IN THE SUPREME COURT OF THE STATE OF NEVADA

JSJBD CORP. D/B/A BLUE DOG'S PUB; STUART VINCENT, AN INDIVIDUAL; JEFFREY B. VINCENT, AN INDIVIDUAL; AND JEFF WHITE, AN INDIVIDUAL, Appellants/Cross-Respondents, vs. TROPICANA INVESTMENTS, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Respondent/Cross-Appellant.	Case No.: 80849 Appeal from the Eighth Judicial District Court, the Honorable Elizabeth Gonzalez Presiding

RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

Marquis Aurbach Coffing
Terry A. Moore, Esq.
Nevada Bar No. 7831
Collin M. Jayne, Esq.
Nevada Bar No. 13899
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
tmoore@maclaw.com
cjayne@maclaw.com
Attorneys for Respondent/Cross-Appellant,
Tropicana Investments, LLC

MAC:08732-0324091614_5

NRAP 26.1 DISCLOSURE

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 Justices of this Court may evaluate possible disqualification or recusal.

1. Respondent/Cross-Appellant, Tropicana Investments, LLC ("Tropicana"), is a California limited-liability company, with no parent company. No publicly held entity owns 10% or more of Tropicana's stock.

2. Tropicana is represented in the district court and this Court by Terry A. Moore, Esq. and Collin M. Jayne, Esq. of Marquis Aurbach Coffing.

Dated this 4th day of November, 2020.

MARQUIS AURBACH COFFING

By /s/ Terry A. Moore
Terry A. Moore, Esq.
Nevada Bar No. 7831
Collin M. Jayne, Esq.
Nevada Bar No. 13899
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent/Cross-Appellant, Tropicana Investments, LLC

TABLE OF CONTENTS

ANSWERING BRIEF ON APPEAL

OPENING BRIEF ON CROSS-APPEAL

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

TREATISES

I. ROUTING STATEMENT

Respondent/Cross-Appellant, Tropicana Investments, LLC ("Tropicana") agrees with Appellant/Cross-Respondent JSJBD Corp. dba Blue Dogs Pub ("JSJBD") that this case should be retained by the Supreme Court pursuant to NRAP 17(a)(9), as the case originated in business court.

II. ISSUES ON APPEAL

1. Whether the district court correctly found that the parties reached an agreement as to the material terms of the lease option period, when substantial evidence was presented that the parties agreed to a rent term which JSJBD offered through its attorney, and that JSJBD performed in accordance with the agreement for over two years without protest.

2. Whether the district court properly held the parties to the lease terms they agreed to, and thereby concluded that an analysis of "reasonable" rent under *Cassinari v. Mapes*[1] was unnecessary.

3. Whether the district court properly awarded Tropicana its reasonable attorneys' fees, where (1) the lease requires JSJBD to pay Tropicana's reasonable attorneys' fees incurred in connection with a default by JSJBD, and (2) the district

[1] 91 Nev. 778, 542 P.2d 1069 (1975).

court specifically found that JSJBD defaulted under the lease by failing to pay full rent, and that Tropicana retained an attorney in connection therewith.

4. Whether the district court properly awarded costs to Tropicana as a prevailing party, and improperly awarded fees and costs to JSJBD, when Tropicana was the prevailing party who was awarded a total net damages award of over $8,000.

III. STATEMENT OF THE CASE

This appeal concerns a dispute over rent applicable to an option period for a commercial lease. JSJBD, the tenant, attempted to negotiate for a "market rental rate" term for the option period's rent, but Tropicana, the landlord, did not agree to that metric. Instead, the parties agreed that the option at issue would be subject to "terms and conditions, including but not limited to rental increases, to be negotiated." Nine years later, JSJBD timely exercised the option, and the parties negotiated and agreed on rent applicable to the option period. After two years of paying the agreed-upon rent, and thereby performing under that agreement without protest, JSJBD reneged on the agreement, unilaterally asserting that it should only be required to pay "market rent" for the option period. When Tropicana disagreed, JSJBD filed suit seeking a judicial declaration of the "reasonable rent" applicable to the option period under *Cassinari v. Mapes*.

JSJBD's case is nothing more than an ill-fated attempt to insert a "fair market value" term into the parties' lease despite the fact that Tropicana had expressly and specifically rejected JSJBD's attempt to include that very same language during the parties' initial lease negotiations. The district court saw through JSJBD's ruse and properly determined that JSJBD's arguments were inconsistent with the parties' negotiations and the express terms of the lease. Not surprisingly, this is a critical point that JSJBD fails to address anywhere in its Opening Brief.

After five days of trial, the district court found in Tropicana's favor, finding that the parties had reached an agreement as to rent for the option period. Further, the district court found, based on expert testimony, that the rent schedule advance by Tropicana was "reasonable" under *Cassinari v. Mapes*. Accordingly, the district court declared that rent for the option period be set based on the rent schedule relied upon by Tropicana, rather than the requested "market rate" rent proffered by JSJBD. The district court further ruled in Tropicana's favor on its breach of lease claim, awarding Tropicana $13,000[2] in monetary damages, based on JSJBD's underpayment of rent. The district court also found in JSJBD's favor on an ancillary issue concerning payment of Common Area Maintenance charges ("CAMs"),

[2] As is detailed in Tropicana's cross-appeal, the correct calculation of underpaid rent based on the district court's own findings is actually $16,780.

awarding JSJBD $4,578 that had been overpaid. As a result, Tropicana received a net monetary judgment of $8,422 and was the prevailing party.

Both parties then moved for attorneys' fees and costs. The district court properly found that Tropicana was entitled to recover its reasonable attorneys' fees by virtue of a lease term permitting Tropicana the right to recover reasonable fees in the event of a default by JSJBD. Although the district court did not award JSJBD a "net" monetary judgment, the district court erroneously concluded that JSJBD was also a prevailing party recovering less than $20,000, and awarded fees and costs to both sides. This was an error, as Nevada law provides that there can be only one prevailing party, determined by the total net judgment awarded. As such, JSJBD cannot be considered a prevailing party where Tropicana was awarded a higher amount of monetary damages, and Tropicana prevailed on the primary issue.

The district court's conclusion that Tropicana is entitled to its fees and costs is correct as a matter of law, under both the lease's attorneys' fees provision and the proper determination that Tropicana was a prevailing party. Thus, the district court's ruling as to rent for the option period, and its award of attorneys' fees and costs to Tropicana, were based on substantial evidence and should not be disturbed.

IV. STANDARDS OF REVIEW

This Court will not disturb a district court's findings of fact unless they are clearly erroneous and not supported by substantial evidence. *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

This Court reviews decisions awarding or denying attorney fees with an abuse of discretion standard. *Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000). Since an award of attorney fees is fact intensive, this Court will affirm an award of attorney fees if it is based upon substantial evidence. *See Logan v. Abe*, 350 P.3d 1139, 1143 (Nev. 2015). When the attorney fees matter implicates questions of law, the proper review is de novo. *In re Estate and Trust of Rose Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009).

The determination of allowable costs is within the sound discretion of the trial court. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).

V. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. THE ORIGINAL LEASE.

The lease at issue was executed in 1996, between the predecessors-in-interest to both Tropicana and JSJBD. [10 Appellants' Appendix ("AA") 2259].[3] The lease concerns a tavern now named Blue Dog's Pub. [5 AA 1145:10-19]. The initial term of the lease was for five years, at minimum monthly rent beginning at $3,150, and increasing on the first day of each subsequent year by $210. [10 AA 2260]. This pattern of annual $210 increases would continue virtually uninterrupted for twenty years, with the sole exception of two years where the parties agreed to maintain the same rent due to economic hardship during the Great Recession. [10 AA 2260–80; 6 AA 1355:18–25].

Section 24 of the lease contains an attorneys' fees provision, entitling the landlord (and only the landlord) to recover reasonable attorneys' fees in the event of a default by the tenant:

> In the event the Landlord finds it necessary to retain an attorney in connection with the default by the Tenant in any of the agreements or

[3] JSJBD's Appellants' Appendix includes numerous exhibits that were either offered at trial but not admitted, or not even offered at trial, and does not raise any issues concerning the admissibility of those exhibits. To the extent that JSJBD relies on any evidence which was not admitted at trial, Tropicana objects to the use of such evidence on appeal. Specifically, this includes documents included in Appellants' Appendix at pages 2311–18, 2330–32, 2341–50, 2357–2466, 2473–2504, 2515–36, 2539–57, 2612–28, and 2727–32.

> covenants contained in this Lease, Tenant shall pay reasonable attorney's fees to said attorney.

[10 AA 2265].

The original lease provided two five-year options to extend the lease term, (to begin September 1, 2001 and September 1, 2006), if the tenant was in full compliance with the terms of the lease. [10 AA 2267]. Both of these first two options were to be "at a market rental rate and terms as agreed by Landlord and Tenant." [*Id*]. The tenant exercised both options: the first on April 16, 2001, as memorialized in an Amendment to Retail Building Lease ("2001 Amendment") [10 AA 2269], and the second on March 7, 2006, as memorialized in an Addendum to Retail Building Lease ("2006 Addendum") [10 AA 2272]. The 2006 Addendum also granted the tenant "one (1) final extension term of five (5) years," to begin on September 1, 2011, and provided that such option period would be "under terms and conditions to be negotiated." *Id*.

B. JSJBD BUYS THE BUSINESS AND NEW OPTIONS ARE GRANTED.

Tropicana purchased the property in 2001. [9 AA 2021:17–18]. At some point in 2007, JSJ, LLC—the entity that would become JSJBD through a corporate conversion years later—purchased the assets in the tavern business from the previous tenant. [5 AA 1145:10–19]. Tropicana, JSJ, and the previous tenant

negotiated terms of the assignment of the business and the lease, resulting in a 2007 Lease Assignment and Modification agreement ("2007 Lease Modification"). [10 AA 2275].

As part of these negotiations, the previous tenant assigned the 2006 Addendum to JSJ (which provided a yet-to-be exercised five-year option to begin September 1, 2011), the three individual members of JSJ signed personal guaranties of JSJ's obligations under the lease, [1 Respondent's Appendix ("RA") 11–19] and Tropicana agreed to grant JSJ three more conditional five-year options to extend the lease term, the first to be available on September 1, 2016. [10 AA 2274].

Notably, during the parties' negotiations of the 2007 Lease Modification, JSJBD twice attempted to include language that provided for rent for the options be set at "Fare [sic] market value[,]" [3 RA 517–18] and Tropicana rejected that proposal. [6 AA 1326:18–27:11; 8 AA 1960:11–64:4]. Ultimately, the parties agreed that they would negotiate terms for each option period at a later date, however, the parties specifically agreed that rental increases were to be applied to each option:

> …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 after

> August 31, 2016, provided Assignee has timely complied with all terms and conditions of the Lease.

[10 AA 2274–78, § 8] (emphasis added).

In or about February 2011, JSJ communicated to Tropicana that it intended to exercise the option granted in the 2006 Addendum, to begin September 1, 2011, and once again requested that the option be subject to fair market rent. [8 AA 1965:1–13]. Although Tropicana declined to reduce the rent for the option period, in light of the Great Recession that was severely impacting the Las Vegas economy, the parties agreed that monthly rent for the first two years of the option would remain at the same rate as was paid in the previous year, and that regular annual increases of $210—as had been the norm for the previous fifteen years—would resume at the beginning of each of the remaining three years of the option period (2013, 2014, and 2015). [8 AA 1965:13–66:23; 9 AA 2065:4–66:1]. JSJ's exercise of the 5-year option beginning September 1, 2011 was memorialized in an Addendum II to Retail Building Lease ("2011 Addendum"), reflecting the agreement as to rent. [10 AA 2279]. As a result of this agreement, monthly rent for the final year of the option period, September 1, 2015 through August 31, 2016, was $8,190. *Id.*

C. JSJBD EXERCISES THE OPTION BEGINNING IN SEPTEMBER 2016, AND THE PARTIES AGREE ON A RENT SCHEDULE FOR THAT OPTION PERIOD.

In early 2016, JSJBD[4] notified Tropicana that it intended to exercise the five-year option beginning September 1, 2016. [10 AA 2282]. JSJBD further demanded that monthly rent be reduced by $2,500 from the then-current rate of $8,190—a reduction of more than 30%. [10 AA 2283]. Tropicana rejected the request for a rent reduction, as it was inconsistent with the terms of the lease documents and was contrary to the parties' course of dealing where rent had never decreased, but rather increased nearly every year. [9 AA 2067:1–68:3].

