IN THE SUPREME COURT OF THE STATE OF NEVADA

JSJBD CORP, d/b/a Blue Dogs Pub, a Nevada corporation, STUART VINCENT, JEFFREY VINCENT, and JEFF WHITE Appellants, vs. TROPICANA INVESTMENTS, LLC, a California limited liability company, Respondent. _____ AND CROSS-APPEAL. _____	) Case No.: 80849)) (Dist. Ct. No. A-18-785311-B))))))))))))))	Electronically Filed Sep 04 2020 02:12 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Appellants herein include the individual persons Jeff Vincent, Stuart Vincent, and Jeff White. JSJBD Corp. dba Blue Dogs Pub is a Nevada corporation that is also an appellant. There are no parent corporations, subsidiaries, etc.

2. The follow are the law firms, whose partners or associates have appeared for Appellants, or are expected to appear in this case: Mario P. Lovato, Esq., Lovato Law Firm, P.C. 7465 W. Lake Mead Blvd. Ste. 100, Las Vegas, NV 89128.

JURISDICTIONAL STATEMENT

A. Basis for the Supreme Court's or Court of Appeals' jurisdiction:

NRAP 3A(b)(1). This is an appeal from a "Final Judgment' entered after a bench trial, as well as from post-trial motions, including a motion to alter or amend, whose orders were entered at or about the same time as the Final Judgment.

B. The filing dates establishing the timeliness of the appeal.

The notice of appeal was filed on March 16, 2020. NRAP 4(a) provides the rule governing the time limit for filing the notice of appeal.

Notice of entry of judgment was served on February 25, 2020. This followed a tolling motion filed on December 27, 2019. The date of entry of the written order resolving the tolling motion was February 24, 2020, with notice of entry thereof served on February 25, 2020.

C. That the appeal is from a final order or judgment (or other basis).

This appeal is from a Final Judgment that was entered on February 25, 2020 that resolved all issues.

ROUTING STATEMENT

This matter should be retained by the Supreme Court, as the case originated in Business Court of the Eighth Judicial District Court. *See* NRAP 17(a)(9) ("Cases originating in business court").

In addition, this case also raises questions of first impression. *See* NRAP 17(a)(11) ("raising as a principal issue a question of first impression"). Approximately 95% of the Judgment consists of net attorney fees, costs, and related interest. The district court granted both sides' fees and costs in a case where it found the claims and counterclaims to be interrelated. The court found Plaintiff JSJBD Corp to be a prevailing party, and then found that Defendant / Counterclaimant did not even need to be a prevailing party to obtain fees and costs. This raises matters of first impression, including: (1) whether NRS Chapter 18 requires prevailing party status to obtain fees and costs; (2) whether a prevailing party can be required to pay the fees and costs of a non-prevailing party; (3) whether Nevada's application of the "American Rule" regarding attorney fees allows a district court to require both sides in a case to pay the other side's attorney fees and costs; (4) whether a tenant who prevailing on an Eviction claim that preserves rights to a tavern purchased for $500,000 has fared better for purposes of prevailing party analysis than a landlord who has been determined to be entitled to a relatively minor amount in comparison.

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I.

STATEMENT OF THE ISSUES

1. **Attorney fees:** Did the district court properly adjudge prevailing party, JSJBD, liable for all of Tropicana's attorney fees and costs on the case-as-a-whole, resulting in a net judgment against JSJBD for the approximately $100,000.00 amount that Tropicana's attorney fees and costs exceeded JSJBD's? Also, did the district court properly interpret the attorney fee provision of the Lease to grant attorney fees to Tropicana regardless of whether it is a prevailing party?

2. ***Cassinari v. Mapes***. Did the district court properly apply the rule of *Cassinari v. Mapes,* 91 Nev. 778, 542 P.2d 1069 (1975), when, after granting summary judgment to JSJBD and finding its option-to-renew Lease enforceable despite not having a rental amount, with reasonable rent to be determined at trial, it thereafter declined to determine reasonable rent at the conclusion of the trial?

3. **Mirror Image Rule.** Did the district court properly apply the Mirror Image Rule in granting summary judgment to JSJBD by determining, inter alia, that a September 7, 2016 letter from Tropicana's counsel did ***not*** constitute an acceptance / agreement because it countered with additional material terms? Did the district court properly apply the Mirror Image Rule at trial when, rather than making a determination of reasonable rent, it found the same September 7, 2016 letter from Tropicana's counsel to constitute an acceptance / agreement?

II.

STATEMENT OF THE CASE

The parties are successors to a 1996 lease (App. 245-52) wherein JSJBD leases space at Tropicana's shopping center for JSJBD's tavern, called Blue Dogs Pub. The lease contains two five-year options-to-extend / renew. (App. 252) In subsequent documents (App. 257, 263), Tropicana granted several more five-year options-to-extend. None of the options state the rent for the option period.

In 2016, after 20 years of operating under the original Lease, JSJBD timely gave notice of its first exercise of a five-year option-to-extend. (App. 268.) The parties thereafter exchanged dozens of written correspondence and proposed lease documents, but were unable to agree on rent for the option period. (*See* below.)

In *Cassinari v. Mapes*, this Court held that a commercial tenant's option to renew lease is enforceable, despite not having a specific amount for rent because the district court can determine a reasonable rental rate.[1]

> It is proper, then, to imply that the parties intended a reasonable rent for the extended period. If unable to agree, a court should be allowed to fix the rental since economic conditions are ascertainable with sufficient certainty to make the clause capable of enforcement.[2]

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[1] *Cassinari v. Mapes*, 91 Nev. 778, 781, 542 P.2d 1069, 1071 (1975) ("[T]he better view is to enforce such a provision for extension."), *citing* numerous cases and 58 A.L.R.3d 500 "Validity & Enforceability of provision for renewal of lease at rental to be fixed by subsequent agreement of parties."

[2] *Cassinari*, 91 Nev. at 781, 542 P.2d at 1071.

A commercial tenant is "clearly entitled" "to affirm the lease and retain occupancy," and apply to the district court for a determination reasonable rent. As this Court stated in *Charter Medical Corp. v. Bealick*, 103 Nev. 368, 370, 741 P.2d 1359, 1360-61 (1987), which discussed *Cassinari*:

> The doctors did not seek to ***affirm the lease*** and retain occupancy, ***something that they were clearly entitled to do.*** See, e.g., Cassinari v. Mapes, 91 Nev. 778, 542 P.2d 1069 (1975) (in which it was held that in these kinds of situations, in which an option provides for rental to be negotiated and the parties fail to reach an agreement, the option is enforceable and a reasonable rental will be imposed).

(Emphasis added.)

On November 14, 2018, Tropicana served a Thirty Day Notice to Quit. (App. 94.), adopting the position that there was no enforceable option-to-extend in light of the parties' failure to agree on the amount of rent for the option period. This is contrary to this Court's decision in *Cassinari v. Mapes*.

A. JSJBD'S COMPLAINT.

On November 30, 2018, JSJBD filed the Complaint in this case, asserting claims for Declaratory Relief, Breach of Contract, and Breach of the Implied Covenant of Good Faith and Fair Dealing. (App. 1.)

B. TROPICANA'S COUNTERCLAIM.

On January 9, 2019, Tropicana filed an Answer & Counterclaim (App. 19), which included claims for Declaratory Judgment, Breach of Lease Agreement,

Breach of the Implied Covenant of Good Faith and Fair Dealing, and "Eviction and Issuance of Writ of Possession." It attached to the Counterclaim the same Thirty Day Notice to Quit to the Counterclaim, again adopting the position that there is no agreement on rent. (App. 94.)

It also added three individual "guarantor" Counterdefendants to the case. (App. 19.)

C. THE COURT GRANTS SUMMARY JUDGMENT TO JSJBD, WITH REASONABLE RENT TO BE DETERMINED AT TRIAL.

1. Both sides file motions for summary judgment.

In mid-2019, Tropicana filed a motion for summary judgment. (App. 119.) It asserted that a plain language analysis applied to the parties' writings (App. 129), that the issues could be decided as a matter of law since they involved a pure question of interpretation of contractual terms. (App. 129.) It asserted that either Tropicana had an agreement at the rental rate it sought to unilaterally impose (App. 131), or, alternatively, that there was no enforceable option-to-extend and that Tropicana could evict JSJBD as a mere holdover tenant (App. 135).

In response, JSJBD filed an Opposition and Countermotion for partial summary adjudication. It agreed that the plain language analysis applied, and that the issues were ripe for determination because they presented questions of law. (App. 220). Specifically, JSJBD asserted that, per *Cassinari v. Mapes*, JSJBD had

enforceable options-to-extend, that there was no agreement as to rental amount for the option period, and that JSJBD was entitled to a determination of reasonable rent by the district court by looking to ascertainable market rates. (App. 205, 226-29.)

2. The district court grants summary judgment to JSJBD finding that the option-to-extend is enforceable, that there is no agreement as to rent for the option period, and that reasonable rent will be determined at trial per *Cassinari*.

At the hearing for the motion and countermotion, the district court found that, per Cassinari, JSJBD possessed enforceable options-to-extend, that there was no agreement as to rental amount for the option term, and that it was entitled to a determination of reasonable rent by the court at trial. (App. 480-81.) The district court denied Tropicana's motion. (*Id.*) It granted JSJBD's countermotion. (*Id.*)

3. Tropicana's Rule 30(b)(6) deposition.

Among the discovery that occurred was Tropicana's Rule 30(b)(6) deposition (App. 486-532) wherein Tropicana engaged in extensive questioning of JSJBD's representative regarding the correspondences sent between counsel and the parties themselves, as well as concerning unsigned proposed lease and related documents (*see, e.g.*, App. 527 (referencing 22 exhibits)). JSJBD's counsel objected to the questioning and made a record at the conclusion that moved to strike and thereby exclude substantially most of the questions and answers in light of the court's summary judgment determination. (App. 531.)

