attention instead of Markusch's attention, Anthony sent Treasure Island's notices attention Markusch. After the conversation, Anthony relied on Dragul's request and sent all future notices to Dragul.[24]

> Equitable estoppel consists of the following elements: (1) the party to be estopped must be apprised of the true facts, (2) that party must intend that his conduct shall be acted upon or must so act that the party asserting estoppel has the right to believe it was so intended, (3) the party asserting estoppel must be ignorant of the true state of the facts, and (4) the party asserting estoppel must have detrimentally relied on the other party's conduct.

*Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 698, 191 P.3d 1138, 1157 (2008); *see Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1209 (2015) (quoting *Pink v. Busch*, 100 Nev. 684, 689, 691 P.2d 456,

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[24]The same is true of the requirement to copy notices to Operadora. Prior notices were copied to Operadora, but after Dragul instructed that notice should not be copied on Operadora, notices were sent to Dragul only.

459 (1984)).

In arguing that the district court erred in estopping Dragul from denying his instruction and practice regarding notices, Rose ignores that the law abhors fraud and falsehood. More than a hundred years ago, the United States Supreme Court declared the equitable principles underlying the estoppel doctrine in *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879). Those principles have withstood the test of time. The High Court stated:

> The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice.
> . . . .
>
> There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.

*Id.* at 580-81 (citations and internal punctuation omitted).

In this case Dragul instructed that notices be sent to him, and accepted such notice for years without complaint. The district court properly prevented Dragul from deciding, after the fact and in order to escape the consequences of his own

breach of the lease, that he no longer wanted notices sent to him alone, to the extreme detriment of Treasure Island.

The "true fact" at issue here is that Dragul asked Anthony to provided notice only to him. Dragul, the party to be estopped, was aware of this true fact, establishing element number one. Dragul intended that Anthony act on his direction, and acted in a manner that confirmed his intent to Anthony, establishing the second element. Anthony did not know that Dragul did not intend to have notice come to him only, and the sophistry that the fifth amendment somehow notified Anthony that Dragul's instruction was no longer in effect is specious. Finally, Treasure Island acted on Dragul's instructions, to its detriment if its lease rights are forfeited because Dragul denies that notice was given as instructed. The district court found facts to support each of these conclusions, and those findings are supported by substantial evidence in the record.

Focusing on what Treasure Island knew, rather than what Dragul knew, and twisting the standard, Rose argues that the elements of estoppel are not present in this case. But Rose does so only by ignoring the district court's findings of fact. The district court found that Rose was aware that Treasure Island was not sending notices to the attention of Markusch after Dragul instructed Anthony to send all notices only to him. Rose accepted the notices without complaint, demonstrating

the intent elements of estoppel. Treasure Island was ignorant of any change in the instruction from Dragul; there was no evidence that Dragul changed his direction. The following testimony not only demonstrates this point, but also Dragul's lack of credibility:

> Q. Did you respond to Mr. Anthony that this letter [notice letter from May of 2013] is inappropriate because it did not-it wasn't sent to Susan Markusch?
>
> A. I have no idea. I don't regard it as my job to make sure that Treasure Island fulfills their business obligations.
>
> Q. Sir, as we sit here today, do you have any memory of ever informing Treasure Island that any of these notices after that August 31, 2012, was sent to Operadora and Susan Markusch? Do you have any memory of receiving any other letters afterwards that were sent to Susan Markusch ever telling Treasure Island from now on, send it to Susan Markusch. Don't send it to me?
>
> A. And I will say it again. I don't regard it as my obligation to make sure that the-
>
> Mr. Sheehan: Your honor, move to strike. It's non-responsive.
>
> The Court: Granted.
>
> Q. [by Judge Gonzalez] Sir, the question to you is: did you ever tell Mr. Anthony that you wanted him to go back to the original notice after you told him that you only wanted him to send them to you?
>
> A. Well, first off I don't think my testimony was that I wanted them to be sent to me. So I never said that.
>
> Q. [by Mr. Sheehan] So I'll make the question very simple. Did you

ever after August 31, 2012, after receiving any of these letters from Treasure Island inform Treasure Island don't send them to you, send them attention Susan Markusch? Yes or no?