On June 15, 2016, Tropicana extended an offer in writing to JSJBD that, among other terms, proposed that the amount of base rent for the initial year of the lease extension (2016–2017) would remain the same as the previous year (2015–2016), which amounted to $8,190 per month with annual 3% increases thereafter. [1 AA 178]. On August 2, 2016, Lesley Miller, Esq., notified Tropicana that she represented JSJBD, re-asserted that JSJBD had exercised its option set to begin on September 1, 2016, and requested that base monthly rent for the first year of the

[4] At some point in time before February 2016, JSJ underwent a corporate conversion to become JSJBD, and also partially changed its members. [6 AA 1350:17–51:15]. Facts related to the conversion are not at issue in this appeal.

option period remain the same as the previous year. [10 AA 2306; 9 AA 2071:2–17].

On August 31, 2016, Miller sent another letter to Tropicana, again reiterating JSJBD's exercise of the option rights, and attaching a proposed amendment to the lease that provided the following rent schedule:

> 9/1/2016 to 8/31/2017 - $8,400 per month, $100,500.00 per annum
> 9/1/2017 to 8/31/2018 - $8,400 per month, $100,500.00 per annum
> 9/1/2018 to 8/31/2019 - $8,610 per month, $103,320.00 per annum
> 9/1/2019 to 8/31/2020 - $8,820 per month, $105,840.00 per annum
> 9/1/2020 to 8/31/2021 - $9,030 per month, $108,360.00 per annum

[3 RA 398–404; 9 AA 2071:18–72:2].

On September 7, 2016, Tropicana's counsel, John Sacco, Esq., sent a letter to Miller discussing several non-material terms which Tropicana wished to clarify or amend in the new lease. [3 RA 405–10]. Sacco's correspondence did not disagree with or reject the amount of rent proposed by Miller's previous letter, and further confirmed that the terms he did address were the "final matters" for the parties to work through. *Id*. Sacco's undisputed testimony at the time of trial was that he then called Miller to discuss the lease terms more expediently, and the two had a conversation during which Sacco confirmed that Tropicana "was fine with the rent schedule that she had proposed, including the rental increase." [9 AA 2123:22–24:9; 2125:20–30:6].

D. FOR TWO YEARS, JSJBD PAYS FULL RENT CONSISTENT WITH THE AGREEMENT UNTIL IT DECIDES TO RENEGE ON THE AGREEMENT.

Although the parties were never able to execute a new lease document memorializing all terms applicable to the option period, the agreement as to monthly rent was evident. JSJBD began paying $8,400 per month in September 2016, which was precisely the amount offered by JSJBD through counsel on August 31, 2016 and agreed to by Tropicana's counsel on September 7, 2016. [7 AA 1534:5–37:18; 9 AA 2073:25–76:25; 9 AA 2124:25–25:2; 11 AA 2580]. Tropicana, understanding that an agreement had been reached as to the rent even if other non-material terms were still being discussed, accepted JSJBD's payments without complaint. [9 AA 2073:25–75:23].

On or about August 7, 2017, nearly a year after the option period began, JSJBD retained new counsel, Lucas Grower, Esq. [3 RA 411; 9 AA 2159:7–22]. On August 31, 2017, Grower sent a letter to Tropicana's counsel which demanded that negotiations for the lease terms be re-opened and asserted, for the first time, that JSJBD was only required to pay rent based on "market rental rate." [10 AA 2337; 9 AA 2173:19–75:5]. Tropicana disagreed, informing Grower that the parties had reached an agreement as to rent a year prior, and that the option provision did not provide for negotiations based on market rental rate, but rather expressly provided

for "rental increases" to be negotiated. [3 RA 495; 9 AA 2178:9–79:7]. Despite the tenant's puzzling communication, JSJBD continued paying monthly rent of $8,400 for the entire second year of the option period (September 2017–August 2018) consistent with the rent schedule that had been agreed upon a year earlier. [6 AA 1374:18–20; 11 AA 2569]. At no point during the first or second year of the option term did JSJBD ever communicate to Tropicana that the payments were being made under protest or reservation of rights. [6 AA 1366:13–71:18; 7 AA 1534:14–23.].

In September 2018, when the agreed-upon rent schedule provided that monthly rent would increase to $8,610, JSJBD continued paying $8,400. [11 AA 2602; 10 AA 2355; 8 AA 1983:10–25]. Tropicana reiterated its disagreement with the "market rent" notion, notified JSJBD that it was in default under the lease, and served a 30-day notice to pay full rent or quit the premises. [11 AA 2733; 6 AA 1484:6–85:9].

E. JSJBD FILES SUIT, AND TROPICANA FILES COUNTERCLAIMS.

On November 30, 2018, JSJBD (through its third attorney) filed the instant lawsuit seeking a judicial declaration fixing the amount of monthly rent for the five-year option period at a "reasonable / market rent for the premises based on market conditions." [1 AA 1]. JSJBD additionally asserted claims for breach of lease and breach of implied covenant of good faith and fair dealing, based on allegations that

Tropicana had overcharged for CAMs and had failed to repair and maintain the premises as required. *Id.*

Tropicana asserted counterclaims, seeking (1) judicial declarations that rent was not subject to market rental rate, that JSJBD did not negotiate in good faith, that JSJBD did not satisfy all conditions of the option provision, and that JSJBD is a month-to-month holdover tenant, or in the alternative, if the option was properly exercised, that rent was agreed to by the parties as a result of Leslie Miller's correspondences; (2) damages for JSJBD's breach of lease caused by underpayment of rent; (3) damages for breach of the implied covenant of good faith and fair dealing for JSJBD's refusal to acknowledge the requirement of rent increases; and (4) should JSJBD be found to be a holdover tenant, eviction of JSJBD from the premises. [1 AA 25–37]. Tropicana asserted these counterclaims against JSJBD, as well as the individual counter-defendants who personally guaranteed JSJBD's performance under the lease. *Id.*

F. THE DISTRICT COURT'S SUMMARY JUDGMENT RULING AND CLARIFICATION DUE TO JSJBD'S MISUNDERSTANDING.

Near the end of discovery, both parties moved for summary judgment on discrete portions of their respective cases. [1 AA 119; 1 AA 204]. In resolving both

motions after oral argument, the district court orally stated her ruling, holding that the option was properly executed, but rent would need to be decided at trial:

> So the countermotion is granted in part. The option under the 2007 agreement was properly executed. However, since **the option does not include an amount of rent**, the Court will need to make **a determination at an evidentiary hearing or bench trial related to the appropriate amount** of that, including **whether the tenant waived any claim for lower rent** and **whether market conditions should influence the Court's determination of rent** and **whether partial performance has waived a claim of lower rent**.

[2 AA 478:1–9] (emphasis added). Of particular note, the district court did not make any finding as to whether any agreement to rent was or was not reached.

JSJBD prepared a written order—without allowing Tropicana an opportunity to review it—which the district court signed. [2 AA 480]. This order, contrary to the district court's oral ruling, includes a finding "that the parties have not been able to agree on an amount for rent" for the 2016–2021 option period. [2 AA 481:3–4]. The written order then states that JSJBD's motion is granted such that JSJBD "has an enforceable option" for the 2016–2021 period, and that "the Court will determine whether it has been properly exercised and if so the reasonable rental rate for such option period subject to the proof, etc. presented by the parties at trial." [2 AA 481:14–17].

Subsequent to this order being entered, Tropicana took the deposition of JSJBD's 30(b)(6) designee concerning eight (8) identified topics. [3 RA 519–21].

At that deposition, JSJBD's counsel repeatedly objected to questions regarding the 2016 correspondence between counsel for JSJBD and Tropicana based on relevance, stating his belief that the district court had ruled that there was no agreement as to rent for the option period. [*e.g.* 3 AA 516–18]. Related to this objection and others, the parties conducted a telephonic conference with the district court, at which time JSJBD's counsel repeated his position that the district court had "rejected" Tropicana's claim that an agreement was reached as to rent. [3 AA 518, 124:25–125:9]. In overruling JSJBD's objections, the district court stated that she was "concerned about the relevance objection," and confirmed that the subject was not beyond the scope of discovery. [3 AA 519, 126:17–20]. In light of the inconsistencies between the district court's oral ruling and JSJBD's interpretation of the ruling, Tropicana filed a motion to correct and clarify the order. [3 AA 726].

At the hearing on the motion for clarification, the district court read the transcript from the hearing on the motions for summary judgment and confirmed that the oral ruling, rather than the written order, was an accurate representation of what issues would be litigated at trial. [5 AA 1012:11–15 ("Yeah. Those are what we're going to do at trial.")]. The trial court recognized "that there could be some confusion. And if we didn't have a system where the judge handles the case from beginning to end, it might be an issue. But those [issues stated on the record at the

first hearing] are the things we're trying." [5 AA 1013:12–15]. Later at that same hearing, JSJBD's counsel repeated his misunderstanding of the district court's summary judgment ruling by attempting to rely on the inaccurate order:

> MR. LOVATO: …when you already have a decision from the Court about his main argument about the August 2nd, 2016 letter, that it is not a contract, every point was rejected. … When that's already been decided that it doesn't have bearing on this case, there's already been dispositive relief granted, why are we going to do discovery about a letter that Leslie Miller sent on August 2nd?

[5 AA 1026:21–27:4].

Following this statement, Tropicana's counsel noted that JSJBD's argument exhibited JSJBD's erroneous belief that the district court had already rejected the possibility of an agreement being reached in 2016, which was the purpose for the motion to clarify. [5 AA 1029:10–22]. In response, the district court unequivocally stated that JSJBD's statements and interpretation as to her rulings were "not true:"

> MR. MOORE: This is why there was confusion over the order. You know, you heard it, you've already ruled and rejected all of their—I've been hearing this. And that's—
>
> THE COURT: That's not true.
>
> MR. MOORE: I know it's not true, Your Honor.
>
> THE COURT: Okay.
>
> MR. MOORE: That's why I wanted the motion to clarify, because I've been being told that you've already considered all of my arguments and you've rejected them completely so basically I've got nothing to argue

at trial. And that's why I want to be able to—that's why I sought to clarify that order.

THE COURT: I understand.

[5 AA 1029:10–22].

The district court declined to enter a written order clarifying the ruling, but rather stated that she understood the problem and that she had now clarified what issues would be dealt with at trial. [5 AA 1013:17–1014:25]. Contrary to JSJBD's tortured interpretation of the district court's ruling, it is clear from this discussion that the district court did not rule out the possibility that an agreement was reached as to rent for the option period, and that the court was going to make any such determination based on the evidence presented at trial.

G. JSJBD'S 30(b)(6) DESIGNEE TESTIFIES TO AN ALMOST COMPLETE LACK OF KNOWLEDGE REGARDING THE LEASE, THE NEGOTIATIONS, AND ITS DAMAGES.

During discovery, Tropicana noticed the deposition of JSJBD's NRCP 30(b)(6) designee, listing eight enumerated topics on which the witness must appear and provide testimony on concerning the following:

a. JSJBD's lease;
b. JSJBD's communications with Tropicana or Tropicana's agents during the term of the lease;
c. JSJBD's compliance with the obligations imposed by the lease;
d. JSJBD's alleged damages;
e. Tropicana's alleged breaches of the lease as alleged by JSJBD;

f. JSJBD's lease payments;
g. Any issues involving maintenance of the premises; and
h. JSJBD's corporate structure, members and officers, and conversion into the corporate entity.

[3 RA 520].

JSJBD designated one witness, Jeffrey Vincent, to serve as JSJBD's NRCP 30(b)(6) designee. Mr. Vincent testified nearly three hundred times that he had no knowledge regarding specific questions concerning these subjects, including facts pertaining to the negotiation of the lease, what JSJBD believed market rental rate would be for the premises, what JSJBD understood particular lease terms to mean, whether JSJBD complied with the lease, what payments JSJBD made to Tropicana, or what JSJBD's damages were. [3 AA 584–614]. Additionally, on approximately 34 occasions, the NRCP 30(b)(6) designee refused to answer numerous questions about the contents of documents, stating only that the document "speaks for itself." *Id.* At one point, due to JSJBD's counsel's and the witness's obstructiveness, Tropicana's counsel was forced to conduct a telephonic conference with the district court for guidance on whether the witness was required to answer Tropicana's questions, with the district court ordering the witness to answer. [3 AA 518]. JSJBD's designee did not make any changes to the substance of his responses pursuant to NRCP 30(e). [3 AA 532].