Tropicana filed a motion for sanctions on order shortening time. (App. 584.) It primarily argued that Tropicana was entitled to the organization's interpretation of various legal documents. The motion sought sanctions even though there was no prior discovery order (*see id.*; App. 800-01) and Tropicana was not moving to compel any discovery (App. 811).

The motion dealt with questioning of matters that had already been decided by dispositive motion, for example whether JSJBD's former counsel Leslie Miller had "authorization" (App. 1018) about matters that the Court already found did not result in any agreement (App. 480-81), which has little if anything to do with discovery of reasonable / market rent. The motion asserted that there were extensive "I don't know" answers, as well as answers asserting that the "document speaks for itself," which were supposedly improper. (App. 584.)

The district court granted the motion such that JSJBD would be "bound" to its responses. It "crossed off" (App. 1025) entering any compelling or predicate order. At trial, this ruling formed the basis for excluding substantial testimony from JSJBD witnesses, Jeff Vincent (*see, e.g.*, App. 1146) and Bruno Mark (App. 1597).

4. Trial.

Trial occurred from November 18-22, 2019. (App. 2735.) On December 5, 2019, the Court served its Findings of Fact and Conclusions of Law electronically, providing notice of same in the Certificate of Service attached thereto. (Id.) The

district court declined to make a determination of reasonable rent, merely referencing expert testimony (App. 2744), rather than making any determination.

Instead, it found that the parties reached an agreement on rent, as a result of Tropicana's counsel's September 7, 2016 letter (App. 300-303). This was contrary to the Court's summary judgment determination that rejected the same argument. (App. 480-81.) Tropicana had specifically presented argument regarding the September 7, 2016 letter at the summary judgment hearing, which the court had rejected. (App. 476-78.) Rather than determine reasonable rent, the district court made a finding that the amount of rent asserted by Tropicana was "not an unreasonable amount" for rent. (App. 2744.)

The Court denied, however, Tropicana's claim for "Eviction and Issuance of Writ of Restitution." (App. 2751-53.)

5. Attorney Fees and Costs.

On December 10, 2020, both sides filed a Memorandum of Costs. (App. 2754, 2829.) On December 26, 2020, JSJBD filed its motion for attorney fees and costs. (App. 3075.) A day later, on December 27, 2020[3], Tropicana filed its motion for attorney fees and costs. (App. 3099.)

[3] NRCP 54(d)(2)(B) requires the motion to be filed no later than 21 days after notice of the judgment has been served. The Court determination includes judgment terminology and was served by it per Nevada's electronic service rules on December 5, 2019. Under NRCP 54(d)(2)(C), ***"The court may not extend the time for filing the motion after the time has expired."*** The district court rejected JSJBD's

On January 27, 2020, the Court conducted a hearing on post-trial motions, stating at the outset that it was considering a novel decision in regard to attorney fees: "So, I wanted to have a discussion with you, . . . about who is the prevailing party and why, and then to have a discussion about the attorney fees awards that you may each be entitled to . . . ." (App. 3346.)

The court found all claims and counterclaims "interrelated" and incapable of apportionment: "Both of you have argued apportionment, I certainly understand your positions, but everything was interrelated in this case." (App. 3354.) The court found that JSJBD had "prevailing party" status in light of prevailing on certain claims. (App. 3354.)

Regarding Tropicana, the court stated: "In addition, the Defendant is entitled to attorney's fees under paragraph 24 of the Lease ***regardless of whether they are the prevailing parties***." (App. 3354.) The court also stated, regarding Tropicana: "You got a contract; ***it doesn't say you have to be a prevailing party***." (App. 3347.)

The result was that the court granted essentially all of both parties fees and costs to each, resulting in each side being responsible for the other side's fees and costs.[4] The court specifically stated it granted JSJBD all of its attorney fees in the

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untimeliness argument, finding that "notice of the judgment" requires a notice of entry of order, which is a "term of art." (App. 3350.)

[4] The court reduced Tropicana's fees by a minor amount, finding that two attorneys were not needed by Tropicana at trial. (App. 3354.)

amount of $126,630.00, while also stating it would grant Tropicana $219,775.00 minus a certain amount billed by a second attorney at trial. (App. 3354.) Because Tropicana billed approximately $100,000.00 more, it would be entitled to a net judgment for the amount its billings exceeded JSJBD's. In summary, the court stated:

> Now, you're going to each give me a revised judgment that includes whatever amount you won in the trial, plus your attorney's fees, and your adjusted costs. And then, I assume you're going to have a setoff between the two of you and somebody's going to win when you do that. Don't know who that's going to be, good luck, bye.

(App. 3355.)

In the written Orders, the district court granted JSJBD $126,630.00 in attorney fees (App. 3384) and $7,124.97 in costs (App. 3387).

It granted Tropicana $208,967.50 in attorney fees and $13,835.50 in costs. (App. 3370.)

The Final Judgment set off the attorney fees and costs, along with a minor setoff of additional rent vis-a-vis overpaid CAM charges[5], resulting in a net Judgment of $98,006.46 to Tropicana. (App. 3394-96.)

[5] The court required JSJBD to pay additional rent of $13,000 minus overpayments of CAM charges in the amount of $4,578.00. The remaining amounts were all for attorney fees, costs, and interest (with interest being charged on all amounts, including net attorney fees and costs). (App. 3394-96.)

III.

STATEMENT OF FACTS

The Facts in this case consist of the same facts presented by the parties in dueling motions for summary judgment that each side filed that exhaustively addressed whether JSJBD possessed valid options to extend the Lease and whether there was an agreement as to rental amount for the option period(s).

In summary, in 2016, JSJBD timely exercised (App. 268) a five-year option to extend its Lease (App. 245) for a tavern called Blue Dogs Pub. JSJBD's options[6] do not state the amount for rent for the option periods. From 2016-18, the parties exchanged numerous proposals, but were unable to agree. (App. 273-351.)

A. THE LEASE AND THE OPTION RIGHTS.

JSJBD's tavern is located in a shopping center owned by Tropicana Investments at East Tropicana Ave. and South Pecos Rd. (App. 237, 245.) JSJBD possessed several five-year options to extend (App. 252, 257, 263), the first of which was exercised in 2016 (App. 268).

The options do not state a specific rental amount. Rather:

- Two options attached to the Lease state ***"market rental rate"***
- A 2006 option is at rent ***"to be negotiated."***

[6] App. 252 (has 2 five-year options); App 257 (another five-year option); App. 263 (3 five-year options).

- Three five-year options granted in 2007 are at rent ***"to be negotiated."***

(App. 252, 257, 263.)

For 20 years, the respective landlord and tenant operated under a 1996 Lease (App. 245), and related documents, drafted by a predecessor landlord. Prior to 2016, no option had been exercised, but rather, the parties entered into Amendment / Addendum documents three separate times (App. 254-55, 257-58, 265-66) that each changed the meaning of the commencement date, and of the expiration date, of the 1996 Lease by five-year periods. Otherwise, these documents kept the 1996 Lease in "full force and effect." (*Id.*)

This occurred in 2001, 2006, and 2011, with the last of these changing "commencement date" to 2011 and "expiration date" to 2016. (*Id.*)[7]

JSJBD's option rights are exercisable within 90 days' prior to expiration of the Lease (the two 1996 options), within 6 months prior to expiration (the 2006 option), or automatically (3 options granted in 2007). (*Id.*)

[7] "The amendment extended the 'term' of the lease . . . The option clause, which remained 'in full force and effect' after the amendment, gave [the tenant] the option to renew the lease for five years beyond the 'term' of the lease. The amendment changed the meaning of 'term' throughout the lease." *McLane & McLane v. Prudential Ins. Co.*, 735 F.2d 1194, 1195-96 (9th Cir. 1984); *Kavanagh v. Walbro Engine, LLC*, 2017 WL 741662, at *3 & n.4 (Ariz. Ct. App. 2017) (approving *McLane & McLane*). "[A]mending a lease's 'term' . . may be seen as granting an additional option period, where the renewal option was in the original lease." 49 Am. Jur. 2d *Landlord and Tenant* § 143.

In summary, the key Lease documents are as follows:

YEAR / TITLE	DESCRIPTION
1996 Lease & attached Option Agreement (App. 245-52)	The Lease. Sets rent for 1996-2001. The Option Agreement is attached to the Lease, ***granting two 5-year options-to-renew*** "at a ***market rate***" and "as agreed"
2001 Amendment (App. 254-55)	Changes "commencement" of 1996 Lease to 2001, "expiration" to 2006. Sets rent amounts for 2001-06. Does not exclude any prior option-to-renew.
2006 Addendum" (App. 257-58)	Changes "commencement" of Lease to 2006, "expiration" to 2011. Sets rent amounts for 2006-11. Does not exclude any prior option-to-renew. ***Grants a 5-year option-to-extend*** "under terms and conditions ***to be negotiated"***
2007 Lease Assignment & Modification (App. 260-63)	Assigned all Lease rights to JSJBD. Does not exclude any prior options. ***Grants three "additional" 5-year options-to-renew*** at rent amount ***"to be negotiated"***
2011 Addendum II (App. 265-66)	Changes "commencement" of Lease to 2011, "expiration" to 2016. Sets rent amounts for 2011-16. Does not exclude any prior options.
02/06/16 Renewal Letter (App. 268-69)	JSJBD serves letter exercising "our five year option" and discussing problem that current "rental rate that is significantly above current market rates"

The options would be critical to any commercial tenant operating a tavern, and were to Van Aken, the original tenant, who had liquor and gaming licensing at the location. (App. 237-39 (¶¶ 4-5).) JSJBD later succeeded to these same rights, which are tied to the location. (App. 237-39 (¶ 10), 260-63.) Each of the options

were part of a bargained-for exchange (i.e. the original Lease, amendments thereto, or assignment involving $50,000 payment), making the options irrevocable.[8]

In 2007, Mark Van Aken sought to sell the bar. (App. 238 (¶¶ 10, 11).) Tropicana's principal, Jeff Chauncey, refused to consent to an assignment unless 10% of the $500,000.00 purchase price was paid to Tropicana Investments. (*Id.*) Van Aken capitulated, and Tropicana received $50,000.00 of the monies paid by JSJBD.[9] (App. 238 (¶10), 262-63.)