A. I don't remember.

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

A. I just said, I don't remember.

4 AA 820, ln. 23-25, 821, ln.1-25, 822 ln. 1-3.

Treasure Island relied to its detriment on Dragul's instruction when sending the notice to the attention of Dragul instead of Markusch. When it sent the notice, it could not have known that Dragul would raise the specious argument that actual notice to him was ineffective, and it could not, at the time the specious argument was raised, have provided a new notice that would have preserved its right of termination. There could hardly be a more direct "irreversible decision relying on the promise." AOB 58.[25]

Rose asserts that the expenditure of substantial resources is required to satisfy the detrimental reliance element of estoppel, and then, in characteristic fashion, string cites and misrepresents cases that say no such thing. AOB 50-60. Although each cited case involved a situation where funds were expended in reliance on a misrepresentation, the Nevada Supreme Court merely found in each

[25]This is Rose's incorrect statement of the standard. No case law supports it.

case that the doctrine of estoppel applied, or might apply. The Nevada Supreme Court never discussed the sufficiency of the detrimental reliance, or suggested as Rose falsely asserts that detrimental reliance requires the expenditure of resources, substantial or otherwise. *See Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.*, 98 Nev. 609, 613, 655 P.2d 996, 998 (1982) (in summary judgment context, facts were discussed that might support application of the doctrine, but the Nevada Supreme Court never addressed or suggested any standard for what constitutes detrimental reliance); *NGA #2 Liab. Co. v. Rains*, 113 Nev. 1151, 1159, 946 P.2d 163, 168 (1997) (discussion of estoppel focused on issue of knowledge of true facts; no mention of issue of detrimental reliance, let alone any requirement of the expenditure of any particular amount of resources); *Noble Gold Mines Co. v. Olsen*, 57 Nev. 448, 66 P.2d 1005, 1012 (1937) (no discussion of any standard for what constitutes detrimental reliance); *Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 853, 839 P.2d 606, 611 (1992) (amount expended was stated but there is no discussion of any standard, and no suggestion that estoppel requires an expenditure of any particular amount of funds or resources); *Summa Corp. v. Richardson*, 93 Nev. 228, 234, 564 P.2d 181, 184 (1977) (waiver case not including any discussion of estoppel or elements of estoppel).

Possibly the most misrepresented authority in Rose's misdirection string citation regarding estoppel is *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314 (1996). Rose falsely states that *Breliant* stands for the proposition that *de minimis* expenditures do not constitute detrimental reliance. Rose misquotes *Breliant* as stating that "whatever resources the complex spent on the failed negotiations as a matter of law did not constitute a 'detrimental change of position' warranting estoppel." AOB 60. The sentence out of which the quoted material was excised states: "[W]e conclude that there is no evidence in the record to show that PEC was induced to make a detrimental change of position because of Breliant's unintentional misrepresentation over the continuing existence of the First Easement." *Id.* at 674, 918 P.2d at 321. In fact, *Breliant* contains no discussion whatsoever regarding the amount, character, or sufficiency of PEC's detrimental reliance. Estoppel was not available in *Breliant* solely because no intentional misrepresentation had been made regarding the true facts that would have warranted detrimental reliance of any kind. The misrepresentation here of *Breliant* is egregious, but consistent.[26]

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[26]The element of detrimental reliance, according to *Breliant*, is satisfied by "a detrimental change of position." *Id.* This belies Rose's claim that detrimental reliance requires the expenditure of resources.

Rose cannot and has not shown that based on the above, the district court erred in ruling that Rose was estopped from arguing that the notice should have been sent to the attention of Markusch instead of Dragul.

The argument that because no money was spent there was no reliance is disingenuous. Anthony relied on the statements of Dragul, and the Court so found, when sending future correspondence to Dragul's attention and not to Markusch's. If Rose is not estopped, Treasure Island is prejudiced. Estoppel is intended to preclude that type of detriment caused by reasonable reliance on the integrity of another.