After the NRCP 30(b)(6) deposition concluded with only marginal substantive testimony, Tropicana moved the district court for an order binding JSJBD to the NRCP 30(b)(6) designee's testimony at trial as to the matters to which JSJBD's designee testified that he had no knowledge. [3 AA 584]. Further, the witness's nonresponsiveness as to whether JSJBD's counsel had been authorized to negotiate on its behalf with Tropicana prevented Tropicana from developing its defense and counterclaim as to the agreement the parties reached in 2016. *Id.*

At the hearing on Tropicana's motion, the district court stated that the witness's conduct was unacceptable for a NRCP 30(b)(6) designee and admonished JSJBD's attorney for failing to prepare his witness. [5 AA 1023:25–25:8]. JSJBD's counsel acknowledged that there were a lot of "I don't know" answers, and the district court held "[h]e doesn't get to do that with a 30(b)(6). He either gets to have . . . this 30(b)(6) redeposed for him to provide real answers, or he gets bound by those answers. That's what happens ... . That's why you do a 30(b)(6) depo." [5 AA 1020:19–21:1]. In response, JSJBD's attorney confirmed that the 30(b)(6) designee was fully prepared for his deposition and, thus, confirmed that his responses reflected JSJBD's position. [5 AA 1024:25–25:8]. As such, the district court entered an order (1) binding JSJBD to any lack of knowledge expressed by its designated 30(b)(6) witness regarding topics included in the notice of deposition,

(2) prohibiting JSJBD from offering contradictory testimony at trial as to any topic to which JSJBD's designee testified to a lack of knowledge, and (3) establishing that the communications from JSJBD's counsel were duly authorized. [5 AA 1067].

H. TROPICANA PREVAILS AT TRIAL.

1. JSJBD Attempts to Offer Contradictory Testimony.

The case was tried to the bench from November 18, 2019 through November 22, 2019. Almost immediately upon beginning its case-in-chief, it became apparent that JSJBD's intention was to engage in trial-by-ambush and attempt to suddenly have the same NRCP 30(b)(6) witness now provide substantive answers in place of all of the prior "I don't know" responses that same designee had provided at trial. [*See* 5 AA 1146:4–21]. During testimony of JSJBD's principals, Tropicana was repeatedly required to request enforcement of the district court's order, as the witnesses repeatedly attempted to offer testimony that contradicted the testimony given at the NRCP 30(b)(6) deposition. [*See, e.g.* 5 AA 1156:1–9, 1159:12–15, 1173:15–1174:15, 1402:19–1403:4, 1407:14–1408:1].

As a result of JSJBD's dogged attempts to ignore the district court's order and contradict its prior testimony, the district court's findings of fact expressed in no uncertain terms that JSJBD's principals had lost all credibility, and that the district

court was forced to rely upon the documentary evidence admitted during the proceedings. [11 AA 2746, ¶ 71].

2. Experts Provide Testimony on Reasonable Rent for the Option Period.

Both sides produced experts who examined comparable properties to estimate what a reasonable rent would have been for the premises as of September 1, 2016. [8 AA 1754–1846; 8 AA 1892–1950]. JSJBD's expert testified to his opinion that the fair market rental rate was $1.05 per square foot, or $4,410 per month. [8 AA 1770]. Meanwhile, Tropicana's expert testified to his opinion that the fair market rental rate was $1.75 per square foot, or $7,350 per month. [8 AA 1896]. At the conclusion of trial, the district court found that both experts were credible, but specifically found that Tropicana's expert utilized more applicable comparable properties. [11 AA 2744, ¶59].

3. The District Court Agrees with Tropicana's Arguments as to Rent for the Option Period.

The District Court ultimately agreed with Tropicana on the main issue in the case, finding that that parties had agreed upon the rent schedule proposed by JSJBD's counsel in September 2016, and refusing to reduce the rent to the amounts argued by JSJBD. [11 AA 2742–48, ¶¶ 45–50, 54–55, 89–91]. The district court further found that the $8,400 in monthly rent that JSJBD agreed to and did, in fact,

pay for the first two years of the option period was "not an unreasonable amount of rent for the option period," and "reflects a reasonable amount of rent under *Cassinari*." [11 AA 2744, ¶ 60; 11 AA 2748, ¶ 90]. The district court's finding of reasonableness was supported by analysis that this amount "comports with the terms of the option exercised by [JSJBD], as well as the understanding of the parties that rent would increase during the option periods, and reflects the schedule [JSJBD]'s attorneys proposed and [Tropicana] accepted." [11 AA 2744, ¶ 60].

After finding that JSJBD deviated from the schedule of agreed-upon monthly rent beginning in September 2018, the district court held that JSJBD underpaid rent due in the amount of $13,000, constituting a default and breach of JSJBD's obligations under the lease. [11 AA 2745, ¶ 61; 2749, ¶¶ 92–93]. As such, the district court found in Tropicana's favor on its breach of lease claim, and ordered JSJBD to pay compensatory damages of $13,000. [12 AA 2751 ¶ 109; 2752:19–24].

4. The District Court Grants JSJBD a Smaller Amount of Damages Based on Impermissible CAM Charges.

Additionally, the district court found that the lease does not permit Tropicana to charge "reserves" as a CAM expense. [11 AA 2749 ¶ 94]. Based on this fact, the district court held that Tropicana's practice of charging for "reserves" in the CAM expenses assessed to JSJBD was both a breach of contract and a breach of the

covenant of good faith and fair dealing. [11 AA 2749, ¶ 95; 2750, ¶ 104]. The district court, therefore, ordered Tropicana to reimburse JSJBD for the overpayment, which totaled $4,578. [11 AA 2749 at n.7]. Thus, the district court entered judgment in JSJBD's favor on its breach of contract claim, awarding compensatory damages of $4,578, and further entered judgment in JSJBD's favor on its breach of implied covenant of good faith and fair dealing claim, "in the amount of the attorney's fees and costs related to the CAM expense portion of the litigation only."[5] [12 AA 2752:7–15]. Finally, the district court erroneously entered judgment in JSJBD's favor on the declaratory relief claim, despite the outcome of the declaratory relief claim being that the district court established a rent schedule for the option period precisely in line with the rent schedule requested by Tropicana. [12 AA 2751–52].

I. BOTH PARTIES MOVE FOR ATTORNEYS' FEES AND COSTS, AND TROPICANA MOVES TO AMEND THE JUDGMENT.

Following notice of entry of the district court's ruling, both parties timely filed memoranda of costs and also moved for awards of attorneys' fees. [12 AA 2754–2828; 12 AA 2829–92; 12 AA 2893–2973; 13 AA 3075–98; 13 AA 3099–3131].

[5] As detailed *infra* in Tropicana's Opening Brief on Cross-Appeal, no evidence of attorneys' fees incurred by JSJBD had been disclosed or offered at trial. Thus, in addition to the award of a portion of attorneys' fees as special damages being legally unsound, the award of attorneys' fees was also factually unsupported and, therefore, an abuse of discretion.

JSJBD requested fees and costs based on NRS 18.010(2)(a) and NRS 18.020, based on its contention that it was the prevailing party. [13 AA 3075]. Meanwhile, Tropicana's motion similarly relied on NRS 18.010(2)(a) and NRS 18.020, as well as Section 24 of the lease which provides that Tropicana is entitled to recover its reasonable attorneys' fees in the event of a default by JSJBD, regardless of which party prevailed. [13 AA 3099].

Concurrently, both parties filed motions to retax the other's claimed costs, based largely on a disagreement as to who the prevailing party was. [12 AA 2974; 12 AA 2987]. Tropicana further filed a motion to alter or amend the judgment, seeking (1) vacation of the general award of a portion of attorneys' fees to JSJBD on the breach of implied covenant claim; (2) amendment of the judgment to state that judgment was entered in Tropicana's favor, rather than JSJBD's favor, on the declaratory relief claim; and (3) a revised calculation of the compensatory damages owed to Tropicana based on the district court's own findings as to the amount of rent underpaid by JSJBD.[6] [13 AA 3132].

[6] As detailed *infra*, the district court found that the monthly rent applicable to the option period increased by $210 per year beginning September 1, 2018, but it appears the district court incorrectly calculated underpaid rent based on a consistent rent amount, with no annual increases. The calculation of underpaid rent using the district court's findings of rent paid by JSJBD and the correct required monthly rent payments reveals total underpayment of $16,780.

In ruling on the various post-trial motions, the district court granted both parties' motions for attorneys' fees, finding that both parties were prevailing parties and, further, that Tropicana was entitled to reasonable attorneys' fees under Section 24 of the lease because JSJBD undisputedly defaulted. [14 AA 3362; 14 AA 3382]. Specifically, while the district court found that Tropicana was entitled to its reasonable fees and costs under Section 24 of the lease regardless of whether it prevailed, it, nevertheless, made a factual finding that Tropicana **did prevail** on its breach of contract counterclaim, and, therefore, Tropicana was a prevailing party. [14 AA 3363:20]. Separately, the district court granted JSJBD's motion for fees because "JSJBD Corp was, and is, the prevailing party in this matter as pertains to the claims in the Complaint filed by JSJBD Corp. ..." [14 AA 3383]. The district court also partially granted each party's motion to retax costs. [14 AA 3371; 14 AA 3385]. Finally, the district court denied Tropicana's motion to alter or amend entirely. [14 AA 3380]. Final judgment was entered on February 25, 2020. [14 AA 3394]. This appeal followed.

VI. LEGAL ARGUMENT

A. SUMMARY OF ARGUMENT.

There are numerous bases for this Court to reject JSJBD's arguments on appeal. First, the district court relied upon the substantial evidence presented to find

that an agreement as to the rent schedule for the option period was agreed upon, and JSJBD has failed to demonstrate that the district court's factual determination was an abuse of discretion or was not supported by substantial evidence. Furthermore, the district court's evidentiary rulings were entirely proper and consistent with Nevada law and were not an abuse of the court's discretion.

Second, after correctly finding that an agreement was reached as to rent for the option period, the district court properly applied the terms of that agreement in declaring the rent applicable to the option period. The "reasonable rent" analysis JSJBD requested pursuant to *Cassinari v. Mapes* is only legally appropriate where no rent term is provided, and the parties fail to agree on rent. As the district court found that the parties here did agree on rent, it followed Nevada law in declining to overturn that agreement in favor of a "reasonable rent" analysis. Nevertheless, the district court specifically found that the agreed-upon rent was reasonable under *Cassinari*.

Third, the district court properly applied the attorneys' fees provision in the lease, which entitles Tropicana to an award of reasonable attorneys' fees in the event JSJBD defaults in its obligations. The district court found that JSJBD defaulted, and the district court correctly followed the plain language of the lease in awarding Tropicana its attorneys' fees. The provisions of NRS 18.010 offer a second potential

basis for the award of attorneys' fees to Tropicana as a prevailing party that recovered less than $20,000, and that statute does not limit the enforceability of express attorneys' fees provisions.

Finally, while the district court incorrectly concluded that both parties were prevailing parties, the district court's determination was correct as it pertained to Tropicana. Nevada law permits a single prevailing party, determined by the party that is awarded a "net damages award," after offsetting all awards to all parties. As the district court awarded Tropicana $8,422 more in damages than it awarded to JSJBD, it was correct to conclude that Tropicana was entitled to its costs of suit as a prevailing party under NRS 18.020.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING AN AGREEMENT WAS REACHED AS TO RENT, AND ENFORCING THAT AGREEMENT.

1. An Agreement as to Rent Renders *Cassinari* Inapplicable.

The ruling from *Cassinari v. Mapes*, on which JSJBD's entire case rests, applies to enable a tenant to enforce an option where rent applicable to the option period is the only material term to be left for future agreement and no agreement is actually reached. 91 Nev. 778, 781, 542 P.2d 1069, 1071 (1975). Here, based on the unrefuted witness testimony and the substantial documentary evidence presented and admitted at trial, the district court found that an agreement was reached as to

rent, as well as to all other material terms for the option. Moreover, consistent with those findings and with the evidence, the district court determined that the amount of rent as proffered by Tropicana was "reasonable," even though the district court was not required to perform a *Cassinari* analysis. This decision was sound, supported by substantial evidence, and should not be disturbed on appeal. It is well settled in Nevada that, "[t]his court will not disturb the district court's factual determinations if substantial evidence supports those determinations" and "will only set aside findings that are clearly erroneous." *J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev, 366, 380–81, 240 P.3d 1033, 1043 (2010). "Substantial evidence is that [evidence] which 'a reasonable mind might accept as adequate to support a conclusion.' " *Id.*

An option to extend a lease term, like any other contract, is enforceable once the parties reach an agreement as to all material terms. *Cert. Fire Prot., Inc. v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012). Conversely, if any material term is not agreed to, the option is unenforceable. *See, e.g. City of Reno v. Silver State Flying Serv., Inc.*, 84 Nev. 170, 173, 438 P.2d 257, 259 (1968) (agreement to negotiate as to terms and conditions of a lease extension was unenforceable for lack of specificity).