The last three five-year options are contained in the 2007 Lease Assignment & Modification. (App. 260-63.) It incorporated and confirmed the Lease, the Amendment, and the Addendum, and that JSJBD succeeds to all rights. (App. 260.) It also granted "three ***additional*** five year options, stating:

> Landlord agrees to conditionally grant Assignee, J.S.J., LLC, three (3) additional five (5) year options to renew the term of the Lease under terms and conditions, including but not limited to rental increases, to be negotiated. The conditional options shall commence[10] after August 31, 2016[11], provided Assignee has timely complied with all terms and conditions of the Lease.

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[8] *See, e.g.*, *Hennessey v. Price*, 96 Nev. 33, 36, 604 P.2d 355, 357 (Nev. 1980) ("the option was supported by consideration and was, therefore, irrevocable.")

[9] Tropicana Investments' taking of $50,000.00 is a breach of both the duty of good faith and fair dealing and of the Lease. *See, e.g.*, *Cohen v. Ratinoff*, 195 Cal. Rptr. 84, 88 (Cal. Ct. App. 1983). ("The duty of good faith and fair dealing . . . militates against the arbitrary or unreasonable withholding of consent to an assignment. A breach by the lessor of his duty constitutes a breach of the lease agreement.").

[10] "[S]hall commence" is self-renewing, i.e. automatically renews the Lease.

[11] The provision states "after August 31, 2016," which indicates there are other options "to renew," and leaves open that the three "additional" options to renew that

(App. 263 (¶8).)

Discussing this exact provision with Landlord in 2007, JSJBD requested a change so that it expressly state that rent for each option would be the "market" rent in the area. (App. 241 (¶3).) In response, Landlord's representative stated: "This Landlord has always negotiated in good faith and ***at market value and below market value*** with his Tenants." (App. 271.)

In 2011, JSJBD and Tropicana entered into an Addendum II. (App. 265-66.) It changed the "commencement date" of the Lease to September 1, 2011. (*Id*. (¶ 1).) It changed the "expiration date" to August 31, 2016. (*Id.* (¶ 2).) Addendum II does ***not*** exclude the prior options from the continued terms of the Lease. It states that, "All of the terms, covenants, provisions, and agreements to the lease not conflicting with this Amendment [sic] ***shall remain in full force and effect***." (*Id.* (¶ 4(A)).)

B. ON FEBRUARY 26, 2016 JSJBD EXERCISES ITS FIRST 5-YEAR OPTION.

1. Timely exercise of option.

On February 26, 2016, JSBJD provided notice, in writing, that JSBJD was "exercis[ing] our five year option beginning September 1st 2016." (App. 268-69.)

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are being granted can be exercised many years "after" August 31, 2016. Again, the provision does not exclude any previously granted options.

In its Answer, Tropicana admitted the exercise on February 26, 2016. (App. 97 (¶ 15) (admitting "that Plaintiff attempted to exercise its option.").)

The Renewal Letter was timely. It was sent more than 90 days prior to the August 31, 2016 expiration date (and more than 6 months prior for good measure).

2. Terms and conditions already in place, with only rent to negotiate.

All terms and conditions of the Lease were already in place, except for the rental rate. For two pages, the Renewal Letter discusses that rent needs to decrease in light of a decline in the market (e.g., "During the past eight years rents in Las Vegas have declined as a result of the recession. Blue Dogs rent increased during this period, resulting in a rental rate that is significantly above current market rates and unaffordable."). (App. 268-69.)

For years, JSBJD had communicated the need to adjust rent to the decreased market rental rates in the area. (App. 271, 273 (requesting meeting to discuss the "rental rates" for option term). JSJBD, in good faith, continued to pay the above-market rent from 2016 while it negotiated with Landlord. (App. 242.)

C. THE PARTIES WERE UNABLE TO AGREE ON RENT, OR OTHER TERMS SOUGHT IN NEW LEASE DOCUMENTS BY LANDLORD, WHILE THE NEGOTIATIONS CONTINUED.

1. The parties were unable to agree on new Lease documents.

From February of 2016 to the filing of this case, the parties discussed the rental rate and Landlord's demand for all new Lease documents. (App. 242, 295).

For example, Jeff Chauncey, Tropicana's principal, stated to JSJBD's counsel: "[W]e will require a new lease to be signed." (App. 295) This case involves a commercial lease. All parties have understood at all times that there is no agreement unless and until the parties actually sign off on binding lease documents. (App 242-43.)

There was no agreement because Tropicana adopted an aggressive negotiating position of refusing to adjust rent to market rental rates, resorting to default declarations, which culminated in Tropicana's service of a Thirty Day Notice to Quit the Premises. (App. 94.) Tropicana attached the Notice to its Answer and Counterclaim (App. 94), seeking "Eviction and Issuance of Writ of Restitution" as its Fourth Claim for Relief (App. 35.).

2. Specifically, from 2016-2018, the parties exchanged numerous correspondences while they negotiated, which shows the parties were at loggerheads over the rental rate, as well as Tropicana's additional demands for new Lease documents and terms.

a. February to June 2016: JSJBD attempts to negotiate market rent for the option period.

On February 16, 2016, JSJBD sent an email to Tropicana, stating: "We would like to set up a meeting to discuss the renewal of the five (5) year lease option for BDP and ***the rental rates going forward*** . . . ." (App. 273.)

On February 26, 2016, JSJBD exercised its five-year option. (App. 268-69.) It further stated: "Blue Dogs needs a $2,500 a month reduction in rent." *Id.*

On April 6, 2016, Tropicana sent a proposed "Addendum" (App. 276-78). On April 26, 2016, JSBJD sent a responding letter (App. 280-82), stating: "We cannot accept a rent above ***$1.40 per Sq/Ft,*** $5880 per month . . . ."

On April 28, 2016, Landlord sent correspondence (App. 284), stating: "You have our best offer. ***We are reducing rent by a substantial amount*** . . . we are not in business to lose money." After further discussions, on May 19, 2016, Tropicana's broker sent correspondence (App. 286), discussing "lease renewal" and "rental reduction." It states: "The Landlord reiterated . . . you have his best offer. The rental ***reduction . . . of $840.00 per month (or $0.20 psf/per month)*** over the next five years . . . ." (*Id.*)

There were further discussions, after which Tropicana proposed a reduction of rent ($50,400 over five years), subject to repayment if JSJBD sold / assigned its rights in the bar. (See App. 288.) On May 26, 2016, JSJBD sent an email to Tropicana (App. 288), rejecting the proposal.

b. In June of 2016, Tropicana demands all new Lease documents, JSJBD's new counsel discusses negotiating points, which Tropicana rejects.

In June of 2016, Landlord began demanding entirely new Lease documents to replace the 1996 Lease and related documents. On June 15, 2016, Landlord sent a letter to JSJBD stating: "Landlord is requiring a new lease document for Blue Dogs

Pub . . . .” (App. 290.) Also, Tropicana began claiming a breach by JSJBD of the assignment provision. (*Id.*) Tropicana demanded a ***rental increase of 3%***. (*Id.*)

On August 2, 2016, JSJBD’s counsel, Leslie Miller, Esq., sent correspondence that: (1) asserted JSBJD did not violate the Lease’s assignment provision; (2) JSBJD was exercising its option (already accomplished on February 26, 2016); (3) discussed increasing rent by $210; and (4) requested further discussion regarding entering into “Addendum III” (which was a document sent by Landlord on April 6, 2016, but which Landlord stated on June 15, 2016 that he no longer sought). (App. 292-93)

The next day, August 3, 2016, Tropicana’s principal, Jeff Chauncey, sent responding correspondence directly to Leslie Miller ***rejecting all of her proposals***. (App. 295.) Specifically, Tropicana rejected her discussion of rent, stating that Landlord sought higher rent consisting of an ***increase of 3% per year***, with the same increase each year thereafter. (*Id.*) Tropicana rejected Miller’s discussion of an “Addendum III,” as Tropicana sought entirely new Lease documents since June 15, stating: “We will require a ***new lease documents***.” (*Id.*)

The notion that Tropicana supposedly had an agreement on rent is meritless. Both sides had rejected the other sides’ proposals. No new lease document was entered into.

c. August 2016 to August 2017: The parties negotiate, but do not agree, on new Lease documents.