Finally, Rose argues that the fifth amendment superseded the prior oral modification. But there is nothing in the fifth amendment that contradicts the instruction of Dragul that notices to Rose should be sent to the attention of Dragul. The fifth amendment does not include anything regarding to whom notices to Rose should be sent. Instead, the fifth amendment states that the new address for serving Rose "is updated to 5690 DTC Blvd., Suite 515, Greenwood Village, CO 80111." This is not inconsistent with Dragul's request that Treasure Island send future notices to his attention only.

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### C. Rose Waived Its Defense That Notice To Dragul Does Not Satisfy the Lease and Amendment.

Dragul's conduct in requesting that future notices be sent to him was an intentional relinquishment of any requirement that Treasure Island send notices to the attention of Markusch. It was also a waiver of any requirement that notices be sent to Operadora. The failure to raise any issues concerning subsequent notices, which were all sent to the attention to Dragul, not Markusch, and were not copied on Operadora, evidenced Dragul's intention to waive the right to any other notice. The district court properly implied a waiver from that conduct. *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev 593, 596, 691 P2.d 421, 423-24 (1984); *see also, Havas v. Atlantic Ins., Co.*, 96 Nev. 586, 588 (Nev. 1980) (internal citations omitted) (the intent of waiver may be expressed or implied from the circumstances.)

In *Parkinson v Parkinson*, 106 Nev. 481, 483, 796 P2d 229 (1990), the Nevada Supreme Court stated:

> While a waiver may be the subject of express agreement, it may also be implied from the conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive a right. In such circumstances, whether there has been a waiver is a question for the trier of fact.

Here, the trier of fact found an express waiver based on Dragul's instruction

that future notices be sent to him alone, and an implied waiver because all of the correspondence after September 2012 was sent to Dragul and not copied to Operadora, without complaint. The record is more than sufficient to support the district court's findings and conclusions.

### D. Treasure Island Was Entitled to Judgment Based on the Unclean Hands Doctrine.

Rose should not be allowed to argue that the notice it received was ineffective because it was not copied to Operadora. The unclean hands doctrine bars a party from receiving relief that is based on the party's own inequitable conduct.

The Nevada Supreme Court has articulated a two-factor balancing test for applying the unclean hands doctrine. *Las Vegas Fetish & Fantasy v. Ahern Rentals*, 124 Nev. 272, 276, 182 P.3d 764, 767 (2008). This test requires the balancing of the egregiousness of the misconduct and the seriousness of the harm caused by the misconduct, against the granting of the requested equitable relief. *Id.* The unclean hands doctrine applies when misconduct is "connected with the matter in litigation so that it has in some manner affected the equitable relations subsisting between the parties and arising out of the transaction." *Gravelle v. Burchett*, 73 Nev. 333, 341, 319 P.2d 140, 144–45 (1957). The district court has

broad discretion in applying the doctrine, and this Court will not overturn that determination if it is supported by substantial evidence. *Las Vegas Fetish*, 124 Nev. at 276, 182 P.3d at 767.

Rose received the rent from Señor Frog's and did not turn those monies over to Treasure Island. Rose receive notice of default, and had the obligation to send the default notice to Operadora, but failed so to do. These failures on the part of Rose are directly connected with the matters in this litigation (*i.e.*, the nonpayment of rent and the notices required to afford a period for cure), and they affected the relations between the parties arising from the transaction. Specifically, Rose elected not to turn funds due to Treasure Island over to Treasure Island, and now claims that the failure of Señor Frog's to obtain notice of the default is the cause of its malfeasance and of its failure to cure, when Rose had an affirmative obligation to give notice to Señor Frog's. Rose cannot be allowed to benefit from its own misconduct.

Rose should not be allowed to tell Treasure Island to send all notices to Dragul only, and then complain when the default notice was not sent to Operadora. Rose apparently did not want Operadora to know that it took Operadora's money and did not turn that money over to Treasure Island.

## V. Rose Has No Standing to Raise the Claim That Treasure Island Did Not Notify Señor Frog's of the Default Notice. That Claim Belongs to Señor Frog's.

### A. Operadora Is Not a Party to this Action.

The district court found that Rose could not raise as a defense Treasure Island's failure to copy Operadora/Señor Frog's with the notice of default. Most importantly, the district court concluded that Rose could not raise any claims regarding Treasure Island's failure to notice Señor Frog's because that claim belongs to Señor Frog's. Señor Frog's is not a party to this case.