Further, as an enforceable contract requires only agreement as to all material terms, any continued discussion between the parties of non-material terms does not destroy the enforceability of the contract. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Though JSJBD's Opening Brief misapplies the "mirror image rule," the caselaw it cites supports this conclusion—when an offer is made, an agreement which includes additional terms not stated in the offer is still an agreement, so long as there is no disagreement as to the material terms. Appellants' Opening Br. at 41; *May*, 121 Nev. at 672, 119 P.3d at 1257 ("With respect to contract formation, preliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms. … A contract can be formed, however, when the parties have agreed to the material terms, even though the contract's exact language is not finalized until later.").

Which terms are material in a given situation "depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought." *Cert. Fire Prot.*, 128 Nev. at 378, 283 P.3d at 255 (quoting Restatement (Second) of Contracts § 131 cmt. g (1981)). Nevada law provides that, like a lease agreement, an option to extend a lease has five material terms: (1) the names of the parties; (2) a description of the property; (3) the amount of rent; (4) when rent is payable; and (5) the duration of the lease or option term.

Reno Club v. Young Inv. Co., 64 Nev. 312, 330, 182 P.2d 1011, 1012 (1947). As such, contrary to JSJBD's baseless assertions, terms such as "parking" are not within the finite category of material terms for an option.

This Court's decision in *Cassinari v. Mapes* created a unique exception to the general rule that a contract is unenforceable if any material terms are undefined. The *Cassinari* exception applies solely in the specific scenario where a lease option provides all material terms except for rent, and where the parties are unable to subsequently agree on rent. *Cassinari v. Mapes*, 91 Nev. 778, 781, 542 P.2d 1069, 1071 (1975). In *Cassinari*, similar to the case at bar, the lease provided an option to extend the lease term "upon the same terms and conditions as herein set forth, at a monthly rental to be determined at that time." *Id.* at 780, 542 P.2d at 1070. The tenant timely communicated his intention to execute the option, but the parties were unable to agree on rent for the option period, leading the landlord to seek eviction and the tenant to file suit for a declaration as to the status of the lease. *Id.* To preserve the enforceability of the option under these circumstances, the *Cassinari* Court held that a tenant who is unable to secure an agreement as to rent in these circumstances may apply to the courts for a determination as to what "reasonable rent" should apply to the option period. *Id.* at 781, 542 P.2d at 1071 ("If unable to

agree, a court should be allowed to fix the rental since economical conditions are ascertainable with sufficient certainty to make the clause capable of enforcement.").

Here, there is no dispute[7] that all terms material to the option other than the amount of rent were set forth either in the lease itself (for the identities of the parties, the description of the property, and when rent is payable) or in the option provision provided in the 2007 Lease Modification (for the duration of the option term). [10 AA 2259; 10 AA 2274]. Thus, the applicability of *Cassinari* to this case depends on whether there was an agreement as to rent; if an agreement was reached between the parties as to rent—the final material term—then the option contract became enforceable on those terms, and no *Cassinari* determination was necessary. The district court found this to be the case, and properly enforced the lease according to the agreed-upon terms.

At trial, the district court heard substantial and largely unrefuted testimony establishing that the parties reached an agreement as to the rent to be paid by JSJBD. JSJBD offered a particular rent schedule in the letter its counsel was authorized to send on August 31, 2016, which included a proposed lease amendment. [3 RA 398–404]. Tropicana responded, through counsel, agreeing to everything except for a

[7] *See* Appellants' Opening Br. 15 ("All terms and conditions of the Lease were already in place, except for the rental rate.").

few non-material terms including parking, security, and signage. [3 RA 405–10]. Tropicana's counsel further testified that he personally communicated to JSJBD's counsel that Tropicana agreed to the rent term proposed. [9 AA 2123–31]. As further evidence of the parties reaching an agreement on the rent amounts, JSJBD began paying rent in accordance with the exact rent schedule the parties had agreed on, and it did so for the first two full years of the option period without complaint or objection. [11 AA 2580–2611].

In sum, there was substantial evidence presented to support the district court's finding that an agreement was reached as to rent. Because rent was agreed upon, all material terms were established, and the option was enforceable. Therefore, the district court was not required to conduct a *Cassinari* determination to find the amount of rent applicable to the option period, but rather was required to enforce the lease under the agreed-upon material terms—which it did. This finding and the corresponding holding were proper under Nevada law, and must not be disturbed on appeal.

2. The District Court was not Precluded from Considering Whether an Agreement was Reached as to Rent.

JSJBD's insistence that the district court somehow violated its own order in resolving the dispute is pure fiction. In reality, the district court's summary judgment ruling did not preclude a factual finding that an agreement was reached as

to rent, nor did it establish as a matter of law that no agreement as to rent had been reached. While the order that JSJBD drafted regarding the cross-motions for summary judgment incorrectly included a statement to this effect, the district court subsequently clarified her order, on motion by Tropicana, and unequivocally stated that JSJBD's position on this issue was incorrect. [5 AA 1012–13; 1029].

Indeed, while the Opening Brief spends pages arguing how the district court's summary judgment order somehow obviates what transpired during the trial, it is particularly telling that the Opening Brief fails to mention or even discuss the fact that the district court subsequently clarified its summary judgment order. The reason why JSJBD deliberately chose not to discuss the district court's clarification of the summary judgment order is obvious—the district court's clarification is unequivocally fatal to the principal arguments that JSJBD's Opening Brief is attempting to make. Indeed, JSJBD is now improperly attempting to convince this Court that the district court misunderstood her own ruling, and the only way to do so is to ignore the district court's subsequent clarification of the summary judgment order. This Court should see through JSJBD's ruse.[8]

[8] It is particularly disingenuous for JSJBD to ignore the applicability of the district court's clarification of the summary judgment order and the issues to be tried when JSJBD's counsel acknowledged understanding the district court's clarification:

The district court's final statement on the outcome of the motions for summary judgment was the clarification she offered in response to Tropicana's Motion to Correct Order of the Court, at the hearing on that motion.[9] As the district court clarified, the result of the summary judgment cross-motions was that trial would be conducted with the goal of determining "the appropriate amount of [rent], including whether the tenant waived any claim for lower rent and whether market conditions should influence the Court's determination of rent and whether partial performance has waived a claim of lower rent." [2 AA 478:1–9]. The district court unquestionably did not make any ruling as to the lack of an agreement as to rent and any arguments by JSJBD to the contrary are misleading and without merit.

THE COURT: It's not denied. It's not denied. I had a discussion. I don't believe a correction needs to occur. I have discussed with both of you what we're going to do when we get to trial."

MR. LOVATO: Fair.

[5 AA 1014:10–14].

[9] As further noted at the hearing, the district court declined to grant or deny the Motion to Correct Order of the Court, or to enter a formal written order on the Motion, based upon the aforementioned discussion of the issues and that her ruling at the July 8, 2019 hearing established what would occur at trial and, thus, that a written order was unnecessary where the district court would be the same judge presiding over the bench trial. [5 AA 1013:7–1014:25].

The determination as to "the appropriate amount" of rent could be based on many different considerations, perhaps the simplest of which would be whether the parties actually agreed on what rent would be. Moreover, the district court's express statement that she would consider "whether market conditions should influence the Court's determination of rent" clearly denotes that no decision had been made as to whether or not the district court would be considering market conditions—i.e. whether the district court would be conducting a *Cassinari* analysis. As such, JSJBD's position that the district court was somehow precluded from making a finding that an agreement was reached—when that finding was supported by substantial and uncontroverted witness testimony and documentary evidence—is without merit and contradicted by the record.

Finally, even if JSJBD were correct that the district court made a finding on summary judgment that no agreement was reached as to rent, and then subsequently made a contrary finding after trial, this would not be grounds to invalidate the district court's ultimate finding. A district court enjoys the inherent ability to reconsider its prior orders. *See, e.g. Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). This is especially true as to the court's ability to "reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v.*

Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). As such, even if the district court had previously ruled that no agreement as to rent had been reached, it was within the district court's authority to weigh the evidence at trial and make a factual finding in accordance therewith. To preclude a district court from recognizing the truth when it is presented, as JSJBD intends to do, would be contrary to the aims of justice.

3. The District Court Explicitly Considered the Holding in *Cassinari* and Determined that the Agreed-Upon Rent was "Reasonable."

Although the district court's finding that all material terms were agreed upon obviated the need for a *Cassinari* determination of "reasonable rent," the record reveals that the district court nevertheless did consider *Cassinari* and concluded that the parties' agreed-upon rent was reasonable. [11 AA 2744, ¶ 60; 11 AA 2748, ¶¶ 88, 90]. The district court's conclusions of law acknowledge the holding of *Cassinari* as stated above, permitting a determination of reasonable rental rate "if no agreement was reached as to rent ... ." [11 AA 2748, ¶ 88]. The conclusions of law then go on to state that an agreement was reached on the amount of rent, and further that "[t]he rent agreed to by the parties and reflected in this schedule based upon the evidence before the Court, **reflects a reasonable amount of rent under *Cassinari***." [11 AA 2748, ¶ 90] (emphasis added).

The district court's express statement of the *Cassinari* rule, and the express factual determination that the rent she imposed was reasonable under *Cassinari*, single-handedly defeats JSJBD's argument that the district court somehow "declined to determine reasonable rent" under *Cassinari*. Accordingly, this Court should determine that JSJBD's arguments on this issue are contradicted by the record on appeal and, therefore, lack merit.

C. THE DISTRICT COURT'S ORDER BINDING JSJBD TO THE TESTIMONY GIVEN DURING THE DEPOSITION UNDER NRCP 30(b)(6) WAS PROPER.

A district court's decision to admit or exclude evidence is reviewed for abuse of discretion and will not be overturned "absent a showing of palpable abuse." *Nevada Power Co. v. 3 Kids LLC*, 129 Nev. 436, 444, 302 P.3d 1155, 1160 (2013).

The testimony of a Rule 30(b)(6) designee "represents the knowledge of the [designating] corporation, not of the individual deponents." *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 538 (D. Nev. 2008); *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D. D.C. 1998); *see also Exec. Mgmt, Ltd. v. Ticor Title Insur. Co.*, 118 Nev. 46, 38 P.3d 872 (2002) ("Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts."). The party designating the Rule 30(b)(6) witness therefore

has an affirmative duty to prepare the designee so that he or she may give "*binding* answers on behalf of the corporation." *Great Am. Ins.*, 251 F.R.D. at 538 (emphasis added); *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1418 (D. Nev. 1995) ("In producing representatives for a Rule 30(b)(6) deposition, a corporation must prepare those individuals to give complete, knowledgeable and binding answers") (emphasis added); *Rainey*, 26 F. Supp. 2d at 94, 95 (Rule 30(b)(6) "obligates a corporate party 'to prepare its designee to be able to give binding answers' on its behalf" and "***binds the corporate party to the positions taken by its 30(b)(6) witnesses***") (emphasis added).

Here, as noted by the district court, JSJBD's designee's lack of knowledge of topics within the scope of the 30(b)(6) notice could only be rectified if the witness was not prepared, in which case the witness could have been ordered to sit for another deposition to provide real answers. [5 AA 1020:19–21:1; 1024:4–23]. JSJBD's counsel, however, confirmed that a lack of preparation was not the problem. [5 AA 1025:2–6]. Based on that admission, the district court properly determined that JSJBD's witness did not need another chance to clarify its responses, and, consequently, JSJBD would be bound by the witness' various "I don't know" and other non-responsive answers. [5 AA 1030:21–25]. This discovery order was not a palpable abuse of discretion, but, rather, was merely giving effect to

NRCP 30(b)(6)'s purpose, which is to bind an entity to the testimony of its designated person with knowledge on the stated topics.

The further order that JSJBD would not be allowed to provide contradictory testimony at trial was in line with a district court's ability to preclude evidence that was not disclosed prior to trial. A party cannot use as evidence at trial any undisclosed evidence or witnesses, unless the party shows that there was a substantial justification for the failure to disclose, or it shows the failure was harmless. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 787 (2017). Any testimony contradictory to the entity's binding testimony given at deposition would have been undisclosed to Tropicana until the time of trial and, thus, would have been inadmissible. *See, e.g. id.* at 265, 396 P.3d at 787. Moreover, permitting such undisclosed testimony would have been unfairly prejudicial to Tropicana and advantageous to JSJBD, thereby rewarding JSJBD's designee's improper conduct.