After the early-August 2016 discussion, Tropicana sent proposed new Lease documents to Leslie Miller. On August 31, 2016, Miller sent correspondence that stated, "***JSJBD declines to go forward with a new lease as proposed***, and hereby again exercises its valid option rights under the Lease . . . ." (App. 297-98.) The letter also counter-proposed regarding "guaranties" at "total base ***rental amount of $1.00/square feet—in accordance with the current advertised rate of the shopping center, plus a 25% premium*** on that amount." (*Id.*)

On September 7, 2016, Tropicana's counsel John Sacco, Esq. sent correspondence. (App. 300-01.) Sacco's letter sought to negotiate various lease provisions as part of Landlord's proposed new Lease documents. He did not claim that a binding agreement on rent already existed, stating: "I . . . thought it would be a good idea to send you our comments in writing, prior to our commencing a dialogue." (*Id.*) In response to JSJBD's counsel's proposed "Amendment to Lease," Sacco stated, "your requested change set forth in Paragraph 6 "Parking" is not acceptable." Sacco proposed other terms regarding "six reserved parking spaces" and other related terms. (*Id.*) Sacco proposed having new terms in "Paragraph 7" regarding Tropicana providing "a statement of the [CAM] Charges within 120 days after the end of each calendar year." (*Id.*) Sacco further sought terms regarding "police the automobile parking and common areas," with Sacco proposing a

"modification" paragraph that might be inserted into some sort of new Lease document. (*Id.*) Sacco made demands regarding "personal guaranties" for four principals of JSJBD. (*Id.*) He also demanded agreement on "current Shopping Center Rules and Regulations" as well as agreement on "replac[ing] the exterior signs which are faded and in poor conditions." (*Id.*) Sacco attached an additional page that had three paragraphs of proposed new Lease terms.

Any notion that Sacco, on behalf of Tropicana, accepted binding Lease terms is plainly meritless, as he proposed all manner of new terms and demands.

On November 22, 2016, JSBJD's counsel sent correspondence confirming that there still is no agreement on new lease documents. (App. 305.) It stated, inter alia, "Our client is still in the process of reviewing the lease in detail." (*Id.*) It stated: "Due to ***the substantial differences*** from the prior lease, JSJBD is ensuring that the terms comport with its specific use and existing business." (*Id.*)

From November 2016 to August of 2017, the parties' counsel discussed proposed Lease documents, but no agreement was reached. By August of 2017, Tropicana's principal threatened to declare JSJBD in default, stating:

> I'm sending you this email in hopes that you are ready to sign your new lease. I'm [sic] am very frustrated that ***this has not been resolved*** months ago as this has been going on over a year. We have sent you our final draft and if you are not going to provide the appropriate information as requested by my attorney and sign the lease, then you are leaving me no choice except to ***declare you in default***.

> You have been a tenant for a long time and this is not my preference but I don't understand these continuing delays and I'm really tired of this back and forth and having to keep paying attorneys.

(App. 308.) The email confirmed that there is no agreement on new lease terms

On August 9, 2017, Tropicana's counsel sent a letter to JSJBD's new counsel, Lucas Grower. (App. 310.) Confirming the lack of any agreement, the letter stated: "I can assure you that my client also wishes to amicably resolve this matter and accordingly, we look forward to getting the Lease Agreement executed by the parties." (*Id.*) It stated that he had "been working on this matter with Rachel L. Sully, Esq. . . . for almost a year." (*Id.*) It discussed redlines of proposed Lease documents that Sully had sent, which Tropicana's counsel stated had been "rejected." (*Id.*)

On August 10, 2017, JSJBD's principal send an email to Tropicana's principal that stated that rent needed to be reduced to ***"current market average of the Plaza."*** (App. 312.)

On August 15, 2017, Tropicana's principal sent an email to JSJBD's principal reducing Landlord's rent demand. (App. 314.) It stated Tropicana's latest proposal "to give you a ***$.05 per foot discount*** and at this point it is the best we can do." (*Id.*) He offered no rental increases for two years. (*Id.*)

Tropicana's principal stated that he refused to discuss market rates, knowing that JSBJD was tied to its location, stating: "***Market conditions or whatever other***

tenants are paying are not a factor as your location and type of use are unique to your industry." (Id.)

In response, on August 18, 2017, JSJBD's counsel discussed with Tropicana's counsel that rent be reduced to "***current market average***." (*See* App. 316-17.) Tropicana's counsel's response stated: "Your client requested that the rent be based on the ***'current market average'*** of the Center, and unequivocally, we aren't going to do that . . . ." (*Id.*) Landlord's counsel began arguing that JSJBD was a "holdover tenant" with no rights under the Lease, ignoring the options-to-extend. (*Id.*)

On August 25, 2017, Tropicana's counsel sent yet another rental offer, stating: "Landlord isn't asking for a rental increase now, and your client would be agreeing to pay Base Rent in ***the amount that he has already been paying*** for the next 12 months." (App. 319)

Two hours later, on August 25, 2017, Tropicana's counsel offered to ***reduce rent by $.05 to $1.95*** per square foot per month if JSBJD would sign the proposed Lease. (App. 321.)

On August 31, 2017, JSJBD's counsel sent a letter to Landlord's counsel, ***proposing rent of $1.45 per square foot per month***. (App. 323-24.)

In response, Tropicana's counsel stated: "[D]on't waste your time with revisions or redlines. A detailed letter to you will be forthcoming . . . ." (App. 327.)

d. On September 6, 2018, Tropicana's counsel sent correspondence falsely claiming the parties agreed on rent / Lease terms in August of 2016.

On September 6, 2017, Landlord's counsel sent a letter to JSBJD's counsel. (App. 329-32.) The letter states: "offers from my client were rejected" and "Negotiation is, by definition, a process whereby parties try to find a way to reach an agreement by discussion." (*Id.*) The letter further states:

> [A]llow me to disabuse you of any notion that there will be any further "negotiations" with respect to his matter. Your client's offer to pay Base Rent in the amount of $1.45 per square foot contradicts his past performance, conduct, and the amount of Base Rent paid during the past 12 months. The offer is firmly rejected.

(*Id.*) Tropicana's counsel references an August 2, 2016 letter from JSJBD's then-counsel Leslie Miller that supposedly made an offer and that there is ***"acceptance thereof by the Landlord."*** (*Id.*) This also ignored that Landlord's principal, Jeff Chauncey, immediately sent correspondence on August 3, 2016 rejecting everything stated in the Leslie Miller's letter. It ignores two-and-half years of other negotiations. It ignores that the clients are the ones who sign lease documents.

On December 29, 2017, Tropicana's counsel sent a letter refusing to negotiate further. (App. 339-41.) On September 6, 2018, Tropicana's broker sent yet another rent proposal (App. 343), offering to "forgive" rent increases that Landlord asserted if JSJBD would sign the proposed Lease documents.

e. JSJBD proposes use of a joint appraiser or other neutral method, and Landlord responds by serving a Thirty Day Notice to Quit.

On October 8, 2018, JSBJD's counsel called and spoke with Landlord's counsel, proposing that the parties use a neutral and reasonable methodology for determining reasonable / market rent. (App. 345-49.)

In response, Tropicana Investments served a "Thirty Day Notice to Quit the Premises" dated November 14, 2018. (App. 94.) On November 16, 2018, JSBJD sent correspondence regarding the improper Notice of Termination and affirming its option rights: "As Landlord knows, in 2016, JSBJD exercised an option to extend the lease for a five-year period." (App. 351.) The same date, JSJBD served a copy of an appraisal of market / reasonable rent (App. 351, 353-437), which shows a much lower market rental rate.

III.

ARGUMENT

A. THE DISTRICT COURT IMPROPERLY ADJUDGED PREVAILING PARTY, JSJBD, LIABLE FOR TROPICANA'S ATTORNEY FEES AND COSTS.

1. The district court erred in finding Tropicana entitled to its attorney fees under the attorney provision of the Lease even if it is not the prevailing party.

a. Standard of review.

Tropicana Investments' basis for seeking attorney fees was the attorney fee provision in the Lease.[12] "Whether a contract authorizes attorney fees is a question of law reviewed de novo." *Pardee Homes v. Wolfram*, 135 Nev. 173, 178, 444 P.3d 423, 427 (2019), *citing Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008). Thus, interpretation of an attorney fee provision is a question of law. *See id.* Contract interpretation is a question of law. *JED Prop., LLC v. Coastline RE Holdings NV Corp*., 131 Nev. 91, 93, 343

[12] JSJBD Corp argued it was entitled to its fees per, inter alia, NRS 18.020, NRS 18.020 (1) ("Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered . . . In an action for the recovery of real property or a possessory right thereto."); NRS 18.010(2)(a) ("the court may make an allowance of attorney's fees to a prevailing party . . . When the prevailing party has not recovered more than $20,000"), as well as pursuant to "*Sandy Valley*'s . . . three scenarios in which attorney fees as special damages may be appropriate." *Pardee Homes v. Wolfram*, 444 P.3d 423, 426, 135 Nev. Adv. Op. 22 (2019) ("clarifying or removing a cloud upon the title to property" and "declaratory relief actions compelled 'by the opposing party's bad faith conduct.'").

P.3d 1239, 1240 (2015); *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (contract interpretation is a question of law subject to de novo review); *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012).

Similarly, interpretation of NRS Chapter 18 is a question of law. "Although the award of attorney fees is generally entrusted to the sound discretion of the district court, when a party's eligibility for a fee award is a matter of statutory interpretation, as is the case here, a question of law is presented, which we review de novo." *In re Estate & Living Tr. of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009) (citation omitted).