The only issue in this case involves whether or not Treasure Island's termination of the Rose lease was effective. Any notice obligations Treasure Island had to Señor Frog's were separate from this case, and could not be raised by Rose. Recognizing this fact, Rose mischaracterizes the notice provisions both as major rights for which the parties contracted, and as a substantive right on which Rose relied. Rose continues to assert the fiction that Señor Frog's would have cured the default had it been noticed thereof, and that this was considered by both parties as a failsafe. But the evidence on this was contradictory, and Krouham's assertion that Señor Frog's would have cured was rejected by the district court. 4 AA 937-38.

The evidence that supports the district court's factual findings is controlling unless the findings are clearly erroneous. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Rose cannot boot strap its own rejected testimony to support a conclusion that justifies its own malfeasance.

The district court relied on a string of case citations in the insurance context disallowing a party who got notice from asserting the failure to provide notice to a different party as a defense. 4 AA 941-42. These will not be repeated here. Rose attempts to distinguish these cases because of their insurance context, and because the notices were required by statute, not contract, but the principle is sound: A party cannot generally raise a defense that belongs to another. And the fact that the notices were statutorily required cuts against Rose's position, not in favor of it.

That Rose contracted to have notice sent to Señor Frog's does not change the fact that Rose got actual notice and failed to cure. At trial, Señor Frog's self-servingly asserted that it would have cured the default on Rose's behalf had it received notice, but this assertion was not only contradicted by the evidence, it rang hollow in light of the fact that Señor Frog's has taken no action to assert its alleged right of notice against Treasure Island, and immediately offered to deal

directly with Treasure Island.[27]

Rose's lease with Operadora required that Rose send any default notices it received to Operadora. When Rose received the default notice on May 14, 2015, it should have sent a copy on to Operadora. Since it chose not do this, it must be concluded that Rose did not consider the requirement that default notices be copied to Operadora to be a material term of the contract. Otherwise it would have sent the notice itself pursuant to its requirement under its contract with Operadora, in order to realize its hope of a cure from Señor Frog's.

Rose may have hoped Señor Frog's would have cured the default, but this hope seems vain in light of the fact that Señor Frog's gave the rent money to Rose, and Rose did not turn it over to Treasure Island. In any event, Rose's string cite of cases for the general proposition that a party to a contract may enforce provisions made for the benefit of third parties is inapposite. *See* AOB 30. Rose is not attempting to enforce the notice provision for the benefit of Señor Frog's; it is attempting to enforce it for its own benefit.

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[27]When Operadora found out about the termination, it did not intervene in this lawsuit. Instead, it confirmed with Treasure Island via email that it did not plan on taking any action until the dispute with Rose was resolved, at which time it would contract directly with Treasure Island. 3 AA 638-39.

Rose argues that the copy to Operadora was for Rose's benefit because if Rose defaulted, Operadora could pay the overdue rent on Rose's behalf. This provision was for Operadora's benefit. Rose was already getting a notice and could cure on its own. If Señor Frog's cured, it would do so for its own benefit, not for Rose's.

Rose got the benefit of the notice provision to which it was entitled. Rose got actual notice and an opportunity to cure. If it had wanted to ask Señor Frog's to cure the default for it, Rose could have complied with its own obligations under it contract with Señor Frog's, by providing notice to Señor Frog's of the default. Rose chose instead to ignore the notice of default, not to inform Señor Frog's of its misuse of Señor Frog's rent money (for obvious reasons), and to assert the technical defect of lack of notice to Señor Frog's as justification for its failure to pay rent or cure when it had the opportunity. After all, Rose speculates, notice would have given Señor Frog's "the chance to cure Rose's default even if Rose missed the notice." AOB 34.

This is not a case of a principal attempting to assert substantive contractual rights of a third party that inure to and were intended for its benefit as well. This is a case of a party attempting to make an end run around its own failure to pay rent by finding a hyper-technical argument on which to excuse its own

malfeasance. Señor Frog's has not complained about the lack of notice to it, and Señor Frog's is not before the court seeking to enforce its alleged right to cure on behalf of Treasure Island. Señor Frog's is content to contract directly with Treasure Island. 3 AA 638-39. The evidence accepted by the district court establishes that Señor Frog's would not have elected to cure on Rose's behalf, and why would it? Señor Frog's had already paid the rent to Rose. It would not likely have paid the same rent twice.