Further, the district court did not entirely preclude JSJBD from testifying at trial, but rather permitted JSJBD's representatives to testify for two full days. [5 AA 1109–7 AA 1588]. The district court's order precluding certain testimony was limited to topics within the scope of the NRCP 30(b)(6) deposition, and limited to specific questions within that scope on which JSJBD's NRCP 30(b)(6) designee had

testified to a lack of knowledge. [11 AA 2735 at n.1]. The district court, on numerous occasions, overruled Tropicana's counsel's objections based on the court's order, if the question asked of the witness was not the same as the question asked at deposition, or if the question sought the witness's personal experience, as opposed to the entity's position. [*See, e.g.* 5 AA 1165:23–66:10].

Lastly, the district court's exclusion of testimony in this regard was, at most, harmless error.[10] As detailed *supra*, the district court determined the appropriate amount of rent for the option period based on a finding that an agreement was reached between the parties. This finding was evidenced by (1) undisputed written communications between the parties' agents showing an agreement as to rent for the option period, (2) testimony of verbal communications between the parties' agents where the agreement was communicated, and (3) the parties' undisputed performance in accordance with the terms of the agreement for two years without protest or reservation of rights. [*See* 11 AA 2735–12 AA 2753]. Moreover, the district court made an express finding that JSJBD's representatives were not

[10] JSJBD appears to agree on this point, noting that "the court's exclusion of witness testimony should have had no effect on making a reasonable rent determination." Appellants' Opening Br. 51.

credible; thus, the testimony of those witnesses would not have affected the district court's factual findings.

D. THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES AND COSTS TO TROPICANA WAS PROPER.

1. The Lease's Attorneys' Fees Provision is Enforceable.

The attorneys' fees provision in Section 24 of the lease is unquestionably enforceable as written. Nevada law requires the enforcement of contracts as written when clear and unambiguous. *See, e.g. Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). Further, as parties are free to provide for attorneys' fees by express contractual provisions, Nevada law will not support restricting a clear and unambiguous attorneys' fees provision. *See id.*; *see also, e.g. Trustees, Carpenters v. Better Building Co.*, 101 Nev. 742, 747, 710 P.2d 1379, 1382 (1985) (unilateral attorneys' fees provision interpreted to be enforceable as written).

JSJBD's argument on this point is flawed in that it incorrectly presumes that the provisions of NRS 18.010 encompass the only manners in which in which a party may be entitled to an award of attorneys' fees under Nevada law. On the contrary, "Nevada adheres to the American rule that attorney fees may only be awarded when authorized by **statute, rule, or agreement**." *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 177, 444 P.3d 426, 426 (2019) (emphasis added). NRS 18.010 is merely a single statute authorizing an award of attorneys' fees in particular

circumstances, and it does not limit the applicability of other statutes, rules, or agreements that may separately entitle a party to an award of attorneys' fees.

This interpretation is consistent with the American rule and Nevada caselaw, and it is solidified by the lack of any exclusivity language in the statute. For example, nothing in NRS 18.010 states that a court may "only" make an allowance of attorneys' fees in the enumerated circumstances. Rather, NRS 18.010(2) states that a court may award attorneys' fees "in addition to" where authorized by specific statute, if one of two conditions is met. NRS 18.010(2). The remainder of the statute clarifies two other bases for an award of attorneys' fees—under an agreement for compensation of an attorney, or in an action arising out of a written instrument entitling the prevailing party to an award of reasonable attorneys' fees—to which the remainder of NRS 18.010 does not apply. NRS 18.010(1), (4). Therefore, as nothing within the statute suggests that it should be read as limiting existing law permitting attorneys' fees when authorized under statute, rule or agreement, NRS 18.010 is best interpreted as supplementing existing law on awards of attorneys' fees.

Here, an express agreement existed between the parties that JSJBD would be required to pay Tropicana's reasonable attorneys' fees in the event Tropicana found it necessary to retain an attorney in connection with a default by JSJBD, regardless

of whether Tropicana ultimately prevails. [10 AA 2265, § 24]. This express written agreement is enforceable under the American rule and Nevada caselaw, and nothing in NRS 18.010 prohibits enforcing the lease under its plain and unambiguous language. Thus, JSJBD's arguments are meritless, and the district court properly concluded that Tropicana was entitled to an award of reasonable attorneys' fees, as the district court found that JSJBD did, in fact, default under the lease, and that Tropicana did, in fact, retain an attorney in connection with that default. [11 AA 2749–12 AA 2752; 14 AA 3363]

2. Regardless of the Enforceability of Section 24 of the Lease, Tropicana was the Prevailing Party, and, Therefore, the Order Awarding Reasonable Attorneys' Fees and Costs was Proper.

While the district court's enforcement of the attorneys' fees provision in Section 24 of the lease was proper under Nevada law, the district court was additionally correct in concluding that Tropicana was a prevailing party. [14 AA 3363]. As such, Tropicana was also entitled to attorneys' fees under NRS 18.010(2)(a), since it was the prevailing party and recovered less than $20,000. [12 AA 2752].

However, there can be only one prevailing party in a case—on this, the parties agree. It is impossible and impractical to attempt to apportion prevailing parties on discrete claims and award fees as to only certain claims. Rather, as this Court has

recognized, the better approach is to determine a single prevailing party, which is the party who receives a net monetary judgment after offsetting all awards. *See Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172, 175 (1999). While Tropicana agrees that the district court made a mistake of law by failing to declare a single prevailing party, the objective analysis of which party received a net monetary award unambiguously requires the conclusion that Tropicana was the prevailing party in this case.

In cases where both parties prevailed on different issues and were awarded monetary judgments, the sole prevailing party, for purposes of attorneys' fees and costs allowances, is determined by offsetting all monetary awards, leaving a single party with a net monetary judgment. *See Valley Electric Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005); *Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172, 175 (1999). The *Parodi* Court addressed, for the first time, consolidated actions resulting in monetary awards to multiple parties on various bases. This Court noted the two possible methods of determining a prevailing party in this circumstance: awarding fees and costs on the basis of each separate monetary award and offsetting those amounts against each other, or considering the claims as a whole and allowing the "total net award" to govern the outcome for purposes of NRS 18.010 and 18.020. *Id.* The *Parodi* Court noted that the same question had

arisen in the past, in a context more akin to the case at bar—a single action involving counterclaims—and that the "net judgment" approach was preferred. *Id.* (citing *Robert J. Gordon Constr. v. Meredith Steel*, 91 Nev. 434, 537 P.2d 1199 (1975)). The ultimate holding of *Parodi* was as follows:

> Thus, in cases where separate and distinct suits have been consolidated into one action, the trial court must offset all awards of monetary damages to determine which side is the prevailing party and whether or not the total net damages exceed the $20,000 threshhold.

Id. After stating this holding, the *Parodi* Court observed that the "net verdict" in the lower case was in favor of Parodi, rendering Parodi the prevailing party.

JSJBD's argument relies on an extremely broad interpretation of the "value" of a judgment—a word which appears only within the *Parodi* Court's analysis of *Robert J. Gordon Construction*—as meaning something akin to the subjective or potential worth of a judgment to a particular party. [Appellants' Opening Br. 32–34]. JSJBD uses this overly broad interpretation to suggest that the declaratory relief claim symbolized to JSJBD the preservation of its option rights and, therefore, that the true "value" of that judgment to JSJBD exceeded hundreds of thousands of dollars. JSJBD, however, offers no support for its proffered interpretation of the rule as stated in *Robert J. Gordon Construction* and *Parodi*, where "value" was more likely intended to mean "monetary worth," in the context of a discussion of monetary damages.

In reality, the holding in *Parodi* was that a prevailing party is to be determined based on the "total net damages" a party receives, after "offset[ting] all awards of monetary damages." *Parodi* at 242, 984 P.2d 172 at 175. Contrary to JSJBD's suggestion that the "value" of a judgment is subject to myriad outside considerations, the Court did not propose such a speculative analysis. Rather, the *Robert J. Gordon* and *Parodi* decisions provide that this determination is to be based on simple math relating to the amounts awarded to each side. To give credence to JSJBD's interpretation would be to eviscerate the guidance currently provided by Nevada law, by replacing an objective mathematical test with a complicated subjective analysis of the "worth" of a judgment in the individual parties' eyes. [11]

[11] This case serves as a prime example of how nebulous JSJBD's proffered interpretation would render the prevailing party analysis. Both parties were awarded less than $20,000, but both parties are equally capable of grossly inflating the "value" of a minimal monetary award. For example, JSJBD has formulated an argument for why the "value" of its $4,578 award somehow exceeds $500,000 in "value," and Tropicana could just as easily inflate its award of $13,000 to an even greater "value," where (1) JSJBD's expert proposed a reduction in rent of $4,000 per month, equating to a difference of $48,000 per year; (2) the option period was for five years, meaning Tropicana saved $240,000 over the option period; and (3) this was the first of three options available to JSJBD, so the total "value" of Tropicana's victory was actually at least $720,000. The absurdity of these possibilities are a certain indication that the Court should not consider endorsing such a nebulous and subjective approach.

Here, applying the test this Court has set forth in *Robert J. Gordon* and *Parodi*, it is undeniable that Tropicana was the prevailing party in this case, as it received a net judgment, after offsetting all monetary awards. Tropicana received an award of $13,000, and JSJBD received an award of $4,578.[12] [12 AA 2752]. Offsetting these awards per Nevada law, Tropicana received a "total net damages" award of $8,422, making it indisputably the prevailing party.

Based on the proper finding that Tropicana was the prevailing party, the district court's award of Tropicana's costs of suit under NRS 18.020 was appropriate. Further, as a prevailing party whose "total net damages" did not exceed the $20,000 threshold of NRS 18.010(2)(a), the district court was within its discretion in awarding Tropicana its reasonable attorneys' fees under that statute. In sum, the district court's award of attorneys' fees and costs to Tropicana was proper under Nevada law, and should not be disturbed.

[12] It bears noting that, contrary to JSJBD's implication, the "net damages" calculation does not incorporate awards of attorneys' fees, as this would result in a circular analysis. One purpose of the "net damages" calculation is to determine which side may be awarded attorneys' fees under NRS 18.010(2)(a). Thus, the fact that Tropicana's reasonable attorneys' fees were greater than JSJBD's reasonable attorneys' fees is irrelevant to the determination of which side received a net monetary award.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's findings and conclusions as to the agreement reached between the parties regarding rent for the option period and should affirm the district court's award of attorneys' fees and costs to Tropicana.

Dated this 4th day of November, 2020.

MARQUIS AURBACH COFFING

By /s/ Terry A. Moore
Terry A. Moore, Esq.
Nevada Bar No. 7831
Collin M. Jayne, Esq.
Nevada Bar No. 13899
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Tropicana Investments, LLC

OPENING BRIEF ON CROSS-APPEAL

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A(b)(1). Following the entry of the district court's findings of fact and conclusions of law, Tropicana filed a tolling motion to alter or amend the judgment pursuant to NRCP 59(e) on December 27, 2019. [13 AA 3132–52]. Notice of entry of the (i) order denying

Tropicana's motion to alter or amend the judgment, and (ii) final judgment were both served on February 25, 2020. [14 AA 3402–12]. JSJBD filed its notice of appeal on March 16, 2020. [14 AA 3413–15]. Tropicana then timely filed its own notice of appeal on March 25, 2020. [14 AA 3416–53]. In this cross-appeal, Tropicana seeks to rectify impermissible damages, attorneys' fees, and legal costs awarded to JSJBD and an inaccurate calculation of damages awarded to Tropicana.

II. ISSUES ON CROSS-APPEAL

1. When a final judgment results in monetary damages being awarded to both sides, the prevailing party is the one who receives a net monetary judgment after offsetting all damages awarded. The district court's order awarded JSJBD $4,578, and awarded Tropicana $13,000, with Tropicana receiving a net monetary judgment of $8,422. As such, did the district court err by concluding that JSJBD was a prevailing party?

2. Damages on a claim for breach of the implied covenant of good faith and fair dealing are limited to those which would be recoverable from a breach of the contract. The district court awarded attorneys' fees as special damages on JSJBD's breach of implied covenant claim, even though the contract between the parties contained no provision permitting JSJBD to recover such damages. Did the district

court err by awarding JSJBD attorneys' fees as special damages for its breach of the implied covenant claim?