"The issue here implicates a question of law because it involves statutory interpretation—the meaning of 'prevailing party,' as used in NRS 18.010(2) and NRS 18.020." *145 East Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. Adv. Op. 14, 460 P.3d 455, 457-58 (Nev. 2020). Because it is a question of law, this Court's review of who the prevailing party is under the "American Rule" should be de novo.

To the extent a consolidated matter requires this Court to determine whether the district court properly concluded that parties were either eligible or ineligible for an award of attorney fees under ***a statute or rule***, this Court reviews those issues de novo. *See Arguello v. Sunset Station, Inc*., 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) ("Questions of statutory construction, including the meaning and scope of a

statute, are questions of law, which this court reviews de novo." (internal marks and citation omitted)); *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 8-11, 106 P.3d 1198, 1199-200 (2005) (reviewing de novo whether landowners in condemnation actions may be awarded attorney fees under NRS 18.010(2)(a)). "An attorney fee award that is based on an interpretation of a statute providing for attorney fee eligibility presents a question of law subject to de novo review." *CCSD v. Las Vegas Review-Journal*, 458 P.3d 352, 2020 WL 970345 (Nev. 2020), *citing In re Estate of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009).

b. The court erred in its interpretation of the attorney fee provision of the Lease and NRS Chapter 18.

After trial, the district court found that JSJBD had prevailing party status. (App. 3354) The district court then found that Tropicana Investments was not required by the attorney fee provision of the Lease to be a prevailing party in order to collects its fees (App. 3346, 3354), which is an erroneous interpretation of the Lease in conjunction with the rule governing awards of attorney fees, NRS 18.010.

NRS 18.010 addresses whether attorney fees can be recovered via contractual attorney fee provisions. It requires that a movant seeking fees be a prevailing party, ***singular***, in order to obtain attorney fees. NRS 18.010(1) and (2) state:

> 1. The compensation of an attorney and counselor for his or her services is governed by agreement, express or implied, which is not restrained by law.

> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees ***to a prevailing party***:

(Emphasis added.)

While section 1 of NRS 18.010 states that a provision of an "agreement" "is not restrained by law," subsection 4 of the same statute nevertheless states that attorney fees are only recoverable based on an agreement if party seeking those fees ***is a "prevailing party."*** Subsection 4 states: "Subsections 2 and 3 do not apply to any action arising out of a ***written instrument or agreement which entitles the prevailing party*** to an award of reasonable attorney's fees." (Emphasis added.) The plain language of section 4 thus requires "prevailing party" status under an agreement's attorney fee provision. Further, section 4 again refers to "prevailing party" in the singular, meaning that there can only be one prevailing party.[13]

The district court erred in finding that Tropicana Investments was entitled to attorney fees under the Lease "***regardless of whether they are the prevailing parties***." (App. 3354.)

[13] In addition, the Lease to which the parties succeeded was of the original landlord, Walter L. Swartz, and makes reference to California "Civil Code" (App. 39). California law would make the provision reciprocal and in favor of the prevailing party. *See, e.g., Ziello v. Superior Court*, 89 Cal. Rptr. 2d 398, 400 n.2 (Ct. App. 1999) ("Civil Code section 1717, under which the attorney's fee award in this case was made, provides for reciprocity in contract-authorized attorney's fees").

c. The district court failed to find that there was a "default," which, in any event, could not be found because Tropicana conceded that asserting "default" was a "mistake."

The Lease's requirement that there be a finding of "default" also shows the district court's determination to be error. Tropicana was the party in "default" by serving a Thirty Day Notice to Quit, which was also attached to its Counterclaim (App. 94), despite the enforceability of options-to-extend under *Cassinari v. Mapes*. A commercial tenant is entitled to apply to the District Court to determine reasonable rent, which it cannot know until such determination is made:

> The doctors did not seek to ***affirm the lease*** and retain occupancy, ***something that they were clearly entitled to do.*** See, e.g., Cassinari v. Mapes, 91 Nev. 778, 542 P.2d 1069 (1975) (in which it was held that ***in these kinds of situations, in which an option provides for rental to be negotiated and the parties fail to reach an agreement, the option is enforceable and a reasonable rental will be imposed***).

Charter Medical Corp. v. Bealick, 103 Nev. 368, 370, 741 P.2d 1359, 1360-61 (1987) (emphasis added).

Further, the district court granted summary judgment to JSJBD affirming its rights under its options-to-extend / renew. (App. 480-81.)

The district court found in favor of JSJBD on Tropicana's counterclaim for "Eviction and Issuance of Writ of Restitution." (App. 2752-53.) "Default" is ordinarily the term in a Lease that provides grounds for Eviction. After addressing the claims in the Complaint, and then the first two claims in the Counterclaim, the

district court stated in its Findings of Fact and Conclusion of Law that Judgment was granted in favor of JSJBD and all Counterdefendants "on all other claims for relief contained in the Counterclaim." (App. 2752-53.)

While Tropicana Investments asserted in post-trial motions that it had abandoned the claim for Eviction / Writ of Restitution at some point prior to trial, such assertion was plainly false. In Tropicana's Pretrial Memorandum, it identified Counterclaims for trial, including "4. Fourth Claim for Relief—Eviction and Issuance of Writ of Restitution." (App. 1075.) It did not "abandon" the claim before trial. (App. 1080.)

At trial, Tropicana's principal, Jeff Chauncey, was directly asked about the threat of default that he made to JSJBD, as well as the Thirty-Day Notice of Termination. He testified: "***I never threatened them [JSJBD] with eviction. If I did, it was in error. They've never been in default*** except -- actually, they're not in default because we have sent a letter recently, but to my knowledge, they have not been in default." (App. 1741.) Further, Chauncey testified, "[N]o, they've [JSJBD] never been in default, and that was an error on my part." (App. 1741.)

Aside from being a prevailing party—including on the Eviction claim—JSJBD was never in "default." The district court erred in adjudging JSJBD liable for Tropicana's attorney fees and costs.

2. The Court failed to follow the "American Rule" regarding prevailing party attorney fees, by failing to either (a) apportion by prevailing party on a claim-by-claim basis; or (b) determine a prevailing party on a case-as-a-whole basis.

a. Standard of Review.

Determining whether the American Rule allows a district court to switch the parties' respective attorney fee obligations—by requiring each side to pay all of the other side's attorney fees without apportionment of fees to the claims vis-a-vis counterclaims—is a question of law. "Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). "[W]hen the attorney fees matter implicates questions of law, the proper review is de novo." *Id.* Thus, a district court's determination that requires ***each side*** to pay essentially all of the fees ***of the other side*** presents a question of law.

b. The district court failed to apportion on a claim-by-claim basis, which it determined could not be done because the claims were "interrelated" and incapable of apportionment.

While the Court asserted that it would be declaring both parties to have prevailed "under two different bases" (App. 3346), the district court did not find "different bases" and/or apportion between those bases. Rather, the Court found, in regard to apportionment arguments comparing the claims vis-a-vis the counterclaims, that "***everything was interrelated in this case***." (App. 3354.) The

court found that "both of you have argued apportionment," but concluded apportionment was not possible. (App. 3354.)

That the Court failed to determine prevailing party on an apportioned claim-by-claim basis is shown by the amounts awarded. (App. 3354.) The Court required each side to pay essentially all of the fees of the other side. (App. 3354.) The court entered orders granting essentially all fees and costs to each side. (App. 3382-84, 3362-64.) Thus, the court failed to make a determination of prevailing party on a claim-by-claim basis that apportioned fees to the given claims.

c. The district court failed to determine a prevailing party on the case-as-a-whole.

One, when there are multiple claims or counterclaims, which are not capable of differentiation or apportionment, this Court has stated that the district court shall look to the value of the claims to determine who is the singular "prevailing party." *Parodi v. Budetti*, 115 Nev. 236, 241-42, 984 P.2d 172, 175 (1999).

> Although this issue has not arisen in a consolidated action context, the same problem has been addressed in single action ***cases involving*** multiple counts or ***counterclaims***. See Robert J. Gordon Constr. v. Meredith Steel, 91 Nev. 434, 537 P.2d 1199 (1975); Peterson v. Freeman, 86 Nev. 850, 477 P.2d 876 (1970). In Gordon and Peterson, multiple claims were litigated in the same lawsuit. Some of the claims were worth less than the statutory cap under NRS 18.010(2). However, the aggregate or net judgments in the case exceeded the statutory cap. The court held that it is the ***value of the total judgment*** which controls, not the individual claims.

> We see no reason to treat multiple lawsuits which have been consolidated into one action differently from multiple claims filed in a single action.

Id. (emphasis added).

Two, this Court has also held that claims seeking information, rather than damages, can confer prevailing party status. In *Pardee Homes v. Wolfram*, the plaintiff was a prevailing party in the case as a whole, even though its accounting claim did not reveal substantial damages. This Court stated:

> Wolfram and Wilkes sought information through an accounting, which was eventually granted by the district court. It is inconsequential to the prevailing party determination that the brokers artfully framed their complaint in a limited way. The complaint requests information; the district court granted this request. It is beyond the scope of prevailing party determination to consider if Wolfram and Wilkes' underlying motivation was to discover they were owed unpaid commissions because that was not one of their claims.

Pardee Homes v. Wolfram, 135 Nev. 173, 179, 444 P.3d 423, 427-28 (2019) **(**finding the district court did not abuse its discretion in awarding $428,462.75 in attorney fees to Wolfram and Wilkes as the prevailing parties on the contract action); *see also LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 616 (2015) (a party prevails "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit.").