Even if Rose could raise the issue of Treasure Island's failure to notice Señor Frog's/Operadora, it is estopped from so doing for the same reasons it is estopped from relying on the alleged failure to notice Markusch. Dragul told Anthony to send all default notices to him and not to anyone else. When Anthony complied, Rose cannot be heard to argue that the notice was defective. Similarly, for the same reasons, Rose waived this defense.

**B. Treasure Island Has Not Acted in Bad Faith.**

Rose insists that Treasure Island acted in bad faith, but its assertions of bad faith are nothing but speculations that Treasure Island had ulterior motive in terminating the lease and suggestions that the result if unfair.

Treasure Island's motives for exercising its rights under the lease in light of Rose's breach of the quintessential obligation to pay rent are not relevant to any

issue in this case. But even if they were, there is not a scintilla of evidence in the record to support Rose's baseless accusations that the termination in this case was motivated by anything other than an exercise of rights based on Rose's failure to pay rent. Painting Treasure Island as the bad guy when Rose failed to pay rent is classic misdirection.

Rose has not even hinted at any action by Treasure Island that could be considered bad faith, and only suggests that enforcing a contract is bad faith when the result is not the result the losing party wants. In making these arguments, Rose ignores entirely its own breaches of contract, and the fact that there is no evidence of any kind in the record to suggest that Treasure Island did anything it was not entitled to do under the contract. It is not bad faith to exercise rights simply because the other side does not like the consequences, especially when those consequences are the result of its own malfeasance.

The district court made no finding of bad faith, although Rose made the same arguments below that it raises on appeal. This Court should not accept Rose's speculations about Treasure Island's motives absent any evidence in the record, and absent any finding of the district court supporting those speculations.

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### C. Operadora Was Not a Necessary or Indispensable Party.

Similarly, Rose's arguments regarding Operadora being a necessary or indispensable party are without merit. At no time did Rose assert below that Operadora was a necessary party. Rose did not file a motion to join, a motion to dismiss for lack of a necessary party, or any other pleading or paper suggesting that Operadora should be joined. *See* NRCP 19 & 12. Rose never suggested that Operadora was an indispensable or necessary party in its trial brief, and never argued this issue at the time of trial. Accordingly, Rose cannot now raise the issue on appeal. *Old Aztec Mine, Inc. v Brown*, 97 Nev. 49, 623 P2d 981 (1981). In any event, the argument is a throw-away.

Still insisting that Señor Frog's was entitled to notice and boldly asserting the rights of Señor Frog's, Rose argues that the judgment will affect Señor Frog's' rights under the lease, and so must be reversed. This lawsuit is between Treasure Island and Rose. It involves Rose's lease with Treasure Island. Señor Frog's is neither a party to that lease nor an intended third party beneficiary. All the district court did was to confirm the validity of the termination of the lease. Operadora was fully aware of the lawsuit and all the circumstances, and participated at the trial by providing witness testimony. But Operadora chose not to intervene in the action because it did not believe its rights were affected. The district court made

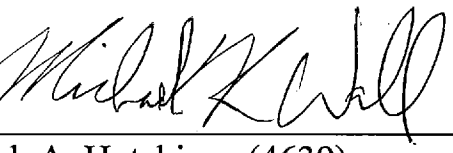
clear that its decision does not effect any claim Operadora may have against Treasure Island. Should Operadora desire to sue Treasure Island under the lease based on any damages it perceives it has suffered as a result of the failure of notice, it is free to do so. The judgment is not infirm because Operadora was not a party to the action below.

## CONCLUSION

This Court should dismiss this appeal.

DATED this 25 day of October, 2017.

HUTCHISON & STEFFEN, PLLC

By 

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## ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,528 words.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25 day of October, 2017

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## CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **RESPONDENT TREASURE ISLAND LLC'S ANSWERING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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