3. In the rare circumstances where a party may recover attorneys' fees as special damages, the plaintiff must plead and prove the amount of attorneys' fees at trial by competent evidence. JSJBD failed to disclose or present at trial any evidence of attorneys' fees it had incurred as a result of Tropicana's alleged conduct. Did the district court err by awarding JSJBD attorneys' fees as special damages without any evidentiary basis?

4. Did the district court erroneously calculate unpaid rent owed by JSJBD as $13,000, when the district court's findings of fact show that JSJBD underpaid rent by a total of $16,780?

III. STATEMENT OF THE CASE

Tropicana appeals from a final judgment entered after a 5-day bench trial in the Eighth Judicial District Court, the Honorable Elizabeth Gonzalez presiding, as well as orders granting Cross-Respondent JSJBD's motion for attorneys' fees and costs and denying Tropicana's motion to alter or amend the judgment.

As detailed in Tropicana's Answering Brief, *supra*, the parties' dispute predominantly centers around JSJBD's insistence that a five-year option in the lease entitled JSJBD to "market rental rate" during the option period, (1) despite the option

being subject to "rental increases" to be negotiated, (2) despite the parties expressly agreeing to exclude "fair market rent" as a consideration, and (3) despite the parties reaching an agreement as to the rent applicable to the option period. The district court properly ruled against JSJBD on this primary aspect of the case, declaring that rent applicable to the option period was set according to the parties' agreement and consistent conduct therewith, that the amount of rent was reasonable, and awarding Tropicana damages for JSJBD's underpayment of rent and default of the lease.

A secondary matter raised by JSJBD behind the primary rent dispute was Tropicana's allegedly improper practice of imposing common-area maintenance ("CAM") charges to fund a "reserve" account. The district court found that this practice was a breach of the contract because the lease did not include the ability of Tropicana to charge for capital improvement "reserves," and, thus, the district court awarded JSJBD damages of $4,578, constituting the amount JSJBD overpaid in this regard. Tropicana's appeal does not take issue with this finding.[13] However, the district court concluded that the same practice of charging for reserves was also a breach of Tropicana's implied covenant of good faith and fair dealing. As damages

[13] JSJBD also litigated a third issue related to Tropicana's alleged failure to maintain the leased premises; however, in response to Tropicana's NRCP 52(c) motion, JSJBD voluntarily dismissed those claims. [8 AA 1884:23-1885:19].

for this claim, the district court awarded JSJBD "the amount of the attorney's fees and costs related to the CAM expense portion of the litigation only." [11 AA 2752]. Despite that narrow award language, the district court subsequently determined that the issues were all interrelated and, therefore, awarded JSJBD its attorneys' fees incurred in the entire action, based on the conclusion that both parties were prevailing parties and, therefore, that JSJBD was entitled to its attorneys' fees as a cost of suit under NRS 18.010(2)(a). The award of attorneys' fees—either as a cost of suit or as special damages—was an error for several reasons and should be reversed.

First, JSJBD was undeniably not the prevailing party, and, therefore, the district court's award of attorneys' fees and costs to JSJBD under NRS 18.010(2)(a) was improper. This Court has instructed district courts that the procedure for identifying the prevailing party when both sides are awarded monetary awards is to offset all awards and then determine which party has prevailed based on the "total net damages." Because Tropicana was awarded $13,000, and JSJBD was awarded $4,578, the required offset calculation results in Tropicana indisputably being the sole prevailing party, as it received total net damages of $8,422. Moreover, to the extent it is relevant to this determination, Tropicana prevailed on the most significant dispute between the parties, which was the dispute over the amount of rent applicable

to the option period.[14] As such, Tropicana was the prevailing party, not JSJBD, and JSJBD was, therefore, not entitled to its attorneys' fees and costs under NRS 18.010(2)(a).

Second, the award of a portion[15] of JSJBD's attorneys' fees as special damages was likewise contrary to Nevada law. Attorneys' fees are only recoverable as an element of damages in rare, specific circumstances, none of which are present here. Further, a contractual breach of implied covenant claim requires the claimant to prove that the other party literally complied with the contract, but did so in a way that deprived the claimant of its justified expectations, and, therefore, the conduct alleged to support such a breach cannot simultaneously support a breach of contract

[14] It is important to note that the JSJBD's arguments throughout the case were that the rent should be set at $1.05 per square foot which it contended was a "fair market rate" whereas Tropicana maintained that the parties had expressly **excluded** any consideration of "fair market rate" from the determination of option rent, and, moreover, Tropicana argued that the $2.00 psf rent being paid by JSJBD was reasonable. The district court agreed with all of Tropicana's arguments on these points.

[15] The district court never made a finding as to an amount of attorneys' fees that was awarded to JSJBD as special damages in this regard. The order granting JSJBD's motion for attorneys' fees and the final judgment each reflect that JSJBD was granted the entirety of its requested attorneys' fees on account of JSJBD being a prevailing party, and neither order mentions any award of attorneys' fees as special damages. [14 AA 3382–84; 3394–96]. To the extent the District Court could have awarded JSJBD attorneys' fees as special damages in addition to the fees granted under NRS 18.010, this would constitute a double recovery, and would be improper.

claim. Moreover, in line with these claims being mutually exclusive, a contractual breach of implied covenant of good faith and fair dealing claim can only be redressed by the measure of damages that would be recoverable for an actual breach of the contract.

Here, where JSJBD's breach of contract and breach of implied covenant claims were both based on the same exact conduct (Tropicana's charging for reserves as part of the CAMs), JSJBD could not have prevailed on both claims, and, further, the potential damages for both claims are necessarily the same: $4,578.00, which is the amount that JSJBD paid for the specific CAM charges that were disallowed. Finally, the lease did not contain a provision permitting an award of attorneys' fees or costs to JSJBD in any case, so attorneys' fees were not within the scope of contract damages for either claim. Thus, JSJBD was limited to recovering only the compensatory damages it received on its breach of contract claim, and, at most, nominal damages on the breach of implied covenant claim. Consequently, the award of attorneys' fees as special damages was unsupported by law.

Third, Nevada law unambiguously requires that any special damages be pleaded and proven by competent evidence. JSJBD did not disclose **any** evidence of attorneys' fees incurred whatsoever, and failed to present **any** such evidence at trial. Therefore, even if attorneys' fees were permitted as special damages on

JSJBD's breach of implied covenant claim, the award was still improper because JSJBD failed to plead and admit any evidence that would support an award of attorneys' fees as special damages. The district court should have awarded, at most, nominal damages for this claim, as the entirety of JSJBD's compensatory damages were already awarded as part of the breach of contract claim based on the same conduct.

Finally, the district court's findings of fact and conclusions of law contain an evident calculation error regarding the amount of damages awarded to Tropicana as compensation for JSJBD's underpayment of rent. The substantial evidence presented and the district court's findings reflect that JSJBD underpaid rent in a total amount of $16,780; yet, the district court's order following those findings inexplicably awarded Tropicana only $13,000 as damages for underpaid rent. This plain mathematical error should be corrected.

In summary, the Court should reverse the award of attorneys' fees and costs to JSJBD as a prevailing party, as well as the award of attorneys' fees to JSJBD as special damages; and further direct the district court to amend the judgment to reflect damages awarded to Tropicana as compensatory damages for unpaid rent in an amount of $16,780, based on the district court's findings.

IV. LEGAL ARGUMENT

A. JSJBD WAS NOT A PREVAILING PARTY, AND THUS IS NOT ENTITLED TO COSTS OF SUIT OR ATTORNEYS' FEES UNDER NRS 18.010(2)(a).

The district court erred as a matter of law by concluding that JSJBD was a prevailing party where Tropicana received a greater monetary award and prevailed on the primary issue being litigated. Because JSJBD was not a prevailing party, JSJBD was not entitled to recover its attorneys' fees under NRS 18.010(2)(a), or its costs of suit, and, therefore, the district court's ruling on this issue must be reversed.

1. JSJBD was not Awarded a Net Monetary Judgment After Offsetting all Damages Awards and Cannot be Considered a Prevailing Party.

A prevailing party is entitled to recover its costs of suit in any action where the plaintiff seeks to recover more than $2,500. NRS 18.020. Further, a prevailing party may be awarded its attorneys' fees if it has not recovered more than $20,000. NRS 18.010(2)(a). To be considered a "prevailing party," a party must "succeed[] on any significant issue in litigation which achieves some of the benefit it sought in bringing suit," which must include a monetary judgment. *Valley Electric Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005); *Smith v. Crown Fin. Servs.*, 111 Nev. 277, 285, 890 P.2d 769, 774 (1995). In the event both sides achieve some benefit and are awarded monetary judgments, the district court must offset all

judgments and determine a single prevailing party based on the "total net damages." *Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172, 175 (1999).

The *Parodi* Court reaffirmed the requirement that a district court determine a single prevailing party based on net monetary judgment in the context of separate and distinct claims originating in consolidated cases. *Id.* In that case, both sides asserted claims against each other, and, at trial, the jury awarded damages to both sides on various claims. *Id.* at 239, 984 P.2d at 174. The net result of all damages awarded was a verdict in favor of Parodi in the amount of $18,798.61. *Id.* Parodi moved for attorneys' fees and costs as a prevailing party, which the district court denied, instead awarding fees and costs to the other side based on an unsurpassed offer of judgment. *Id.* On appeal, the Court was asked to determine whether fees and costs should have been awarded under NRS 18.010 and NRS 18.020 relative to each claim on which each party prevailed. The *Parodi* Court held that district courts should "consider the claims as a whole and let the total net award govern the outcome for purposes of NRS 18.010 and 18.020." *Id.* Thus, after offsetting all monetary awards, the *Parodi* Court concluded that Parodi was the prevailing party and reversed the award of fees to the non-prevailing party. *Id.* at 242, 984 P.2d at 176.

Here, the district court found in favor of JSJBD on its claims for breach of lease and breach of the implied covenant of good faith and fair dealing, both in

regard to Tropicana's allegedly improper practice of assessing a CAM charge for capital improvement "reserves." [11 AA 2749:7, 2750:18–20]. The district court also found in favor of Tropicana on its counterclaim for breach of contract based on JSJBD's underpayment of rent. [11 AA 2749:1–3]. As a consequence of its rulings, the district court awarded JSJBD a monetary judgment of $4,578 and awarded Tropicana a monetary judgment of $13,000.[16] [12 AA 2752]. Therefore, both parties achieved a benefit sought in the litigation, and both parties were awarded monetary judgments.

In this scenario, just as in *Parodi*, the district court was required to determine a prevailing party by offsetting all monetary awards and analyzing the "total net damages" award. The simple math of this analysis unambiguously leads to the conclusion that Tropicana was the prevailing party with a "net damages" award of $8,422.[17] Accordingly, the net damages award in Tropicana's favor necessarily

[16] As noted *infra*, the district court's calculation of damages due to Tropicana was inconsistent with the district court's findings of rent due and rent paid and, thus, was an abuse of discretion. However, substituting the correct judgment amount of $16,780 does not change the prevailing party analysis, as it only increases the amount of Tropicana's "total net damages" to $12,202.

[17] As detailed *supra* in Tropicana's Answering Brief, Tropicana was not only entitled to its reasonable attorneys' fees under NRS 18.010(2)(a), but, additionally, Tropicana was entitled to receive its reasonable attorneys' fees regardless of whether it was the prevailing party, under an express lease provision. [10 AA 2265, § 24]. The district court properly determined that Tropicana was required to retain an

leads to the conclusion that JSJBD was not a prevailing party. Instead of following Nevada law, the district court concluded that both parties were prevailing parties, and awarded reasonable attorneys' fees to both sides. This was an error of law under *Parodi*.

Because JSJBD was not a prevailing party as a matter of law, JSJBD could not be awarded attorneys' fees or costs of suit under NRS 18.010 and NRS 18.020, respectively. Nevada law authorizes an award of attorney fees only when authorized by statute, contract or rule. *See, e.g. Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1220, 197 P.3d 1051, 1060 (2008). No other statute, rule, or agreement between the parties provides a basis for JSJBD to recover its attorneys' fees or costs, and the awards of fees and costs below were based solely on JSJBD being a co-prevailing party under NRS 18.010 and NRS 18.020. As such, the district court's failure to apply the judgment-offset rule from *Parodi* renders the award of fees and costs to JSJBD erroneous, and this Court should reverse that award.

---

attorney in connection with a default by JSJBD under the lease and, thus, that Tropicana was entitled to its reasonable attorneys' fees under this provision.