Comparing the value of the respective relief here is not difficult. The value of JSJBD's Declaratory Relief claim that affirmed the Lease and the options-to-

extend avoided Eviction by Tropicana, thereby avoiding forfeiture of the $500,000.00 invested in purchasing the tavern. In 2007, JSJBD paid $500,000.00 to purchase Mark Van Aken's ownership of the bar. (App. 1432-36.)[14] As in *Pardee Homes*, JSJBD sought a declaration that it had enforceable options-to-extend / renew and to have the Court make a finding of reasonable rent—regardless of the amount that would be determined, which could not be known when the case was filed. Even if a minor additional amount of rent was required as a result of the determination, JSJBD Corp retained its possessory Lease rights.

Further, JSJBD sought proper accounting of CAM charges, regarding which the district court found JSJBD to have prevailed (App. 2745 ("Defendant has failed to provide a CAM accounting," "Defendant has charged amounts in excess of the CAM charges"), 2749 (finding Tropicana breached regarding CAM charges) 2750 (finding Tropicana breached the implied covenant of good faith and fair dealing regarding CAM charges) 2752 (adjudging JSJBD to have prevailed), even it did not result in substantial damages.

JSJBD Corp. succeeded on the significant issue—which was having the option rights confirmed and declaratory relief granted—which ended the threat of

[14] Van Aken testified at length regarding the $500,000.00 purchase price, as well as the 10% charged by Tropicana as a condition to consenting to the sale. Reference to the 10% also appears in the Lease Assignment and Modification Agreement (App. 57) and in the Findings of Fact and Conclusions of Law (App. 2740).

Eviction and possible loss of Blue Dogs Pub, which was purchased at a price of $500,000.00. The value of this determination far exceeds any "damages" amount granted to Tropicana, which, in any event, relates to the same declaration that JSJBD sought regarding rental amount.

d. The American Rule does not permit a district court to "exchange" the parties' respective attorney fee obligations so as to require each side to pay the other's fees.

The American Rule provides discretion to a district court to require the losing party to pay the prevailing party's fees OR to essentially find that there is no prevailing party and not award attorney fees to either side. This is stated succinctly in NRS 18.010(2) ("the court may make an allowance of attorney's fees ***to a prevailing party***"). Thus, the district "may" grant fees to a prevailing party. On the flip-side, the district court "may" choose not to make an allowance of attorney fees. As a question of law, it is erroneous for a district court to create a third, unprecedented option wherein the parties are required to pay all of the other side's attorney fees.

Under the first option, a court can award attorney fees to a prevailing party. This is represented by the *Parodi* "total value of the case" analysis. Yet, the district court did not find that solely one side was entitled to attorney fees based on the case as a whole.

The only other option was to decline to grant attorney fees and costs to either side. Numerous courts discuss the situation where there is merely a "pyrrhic" or "close" victory that does not warrant the granting of attorney fees. Where the issues were close and hard fought, courts may avoid finding one side to be the prevailing party, leaving each side responsible for paying its own fees and costs. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (the most critical factor in determining the appropriate amount of attorney's fees ***is the degree of success obtained***.) "At best this can only be described as a close and difficult case. The District Judge did not abuse his discretion in requiring each party to pay its own costs." *U.S. Plywood Corp. v. General Plywood Corp.,* 370 F.2d 500 (6th Cir. 1966); *see also Kalkowski v. Ronco, Inc*., 424 F. Supp. 343, 354 (N.D. Ill. 1976) (requiring each party to pay its own costs where "there are claims and counterclaims" and the case was "a close and difficult one").

As a matter of law, the district court decision was not an exercise of discretion in disallowing attorney fees to either side. Rather, it failed to follow either of the options available to it under the American Rule.

Finally, the court's "everybody wins and everybody loses" determination violates the "reasonableness" requirement for granting attorney fees by turning it on its head. Switching and exchanging the parties' respective attorney fee obligations

rewards the more wasteful party based solely on billing an amount unreasonable in comparison with the other side in the case.

This Court should reverse the district court's decision adjudging prevailing party JSJBD liable for Tropicana's attorney fees and costs.

B. THE DISTRICT COURT ERRED IN FAILING TO MAKE A DETERMINATION OF REASONABLE RENT PER *CASSINARI*, WHICH THE COURT AVOIDED DOING BY MIS-APPLYING TO THE "MIRROR IMAGE RULE" TO THE PARTIES' NEGOTIATIONS.

1. Standard of review.

The enforceability of options to extend present a question of law, as *Cassinari* and *Bealick* state that a commercial tenant is entitled to apply to a court for a determination of reasonable rent. That the district court entered summary judgment in favor of JSJBD Corp means that the district court made a determination as a matter of law. Interpretation of the written offers, counteroffers, and proposed lease documents follows the plain language rule, which both sides asserted at the summary judgment stage was the proper method of interpretation. (App. 129, 220.) Contract interpretation and plain language analysis presents a question of law. *See* above (regarding standard of review that applies to attorney fee contract provisions).

Accordingly, whether the district court made a reasonable rent determination and/or whether it properly applied the Mirror Image Rule in regard to the parties' written contract negotiations is subject to de novo review.

2. The district court failed to make a determination of reasonable rent, failing to follow *Cassinari*'s rule of looking to ascertainable market conditions.

At a hearing on July 7, 2019, the court ruled on both sides' motions for summary judgment, finding that the options were enforceable, that the parties had not agreed on a rental amount for the option period, and that the court would make a determination of reasonable rent at trial. (App. 478.) Likewise, the court's July 23, 2020 written order makes the same findings. (App. 481.) It further states that the court will determine "reasonable rental rate for such option period subject to the proof, etc. presented at trial." (App. 481.)

Under Cassinari, an option to extend is enforceable. The tenant can affirm the lease and obtain a determination of reasonable rent. "If unable to agree, a court should be allowed to fix the rental since ***economic conditions are ascertainable*** with sufficient certainty to make the clause capable of enforcement." *Cassinari*, 91 Nev. at 781, 542 P.2d at 1071 (emphasis added). *Cassinari* follows the same rule that applies to contracts for the sale of goods, which appears in Nevada's codification of the Uniform Commercial Code at NRS 104.2305(1):

> NRS 104.2305 Open price term.
>
> 1. The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case ***the price is a reasonable price*** at the time for delivery if:
>
> (a) Nothing is said as to price; or

> (b) The price is left to be agreed by the parties and they fail to agree; or
>
> (c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Under *Cassinari*, the court should have made a determination of reasonable rent by looking to ascertainable market conditions.

Rather than make a determination of reasonable rent at trial, the district court's Findings of Fact and Conclusions of Law state that there was an agreement on the amount of rent for the option period, finding that a September 7, 2016 letter from Tropicana's counsel constituted an agreement. (App. 2745 ¶ 45) At the summary judgment stage, further discussed below, the district court had rejected precisely the same argument that Tropicana presented in its summary judgment filings and which it presented at the hearing. Regardless, and as further discussed below, under the plain language analysis and the Mirror Image Rule, such letter could not be an acceptance since it proposed numerous additional contract / lease terms.

In finding that the September 7, 2016 letter constituted an acceptance / contract, the district court avoided making the reasonable rent determination, which was essentially the only remaining issue being litigated at trial.

Other than succinctly addressing the respective testimonies of expert witnesses persuasive (App. 2744), the court made no significant findings as to the

evidence presented regarding market / reasonable rent. Despite the respective expert witness valuations being $1.05 per square foot per month, and $1.75 per square foot per month, the court did not determine or analyze how such amounts affect the determination of reasonable rent. (*See* 2744-45).

Rather, the district followed its finding that there was an agreement as to rent amount resulting from the September 7, 2016 letter sent by TI's counsel (App. 2742 (¶ 45)). It then stated in the Findings of Fact and Conclusions of Law that the amount supposedly agreed-to in the September 7, 2016 letter "is not an unreasonable amount of rent." (App. 2744 (¶ 60).) *Cassinari* does not state that the district court may merely make a finding that a given amount is "not an unreasonable amount."

Thus, contrary to Cassinari, the district court made no finding regarding reasonable rent by looking to ascertainable market conditions.

3. The district court properly applied to the Mirror Image Rule at the summary judgment stage, and then erred when it made a contrary determination in its Findings of Fact and Conclusions of Law.

In the law of contracts, the Mirror Image Rule, also referred to as an unequivocal and absolute acceptance requirement, states that ***an offer must be accepted exactly with no modifications***. Restatement (Second) of Contracts § 59. The offeror is the master of one's own offer. An attempt to accept the offer on different terms instead creates a counter-offer, and this constitutes a rejection of the original offer. Restatement (Second) of Contracts § 59.

As recently stated by this Court:

> ***For an acceptance to be valid, it must not vary from the initial offer***. *Steiner v. Mobil Oil Corp*., 569 P.2d 751, 757 (Cal. 1977) ("Under traditional common law, no contract was reached if the terms of the offer and the acceptance varied."); *see also Morrill v. Tehama Consol. Mill & Mining Co.*, 10 Nev. 125, 136 (1875) (holding that a contract is formed only when an acceptance corresponds with an offer "entirely and adequately.").

JSD Properties, LLC v. Grant, Morris, Dodds, PLLC, 445 P.3d 225, 2019 WL 3489469, at *1 (Nev. 2019) (emphasis added) (unpublished). "[A]n acceptance ***must mirror the offer*** as to all material terms . . . ." *Id.*, 445 P.3d 225, 2019 WL 3489469, at *1 (emphasis added), *citing Steiner*, 569 P.2d at 757; *Morrill*, 10 Nev. at 136.