2. Tropicana Prevailed on the Most Significant Issue of the Litigation and is Undisputedly the Prevailing Party.

While the above-detailed Nevada law plainly requires that a prevailing party must receive a monetary judgment and that the net monetary judgment controls the determination of which party prevailed, JSJBD has argued that it should be considered the prevailing party based on the "any significant issue" requirement stated in *Valley Electric*. 121 Nev. at 10, 106 P.3d at 1200. The *Valley Electric* test is only half of the analysis here, where both parties achieved some success and monetary damages; yet, even if the Court were to look beyond the mathematical determination required by *Parodi* in this case, it is clear that Tropicana prevailed on the most significant issue in the litigation—the determination of rent for the option period—and, thus, that JSJBD would still not be considered the prevailing party.

The parties' dispute originated with a disagreement over rent applicable to the option period. From the first letter sent by JSJBD to exercise the September 2016 option, rent for the option period was at the forefront of the parties' discussions. When the rent disagreement reached a head because JSJBD stopped paying rent commensurate with the agreed-upon rent schedule, Tropicana threatened legal action, and JSJBD filed suit to seek a judicial declaration on this issue. Thus, the litigation was always primarily about the rent determination, even though both sides took the opportunity to resolve additional disputes of lesser importance.

The contents of JSJBD's complaint and Tropicana's counterclaim further establish that the determination of rent for the option period was the primary purpose for both parties' claims. Approximately 90% of the 97-paragraph complaint is dedicated to the rent issue, with the remainder being tacked-on allegations regarding maintenance, CAMs, and security. [1 AA 1, ¶¶ 10–13, 16–18, 21–51, 60–77, 80–84, 91–102]. Meanwhile, Tropicana's counterclaim was focused entirely on establishing rent for the option period at the amounts on which the parties had agreed, or in the alternative establishing that no agreement was reached, rendering JSJBD a holdover month-to-month tenant at the same rent as was in effect prior to the lease expiring. [1 AA 19]. Because there was a possibility that the district court could determine JSJBD to be a holdover tenant, Tropicana included a cause of action seeking restitution of the premises. *Id.*

The overwhelming importance of the rent issue is additionally observable by simply reviewing the time each party spent on this issue at trial. The parties' witnesses and exhibits focused almost entirely on the rent issue for the first four days of the five-day trial, including both parties presenting expert testimony on what rent would be the "market rate" for the premises. [5 AA 1109–9 AA 2051]. JSJBD abandoned its claims based on maintenance/repair issues and offered zero evidence relating to the lack of security allegation. [8 AA 1884–85]. These claims were

clearly "afterthought" issues that JSJBD only included in its complaint because it had already decided to sue on the rent issue.

Third, the rent dispute concerned the greatest potential monetary consequences on either side, rendering it the most significant issue from a financial standpoint as well. JSJBD's position at trial was that monthly rent should, beginning in September 2016, be set at $1.05 per square foot, or $4,410, per month, and increase at 3% annual intervals, based on JSJBD's expert's opinion of what constituted "market rental rate." [11 AA 2744, ¶ 57; 8 AA 1770]. Tropicana's position, meanwhile, was that the parties' agreed-upon rental schedule should be affirmed, beginning at $2.00 per square foot, or $8,400, per month for the first two years, with annual increases of $210 thereafter, consistent with the parties' agreement and prior course of conduct. [3 RA 398; 9 AA 2071:18–72:2]. Further, the dispute concerns ten years of monthly rent payments, consisting of the five-year lease term beginning in September 2016, and extending to the five-year option available beginning September 2021. As such, the difference between Tropicana's position and JSJBD's position constituted a disparity of nearly $500,000 over the span of ten years, rendering it the most financially significant issue.

Finally, it is indisputable that the district court's ruling after trial was in Tropicana's favor on the rent issue. JSJBD and its predecessor-in-interest had paid

monthly rent for twenty years based on consistent annual increases of $210, with the exception of two years (2011 and 2012) during which Tropicana waived the customary increase and agreed to maintain rent; however, the regular rent increases resumed in 2013, resulting in rent of $8,190 through the end of the 2015 lease year. [11 AA 2741, ¶ 37]. JSJBD's requested relief in this case was for the district court to reduce rent to $4,410 for the 2016 option period—approximately 40% of the rent paid in 2015. [11 AA 2744, ¶ 57]. Tropicana, on the contrary, sought the district court's declaration that the parties had agreed on a rent schedule for the 2016 option period commencing with the amount JSJBD had agreed to pay ($8,400/month) for the first two years and then continuing to increase at the rate of $210 every year thereafter. [1 AA 19].

Following trial, the district court found that the parties reached an agreement on rent for the option period precisely as Tropicana proposed and reaffirmed that the option was exercised under those terms, concluded that the rent the parties had agreed upon was a reasonable rent under *Cassinari*, and awarded Tropicana damages for JSJBD's default and underpayment of rent. [11 AA 2743–49, ¶¶ 49–50; 60, 82, 89–93].

In sum, every aspect of the rent dispute was decided in Tropicana's favor. JSJBD failed to achieve a reduction in rent, and Tropicana succeeded in establishing

that JSJBD was bound to pay rent according to the parties' agreement, which also happened to be an amount that the district court found to be a reasonable rent for the premises. Therefore, there can be no question that Tropicana was the prevailing party on the most significant issue in the litigation.

B. ATTORNEYS' FEES ARE NOT RECOVERABLE BY JSJBD AS DAMAGES FOR THE BREACH OF IMPLIED COVENANT CLAIM.

The district court also erred as a matter of law in awarding JSJBD its "attorney's fees and costs related to the CAM expense portion of the litigation," as damages for JSJBD's breach of implied covenant of good faith and fair dealing claim, as (1) Nevada law does not enable the same conduct to establish both a claim for breach of contract and for breach of implied covenant of good faith and fair dealing; (2) if the implied covenant claim were permissible, JSJBD would be limited to contractual damages, which cannot include attorneys' fees where no contractual provision allowing such recovery exists; and (3) no special circumstances exist that would permit attorneys' fees to be recoverable as special damages here.

1. Tropicana's Alleged Breach of the Lease Cannot also Support a Breach of the Implied Covenant Claim.

First, the district court erred in concluding that Tropicana's charging of "reserves" within CAM expenses was both a breach of the lease and a breach of the implied covenant of good faith and fair dealing. Liability for breach of the implied

covenant of good faith and fair dealing can be found where "the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922–23 (1991) ("*Hilton I*"). As noted by the *Hilton I* decision, a prime example of a contractual breach of implied covenant claim is a tenant who agrees to pay its landlord a portion of its sale proceeds, then deliberately alters its business in a way that reduces expected sales; such conduct by the tenant would not be in breach of the lease, but could be in bad faith. *Id.* at 234 n.6, 923 n.6.

Here, JSJBD alleged that Tropicana improperly assessed CAM expenses to JSJBD that included amounts to fill capital improvement "reserves" because, although the lease allowed for the Landlord to charge for capital improvements, the lease did not expressly state the word "reserves" for capital improvements was an allowed charge.[18] [1 AA 1; 9 AA 2220:17–20]. After trial, the district court entered findings of fact and conclusions of law concluding that charging for "reserves" was

[18] The district court made this ruling despite the unrefuted testimony of Tropicana's principal which confirmed that the amounts collected for the capital improvement "reserves" were, in fact, spent on capital improvements that were allowed to be assessed as Common Area Maintenance charges and for which the tenants were responsible. [9 AA 2037:17–2038:5; 2039:2-25; 2040:1–2041:14].

a breach of the lease because the lease did not permit the landlord to charge for "reserves" as part of CAM expenses. [11 AA 2749, ¶ 95] (Tropicana's "charging of 'reserves' as a CAM expense is a breach of contract."). However, the district court also found that the same conduct constituted a breach of the covenant of good faith and fair dealing. [11 AA 2750, ¶ 104] ("The use of reserves as part of the CAM expenses is a breach of the covenant of good faith and fair dealing.").

As noted in *Hilton I*, a contractual breach of the covenant of good faith and fair dealing requires literal compliance with the contract; an act which constitutes a breach of the contract cannot simultaneously be said to be in literal compliance with the contract. Therefore, Tropicana's act of charging for "reserves" that was found to be in breach of the lease could not have possibly also been a violation of the covenant of good faith and fair dealing, as the element of literal compliance with the terms of the contract was disproved by the district court's own conclusions. As such, the district court's judgment in JSJBD's favor on the breach of implied covenant claim was an error of law and must be reversed.

2. JSJBD's Recovery for its Contractual Breach of Implied Covenant Claim is Limited to Contract Damages.

Even if JSJBD's recovery on both a literal breach theory and a breach of implied covenant theory is not duplicative, the proper amount of damages that the district court could have awarded for the contractual breach of implied covenant

claim is limited to contract damages. In *Hilton I,* this Court held that a party can recover "contract damages" on such a claim even where no literal breach occurred. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922–23 (1991) (citing *A.C. Shaw Constr. v. Washoe Cty.*, 105 Nev. 913, 784 P.2d 9 (1989)). *Hilton I* further enunciated the significant difference between cases alleging breaches of the implied covenant founded in contract, as opposed to those founded in tort, where "the tort action requires a special element of reliance or fiduciary duty ... ." *Id.* at 232–33, 808 P.2d 919, 923 (1991). The limitation on damages for a contractual breach of covenant of good faith was reiterated in the second published opinion stemming from that case. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1047, 862 P.2d 1207, 1209 (1993) ("A determination by the jury that the implied covenant was breached will give rise to an award of contract damages."). As such, Nevada law is clear where no special element of reliance is alleged, a party alleging a breach of the covenant of good faith is limited to contract damages.

Contract damages are damages "awarded to make the aggrieved party whole and . . . place the plaintiff in the position he would have been in had the contract not been breached." *See Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 84, 807 P.2d 208, 211 (1991). Such damages may be calculated by considering loss in value of the breaching party's performance and other losses including incidental or

consequential losses caused by the breach. *Century Surety Co. v. Andrew*, 134 Nev. 819, 821–22, 432 P.3d 180, 183 (2018) (quoting Restatement (Second) of Contracts § 347). These enumerated damages categories do not include attorneys' fees, in line with the "American rule" providing that each party normally bears their own attorneys' fees unless specifically authorized under rule, statute, or agreement. *See, e.g. Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 177, 444 P.3d 423, 426 (2019). Thus, a contractual breach of implied covenant claim cannot result in attorneys' fees as damages absent a rule, statute, or agreement authorizing such award.

Here, no rule, statute, or agreement exists which would entitle JSJBD to its attorneys' fees in this litigation. While the lease contains an attorneys' fees provision, it is expressly limited in its application to Tropicana, not to JSJBD. [10 AA 2265 § 24; 11 AA 2738, ¶ 16 n.4]. Further, because damages for the parties' claims must be assessed based on the facts and prior to a prevailing party determination, as discussed in detail *supra*, NRS 18.010(2)(a) cannot support an award of attorneys' fees as damages in any case. Therefore, JSJBD's claim for contractual breach of the implied covenant was limited to contractual damages, which the district court already calculated as the $4,578 awarded on JSJBD's breach of contract claim. As JSJBD was already awarded these damages on that claim, any

further award for the implied covenant claim beyond nominal damages would constitute an impermissible double recovery.

3. JSJBD's Case does not Meet any *Sandy Valley* Exceptions Permitting Attorneys' Fees as Special Damages.

An award of attorneys' fees as special damages is an exception to the general American Rule that fees may only be awarded when authorized by statute, rule, or agreement. *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 177, 444 P.3d 423, 426 (2019). Nevada law rarely permits an award of attorneys' fees as an element of damages for a claim, as this requires a party to demonstrate "that the fees were proximately and necessarily caused by the opposing party, and that the fees were a reasonably foreseeable consequence of the breach or conduct." *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 957, 35 P.3d 964, 969 (2001). The *Sandy Valley* Court recognized that, practically, this is difficult for parties to prove, especially as "the mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney fees as damages." *Id.* at 957, 35 P.3d at 970.

To provide guidance on this subject, the *Sandy Valley* Court enumerated three specific scenarios wherein attorneys' fees may be awarded as an element of damages: (1) "cases when a plaintiff becomes involved in a third-party legal dispute as a result of a breach of contract or tortious conduct by the defendant;" (2) "cases

in which a party incurred the fees in recovering real or personal property acquired through the wrongful conduct of the defendant or in clarifying or removing a cloud upon the title to property;" and (3) injunctive or declaratory relief actions compelled "by the opposing party's bad faith conduct." *Id.* at 957–58, 35 P.3d at 970.