In mid-2019, the parties filed dueling motions for summary judgment (App. 119, 204), seeking to have the district court decide substantially all issues other than "reasonable rent" by deciding the respective dispositive motions. In such motions and related filings, Tropicana exhaustively argued that its attorney Sacco, via a letter dated September 7, 2016 "accepted" terms without making a counteroffer, resulting in an agreement on rent. (App. 133-34.)

a. The September 7, 2016 letter: which does not "mirror" any prior offer, but rather, counters with numerous additional material terms.

Tropicana's September 7, 2016 letter (App. 191-94) did not "mirror" any prior correspondence from JSJBD's counsel, let alone enter into any Lease documents. Plainly, it made numerous counteroffers, as well as repeatedly communicating that

there was no acceptance or agreement. That it is in writing presents a question of law regarding the proper application of the Mirror Image Rule.

In the first paragraph (App. 191), Tropicana's counsel communicates that this is his first communication with JSJBD's new counsel. He also makes clear that he is merely "commencing a dialogue," and not entering into any agreement:

> I write to let you know that our office represents Tropicana Investments, LLC. I have reviewed your proposed "Amendment to Lease" with my client and thought it would be a good idea to send you our comments in writing, prior to our commencing a dialogue.

In the next paragraph, Tropicana's counsel references the "Amendment to Lease" in quotations that JSJBD's counsel had sent in prior correspondence, no doubt, because Tropicana's principal had recently demanded (App. 295) entirely new lease documents and not a mere Amendment. Tropicana's counsel then proposes different terms for Parking, which is yet another material term:

> As far as the "Amendment to Lease" is concerned, your requested change set forth in Paragraph 6. "Parking" is not acceptable. Provided we are able to reach an agreement on all other points, the Landlord will agree to provide six reserved parking spaces, three in front and three on the south side of the driveway, all to be designated on a Site Plan (see attached). Please note that if any of the designated spaces on the Site Plan are currently designated for handicapped use, then an adjacent space will be provided.

(App. 191.)

In the third paragraph of the September 7, 2016 letter, Tropicana proposes new terms regarding how often Tropicana will account for CAM charges. While the letter states that "Landlord will agree," it plainly is making a counteroffer based on new CAM terminology, seeking to have JSJBD agree to terms to which other tenants have supposedly agreed. The third paragraph states:

> As far as Paragraph 7. is concerned, the Landlord will agree to provide Tenant a statement of the Common Area Maintenance Charges within 120 days after the end of each calendar year. This is the procedure the Landlord currently follows for all of its other tenants. The Landlord recommends using the language attached hereto.

(App. 191-92.)

Meanwhile, the new CAM terminology that Tropicana proposes consists of three lengthy paragraphs that Tropicana's counsel attached as a separate page to the September 7, 2016 letter (App. 194). Thus, Tropicana countered with three additional paragraphs being proposed.

The fourth, fifth, and sixth paragraphs of the September 7 ,2016 letter (App. 191-92) propose entirely new language regarding "patrol and security services." It also proposes how such costs will be included in CAM charges, thus, making a change to that provision. Proposing entirely new language and costs is a counteroffer, not an acceptance. Tropicana's counsel even refers to the new language as a "***modification***."

The seventh paragraph requests personal guaranties from principals of JSJBD, including of Bruno Mark, who has never signed a guaranty. This is yet another counter. The paragraph states:

> My client also requests that personal guaranties be executed and delivered by Stuart R. Vincent, Jeffrey B. Vincent, Bruce Eisman, and Bruno Mark, with joint and several responsibility (to be provided).

As stated, the guaranty documents are not even provided with the letter. (App. 192.)

The eighth paragraph states that Tropicana seeks assent to "Shopping Center Rules and Regulations," which is another counter. It also requests that JSJBD agree to "promptly replace the exterior signs which are faded and in poor condition," which would be another significant obligation and cost item.

The text of the letter concludes by acknowledging that there is no agreement. It states: "I look forward to discussing these points with you and ***attempting to work through these final matters***." Thus, additional discussions and negotiations that need to occur.

"***For an acceptance to be valid, it must not vary from the initial offer***." *JSD Properties*, *citing Steiner*, 569 P.2d at 757; *Morrill*, 10 Nev. at 136. Plainly, the September 6, 2016 letter was not acceptance or an agreement. In addition, no Amendment or new lease documents were ever signed. After exchanging yet more emails indicating matters were still being reviewed (App. 305), on November 22,

2016, JSJBD's counsel sent yet another email stating that the proposal was still being reviewed in light of "substantial difference from the prior lease." (App. 305.)

b. Whether the September 7, 2016 letter represented an acceptance / agreement was extensively litigated at the summary judgment stage, with the Court properly finding that it did not constitute an acceptance / agreement.

In JSJBD Corp's Opposition and Countermotion, it addressed the letter. (App. 214-16, 233.) It asserted that Tropicana's response was a rejection and counteroffer (to the extent it is even deemed more than mere "negotiation"), citing Restatement (Second) of Contracts § 59 (App. 233). In Tropicana's Reply and Opposition to Countermotion, it doubled-down on its argument that the September 7, 2016 letter from its attorney was the "agreement" on rent. (App. 445.) In JSJBD's reply in support of Countermotion, JSJBD further addressed the argument in detail. (App. 459-60.)

At the summary judgment hearing, the court rejected Tropicana's argument that the September 7, 2016 letter "accepted" terms, as Tropicana's counsel demanded entirely new Lease documents:

> MR. MOORE: The third point I wanted to make, ... One, if the parties reached an agreement based upon Ms. Miller's letter from August 31st where she set forth the term --
> THE COURT: Then you wouldn't have ***rejected it***, would you?
> MR. MOORE: We didn't reject the August 31st, Your Honor. The tenant's opposition and reply spent a lot of time pointing out the August 2nd letter and the August 3rd

> response from Mr. Chauncey. They ignored the August 31st where Ms. Miller says, here's the proposal, here's our addendum. And then Mr. Sacco responds to it and says -- he doesn't even address the rent. He's fine with the rent that they proposed, and he has a couple little non-material things that he's changing.
> THE COURT: ***Because they've got a 25-year-old lease form and somebody wanted to update it.***
> MR. MOORE: He wanted to update it.
> THE COURT: ***But that's not necessarily what an option is for.***
> MR. MOORE: I agree with you. It's not.

(App. 468-69.)

This exchange properly applied the Mirror Image Rule.

Thus, the district court granted summary judgment to JSJBD, with the Order stating:

> JSJBD Corp has an enforceable option to renew / extend the Lease for the current option period of September 1, 2016 to August 31, 2021, that ***the parties have not been able to agree on an amount for the rent*** for such option period, and that per [*Cassinari / Bealick*], the Court can determine a reasonable rental rate via an evidentiary hearing, i.e. at the trial. . . .

(App. 480-81.) The question regarding application of the Mirror Image Rule to the September 7, 2016 letter had been exhaustively litigated and determined at the summary judgment stage.[15]

[15] The court also rejected Tropicana's argument that rent supposedly could only increase, with the court rejecting the argument that terminology in one of the options stating "including, but not limited to, rental increases" requires that rent only increase over time (App. 466-68.)

c. The Court failed to properly apply the Mirror Image Rule when, in its Findings of Fact and Conclusions of Law, it found that the September 7, 2016 letter represented an acceptance / agreement.

Contrary to its decision at the summary judgment stage, the court improperly ruled at trial that the September 7, 2016 letter represented an acceptance / agreement. (App. 2742 (¶45).) The letter plainly is not an acceptance as it presented numerous additional terms.

In so ruling, the district court failed to make a determination of reasonable rent. From the exercise of its option to the filing of the Complaint, JSJBD properly affirmed its option rights while remaining in possession, which is what *Cassinari* and *Bealick* require. "If . . . ***the parties simply could not agree in writing on what the rent should be***, then one or the other of the parties could have enforced the lease by suing under *Cassinari* to determine a reasonable rental . . . ." *Charter Medical Corp. v. Bealick*, 103 Nev. 368, 371, 741 P.2d 1359, 1361.

The court failed to properly apply the Mirror Image Rule to the September 7, 2016 letter when it made a finding contrary to its summary judgment ruling.

4. The district court's exclusion of certain testimony relating to the Rule 30(b)(6) deposition could not have properly had any effect on application of the Mirror Image Rule to the September 7, 2016 letter sent by Tropicana's counsel.

a. To the extent the court re-addressed the matter despite its summary judgment order, the same plain language analysis and Mirror Image Rule applied at trial.

The district court disallowed certain testimony of JSJBD witnesses[16] in light of its ruling (App. 1062) on a motion for sanctions filed by Tropicana regarding the Rule 30(b)(6) deposition it took. Such ruling should have no impact on application of the Mirror Image Rule, which involved a plain language analysis of the parties' correspondences, which were already addressed at the summary judgment stage and admitted at trial. The correspondence is in writing and analysis of it involves the same plain language both sides asserted at the summary judgment stage.

b. Even where a court finds a witness did not properly testify at a Rule 30(b)(6) deposition, it is improper to exclude testimony at trial, especially where there is no predicate discovery order and a summary judgment has been entered on the issues.

The district court's exclusion of JSJBD's witness testimony was improper. Generally, NRCP 37 authorizes discovery sanctions only if there has been ***willful noncompliance with a discovery order*** of the court. *Fire Insurance Exchange v. Zenith Radio Corp*., 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). Tropicana filed a motion for sanctions without there being any predicate discovery order. (App. 584-725, App. 798, 800.)

[16] (*See, e.g.*, App. 1146 (Jeff Vincent), 1597 (Bruno Mark), 2735 (footnote in Findings of Fact and Conclusions of Law referencing ruling).)

While Tropicana referenced (incorrectly) the amount of "I don't know" answers, it did not connect those to the subject matters listed in the Rule 30(b)(6) deposition notice.[17]

The substantial majority of alleged "I don't know" and "document speaks for itself" responses involved Tropicana's demand for interpretation of the parties' counsel's correspondences and interpretation of lease documents, proposed or otherwise. (*See, e.g.*, 597-600.) In its motion for sanctions, Tropicana asserted that it was entitled to the organization's interpretation of proposed lease documents (App. 600)—documents the district court had already found did not result in an agreement under the Mirror Image Rule. A designated representative's own interpretation of the facts or own legal conclusions in his deposition testimony do not bind the corporation. *Snapp v. United Transportation Union*, 889 F.3d 1088 (9th Cir. 2018). Plain language analysis does not involve a lay witness's private interpretations of documents that are in writing. The primary remaining issue involving a determination of reasonable rent, not a witness's interpretation of legal documents.

"[T]he testimony of the representative designated to speak for the corporation are admissible against it. But as with any other party statement, they are not 'binding' in the sense that the corporate party is forbidden to call the same or another

[17] (App. 596 (merely stating that topics are attached at Ex. 12, which does not have the topics (see App. 662).

witness to offer different testimony at trial." Wright & Miller Fed. Prac. & Proc. § 2103. "[T]he 'majority of courts to reach the issue ... treat the testimony of a Rule 30(b)(6) representative as merely an evidentiary admission, and do not give the testimony conclusive effect.' " *Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 839 F.3d 1251, 1260 (10th Cir. 2016) (citation omitted); *see also Keepers, Inc. v. City of Milford*, 807 F.3d 24, 34 (2d Cir. 2015) ("Rule 30(b)(6) testimony is not binding in the sense that it precludes the deponent from correcting, explaining, or supplementing its statements."); *A.I. Credit Corp. v. Legion Ins. Co*., 265 F.3d 630, 637 (7th Cir. 2001) ("[T]estimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes."); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013) ("A 30(b)(6) witness's legal conclusions are not binding on the party who designated him, and a designee's testimony likely does not bind [its employer] in the sense of a judicial admission." (citation omitted)); *R&B Appliance Parts, Inc. v. Amana Co*., 258 F.3d 783, 786 (8th Cir. 2001) ("Although Amana is certainly bound by Mr. Schnack's testimony, it is no more bound than any witness is by his or her prior deposition testimony. A witness is free to testify differently from the way he or she testified in deposition, albeit at the risk of having his or her credibility impeached").

Nevertheless, the court's exclusion of witness testimony should have had no effect on making a reasonable rent determination. It should have had no effect on a summary judgment determination that already rejected Tropicana's argument that there was an acceptance / agreement as to rent via Tropicana's counsel's September 7, 2016 correspondence.

5. The district court's various additional findings do not lead to a different result, as they are contrary to Cassinari, as well as a plain language application of the Mirror Image Rule.

The Findings of Fact and Conclusions of Law reference "part performance" (App. 2750 (¶ 106)), which was argued (App. 476) and rejected by the court (App. 480-81) at the summary judgment stage. The parties already had a lease that contained enforceable options to extend, which entitles a tenant to affirm the lease (i.e. remain-in-possession) and apply to a court for a determination of reasonable rent. Meanwhile, "part performance" is a doctrine that addresses a situation where there otherwise is no contract. Here, there was already a contract in the Lease and options-to-extend, which is enforceable per *Cassinari*.

In *Cassinari,* the tenant continued paying the "former" rent while the case continued. This Court did not find that such payment constituted some sort of acceptance as to a rental amount. Rather, a tenant would be required to pay something, while still being entitled to apply to a court for a determination of rent. Paying "something" does not waive the right to a determination of reasonable rent.

JSJBD already had enforceable option rights, was already in possession of the premises, and was obligated to pay rent even if it was unknown what the amount would be determined to be.

In its Findings of Fact and Conclusions of Law, the court made findings that the rent could only increase (App. 2748), contrary to the decision it made at the summary judgment hearing where Tropicana presented the same argument (App. 466-68). As argued at the summary judgment stage, the phrase, "including but not limited to" that appears in the three options granted in the 2007 Lease Assignment and Modification is subordinate. The term "including" usually kicks off a dependent clause without changing the meaning of a sentence. Ordinary words are given their ordinary meaning, so "including" would mean not "exclusively." The list that follows "including but not limited to" is non-exhaustive. *Zhang v. Barnes*, 2016 WL 4926325, at *5 n.3, 382 P.3d 878 (Nev. 2016) (rejecting argument that "***including, but not limited to***, a corporation, partnership, association trust or unincorporated organization" excludes a "professional medical corporation" from being subject to liability because it is not an exhaustive list); *see also Auer v. Commonwealth*, 621 S.E.2d 140 (Va. Ct. App. 2005) ("'include' implies that the provided list of parts or components is not exhaustive and, thus, not exclusive."). Use of the phrase "but not limited to" emphasizes this even more. *See, e.g., DIRECTV, Inc. v. Crespin*, 2007 U.S. App. Lexis 6279 (10th Cir. Mar. 16, 2007) ("the normal use of 'include' as

introducing an illustrative—and non-exclusive—list"); *Jackson v. Concord Co*., 253 A.2d 793 (N.J. 1969) (terms like include are "words of enlargement and not of limitation and that examples specified thereafter are merely illustrative" "especially so here where the word 'including' is followed by the phrase 'but not limited to.'"). Thus, "including but not limited to rental increases" plainly includes the possibility of both rental increases and decreases, depending on market forces affect what is to be negotiated.

The doctrine of estoppel cannot be used by a district court to avoid making a determination of reasonable rent where a tenant has enforceable options to extend that do not have a rental amount. Further, "Estoppel or part performance must be proved by some ***extraordinary measure or quantum of evidence***." *Zunino v. Paramore*, 83 Nev. 506, 508, 435 P.2d 196, 197 (1967). There is no need to even address "estoppel" since under *Cassinari*, the tenant already has enforceable option rights.

When the district court states: "Plaintiff intended for Defendant to accept the full amount of rent as payment under the Lease, in exchange ***for being allowed to continue to occupy*** the Premises." (App. 2751 (¶ 107).) This fails to follow *Cassinari*. The rent payment were not made in order to be "allowed to continue to occupy the premises," which Plaintiff already had the right to continue

occupying. Further, there is no detriment to a landlord in enforcing options-to-extend.

The district court states: "Plaintiff's significant ***delay*** in asserting any dispute or protest as to the amounts being paid demonstrate the Defendant had no idea of Plaintiff's purported ***hidden understanding*** that it did not agree to the rent." (App. 2751 (¶ 107).) This sentence has nothing to do with an estoppel analysis. Cassinari holds that the options are enforceable. JSJBD remained in possession during the option period, and neither side filed a case until Tropicana served a Thirty-Day Notice to Quit, which led to JSJBD filing the case within a matter of days. Meanwhile, application of the Mirror Image Rule already addresses whether there is an acceptance / agreement as to proposed lease terms, such as the entirely new lease documents being proposed by Tropicana in the September 7, 2016 correspondence.

The Court states: "Defendant detrimentally relied on Plaintiff's position, as Defendant kept the property off the market . . . ." (App. 2751 (¶ 107).) Yet, under *Cassinari*, Plaintiff already had an enforceable option—even where there is no agreement on the amount of rent. That is the holding in *Cassinari v. Mapes*. Putting the property "on the market" was never a possibility—and cannot be used to show "detrimental reliance"—because the options "shall commence" and the Court already found them enforceable, which is what *Cassinari* also states.

Ironically, the very next finding (App. 2751 (¶ 108).) states that "there was a good faith dispute related to the amount of rent for the option period," which means that there was no agreement on rent.

The court's findings in its Findings of Fact and Conclusions of Law fail to follow *Cassinari*, as well as a plain language application of the Mirror Image Rule.

V.

CONCLUSION

Respectfully, JSJBD requests that the district court's decision regarding attorney fees be reversed such that JSJBD is not adjudged liable for Tropicana's attorney fees and costs. JSJBD prevailed because, inter alia, it was required to file the case to protect its option rights under *Cassinari* in response to a Thirty Day Notice to Quit, and for other reasons found by the court in regard to CAM charges.

The district court's plain language application of the Mirror Image Rule to the September 7, 2016 correspondence (and any other related correspondence) sent by Tropicana should be reversed. Rather, the district court's decision at the summary judgment stage was the correct determination, as shown by the writings themselves.

The matter should be remitted to the district court for further proceedings, including a proper determination of reasonable rent that properly evaluates the evidence by looking to ascertainable market conditions.

The Judgment as to Counterdefendants, whose liability is based on guaranty-liability, should be set aside and reversed.

Finally, JSJBD and Counterdefendants request any further relief consistent with this brief.

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ATTORNEY'S CERTIFICATE THAT COMPLIES WITH RULE 28.2.

1. I certify 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) as it has been prepared in a proportionally spaced typeface using Microsoft Word 14-font size and Times New Roman type style.

2. I certify this brief complies with page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 14,000 words and the "word count" feature counts 12,450 words.

3. I hereby certify I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I 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 page and volume number, if any, of the appendix where the matter relied on is to be found. I understand I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: September 3, 2020.

/s/ Mario Lovato

CERTIFICATE OF SERVICE

I hereby certify that, on September 3, 2020, I submitted **APPELLANTS' OPENING BRIEF** for service via electronic service to the parties registered for service with the Nevada Supreme Court in this matter, including the following:

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