Subsequent to *Sandy Valley*, the Court has refined these exceptions permitting attorneys' fees as special damages and repeatedly noted that the scope of cases providing such damages should not be read expansively. *See, e.g. Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007) (noting that the "clarifying or removing a cloud upon the title to property" exception requires an actual slander of title claim). Most recently, this Court's decision in *Pardee Homes of Nevada v. Wolfram* dispelled any notion that attorneys' fees may be awarded as special damages merely due to their being incurred as a result of the litigation:

> *Sandy Valley*'s comment that attorney fees as special damages are "foreseeable damages arising from tortious conduct or a breach of contract," and a "natural and proximate consequence of ... injurious conduct" did not expand the scope of the scenarios that warrant attorney fees as special damages. … **Therefore, to the extent *Sandy Valley* has been read to broadly allow attorney fees as special damages whenever the fees were a reasonably foreseeable consequence of injurious conduct, we disavow such a reading**.

135 Nev. 173, 177, 444 P.3d 423, 426 (2019) (emphasis added).

In *Pardee Homes*, the Nevada Supreme Court reversed the district court's award of attorneys' fees as special damages under a two-party breach of contract

claim. *Id.* at 178, 444 P.3d at 426–27. In reaching this conclusion, the Court noted that *Sandy Valley* "does not support an award of attorney fees as special damages where a plaintiff merely seeks to recover fees incurred for prosecuting a breach-of-contract action against a breaching defendant." *Id.* The Court further emphasized that "attorney fees as special damages are an exception to the American rule that each party assumes their own attorney fees," and, thus, that the broad granting of attorneys' fees as damages would conflict with caselaw. *Id.* at 178, 444 P.3d at 426.

Here, the district court found that JSJBD prevailed on a contractual breach of implied covenant claim, which, like the two-party breach of contract claim at issue in *Pardee Homes*, entitles JSJBD only to contract damages. Thus, just as in *Pardee Homes*, an award of attorneys' fees as special damages would only be proper if one of the enumerated exceptions from *Sandy Valley* were to apply. None of the *Sandy Valley* exceptions apply here as: (1) there was no third-party legal dispute; (2) JSJBD was not seeking to recover real or personal property; and (3) the attorneys' fees were not awarded in relation to JSJBD's declaratory relief claim, and, regardless, the declaratory relief claim was not necessitated by Tropicana's bad-faith conduct, where the district court ruled in Tropicana's favor in regard to the rent dispute.

In sum, the district court erred as a matter of law by awarding JSJBD any amount of attorneys' fees as special damages for its breach of implied covenant

claim. JSJBD could not recover on a breach of implied covenant claim based on conduct which the district court found to be in breach of the lease and which, therefore, could not have been in literal compliance with the contract. Even if the breach of implied covenant claim were appropriately decided in JSJBD's favor, the claim sounded in contract, and, thus, JSJBD was limited to recovering non-duplicative contractual damages. Contractual damages do not include attorneys' fees unless one of the specific exceptions from *Sandy Valley* applies, and none of the three *Sandy Valley* exceptions is satisfied. Therefore, this Court should reverse the award of attorneys' fees to JSJBD as special damages.

C. JSJBD FAILED TO PRESENT ANY EVIDENCE THAT WOULD SUPPORT AN AWARD OF ATTORNEYS' FEES AS SPECIAL DAMAGES.

In addition to the substantive legal hurdles precluding an award of attorneys' fees as special damages for JSJBD's breach of implied covenant claim, the district court further abused its discretion in awarding these damages after JSJBD failed to plead or prove any amount of attorney's fees at trial. Because the award of attorneys' fees was utterly unsupported by any evidence at trial, this Court need not consider whether JSJBD's claims could have supported an award of attorneys' fees as an element of damages.

Where "an item of special damage is claimed, it must be specifically stated." NRCP 9(g). As addressed above, *Sandy Valley* enumerated exceptions to the general rule of law that attorneys' fees cannot be awarded as special damages. However, these exceptions were only half of that case's holding; the *Sandy Valley* Court additionally clarified that, in such scenarios where attorneys' fees are recoverable as special damages, the attorneys' fees sought must be pleaded and proven by competent evidence at trial, just like any other category of special damages. *Sandy Valley*, 117 Nev. at 960, 35 P.3d at 971 ("When attorney fees are alleged as damages, they must be specifically pleaded and proven by competent evidence at trial, just as any other element of damages."). Thus, even if attorneys' fees could be recovered as special damages under the particular claims at issue, if no evidence of attorneys' fees is presented at trial, then the district court cannot award attorneys' fees as damages.

In *Sandy Valley*, the Supreme Court of Nevada considered an award of attorneys' fees as special damages in an action involving title to real property where those fees were not requested until after trial. *Sandy Valley*, 117 Nev. 948, 958–60, 35 P.3d 964, 970–71 (2001). The *Sandy Valley* plaintiffs failed to present or litigate any evidence of attorneys' fees at trial but, rather, solely submitted an affidavit of counsel requesting attorneys' fees after the trial had concluded. Then, "the district

court, in its findings of fact and conclusions of law, simply stated that attorney fees were awarded as damages." *Sandy Valley*, 117 Nev. at 958, 35 P.3d at 970. Thus, the district court's error was treating the award of attorneys' fees in the same manner as a request for fees as part of cost of litigation, rather than as an element of damages. *See Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969 (noting the procedure for seeking attorneys' fees as a cost of litigation, in which case "the matter is decidedly based upon pleadings, affidavits, and exhibits[,]" and the opposing party has an opportunity to contest the request, even after trial).

Despite the *Sandy Valley* plaintiffs' claims potentially supporting attorneys' fees as damages under the enumerated exceptions to the American rule, the plaintiffs' failure to present any evidence of attorneys' fees at trial precluded the district court from awarding attorneys' fees as damages. This Court held that the *Sandy Valley* district court erred in considering attorneys' fees as special damages because the issue was neither pleaded nor proven by competent evidence at trial, specifically stating that litigants cannot obtain attorney fees as special damages without complying with NRCP 9(g) and proving by competent evidence attorneys' fees "just as any other element of damages." *See id*. at 959–60, 35 P.3d at 971.

Here, as in *Sandy Valley*, JSJBD failed to present any evidence at trial of the attorneys' fees JSJBD incurred as a result of Tropicana's alleged breach of the

implied covenant, or any attorneys' fees incurred by JSJBD at any time, for that matter. Further, like in *Sandy Valley*, the district court's findings of fact and conclusions of law included a statement that JSJBD was awarded damages on its breach of implied covenant claim "in the amount of the attorney's fees and costs related to the CAM expense portion of the litigation only," without providing any particular amount of such damages. [12 AA 2752:14–15]. The lack of evidence supporting this award is further shown by the Court's thorough findings of fact, which include no mention of any amount of attorneys' fees incurred by JSJBD. [11 AA 2735].

Tropicana moved for judgment as a matter of law on this issue at the close of JSJBD's case in chief and renewed its motion at the close of evidence. [8 AA 1884:14–89:24; 9 AA 2211:6–18]. Tropicana argued that JSJBD failed to present any damages related to the CAMs issue, and the district court denied the motion both times. First, in denying Tropicana's initial motion, the district court stated "[t]he motion is denied because part of the damages that can be assessed in that type of claim relates to the attorney's fees related to this litigation. For that reason, the Court denies it." [8 AA 1887:7-10]. Notably, the district court did not point to any evidence of attorneys' fees that JSJBD had presented, but rather only stated the general opinion (which is legally inaccurate) that attorneys' fees could be assessed

on this claim. This was an incorrect ruling, as JSJBD had presented zero evidence of any attorneys' fees incurred in its case-in-chief, and, thus, judgment as a matter of law on this issue was appropriate.

When Tropicana renewed its motion at the close of evidence, the district court again denied the motion, this time on the grounds that JSJBD had produced evidence of overpayment of CAMs; however, the district court did not state that any evidence of attorneys' fees had been presented. [9 AA 2213:5–10] ("The motion is denied because paragraph 85 of the complaint is asking for restitution and reimbursement of the CAM charges that have been charged. And based upon the testimony, the Court can make a determination, or at least can potentially make a determination related to the charges that should be reimbursed.").[19]

Just as the award of attorneys' fees was improper in *Sandy Valley*, so too must the award of attorneys' fees here be reversed for JSJBD's failure to plead and prove this element of special damages.

[19] This statement by the district court further illustrates the court's error of law as it improperly conflates and duplicates the breach of contract damages with what damages are available for a breach of the implied covenant of good faith and fair dealing.

D. THE DISTRICT COURT MISCALCULATED THE AMOUNT OF UNDERPAID RENT EVIDENCED BY THE DISTRICT COURT'S OWN FINDINGS.

Lastly, irrespective of the above-appealed issues, the district court's award of damages to Tropicana was based on an evident math error, and it should be reversed as an abuse of discretion.

While district courts are given wide discretion in calculating an award of damages, an award that is not supported by the evidence, or which is contrary to the district court's findings of fact, constitutes an abuse of discretion that requires reversal. *See, e.g. Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74–75 (1997). In *Lau*, the district court entered judgment in favor of a hotel, finding that the hotel was entitled to damages in the form of lost profits for a period of 89 days, and further found that the resulting damages were $310.94 per day. However, the district court then determined the hotel's total damages to be $36,690.92, which is not the correctly calculated sum of $310.94 per day for 89 days. As such, it was apparent that the district court either made a mathematical error, or else abused its discretion in awarding an amount that was not supported by the findings of fact. Therefore, this Court reversed and remanded for a recalculation of these damages. *Id.*

Here, the district court's findings of fact reflect that the option period is subject to the schedule of rents agreed to by the parties, as follows:

> 9/1/16 to 8/31/17 - $8,400 per month, $100,500 per annum
> 9/1/17 to 8/31/18 - $8,400 per month, $100,500 per annum
> 9/1/18 to 8/31/19 - $8,610 per month, $103,320 per annum
> 9/1/19 to 8/31/20 - $8,820 per month, $105,840 per annum
> 9/1/20 to 8/31/21 - $9,030 per month, $108,360 per annum

[11 AA 2748 at ¶14].

Further, the district court's findings of fact included findings that JSJBD paid the following amounts: (1) $8,400 through July 2019; and (2) $5,150 from August 2019 through November 2019. [11 AA 2742, ¶ 47; 2743, ¶ 54; 2748, ¶ 91; 2749, ¶ 92 n.6]. Putting the amount of rent required to be paid (based on the district court's conclusion) side by side with the amount of rent actually paid (based on the district court's findings) illustrates that the sum of Tenant's underpayments is **$16,780:**[20]

Year	Date	Rent Required	Rent Paid	Underpayment
1	9/2016–8/2017	$8,400	$8,400	$0
2	9/2017–8/2018	$8,400	$8,400	$0
3	9/2018–7/2019	$8,610	$8,400	(210 x 11 months) = $2,310
	8/2019	$8,610	$5,150	(3,460 x 1 month) = $3,460
4	9/2019–11/2019	$8,820	$5,150	(3,670 x 3 months) = $11,010
				TOTAL (2,310 + 3,460 + 11,010) = **$16,780**

[20] This issue was specifically addressed in Tropicana's Motion to Alter or Amend the Judgment. [13 AA 3147–48].

However, in its conclusions of law, the district court stated that, "[a]s Plaintiff deviated from this schedule from September 1, 2018 through November 2019, the Plaintiff has underpaid the rent due in the amount of $13,000." [11 AA 2749 ¶ 92]. The $13,000 dollar amount is based on a mathematical error, revealed in a footnote used to explain the district court's calculation. *Id.* ¶ 92, n.6 ("The agreed upon rental rate was $8400 per month. The reduced rental rate paid by [JSJBD] was $5150. The monthly deficiency of $3250 accrued for 4 months yielding a total underpayment of $13,000."). As can be seen in this footnote, the district court erroneously based its calculation on rent being $8,400 per month for the entire option period. This was an abuse of discretion because it is contrary to the district court's express finding that the agreement was for rent to begin at $8,400 per month, and that this figure would increase by $210 every year—a finding that was based on the evidence presented at trial. [11 AA 2748, ¶¶ 89–91]. This error further explains why the district court incorrectly stated that JSJBD only underpaid for 4 months, despite the express conclusion that JSJBD "deviated from this schedule from September 1, 2018 through November 2019," which is a term of 15 months. [11 AA 2748, ¶ 92].

As such, it is apparent that the calculation of Tropicana's damages as $13,000 was based on simple mathematical error, and does not comport with the district court's express findings and conclusions. This Court should reverse based on this

abuse of discretion, and remand with instructions for the district court to enter judgment in Tropicana's favor for $16,780, rather than $13,000.

V. CONCLUSION

For the foregoing reasons, the district court's finding that JSJBD was a prevailing party was incorrect as a matter of law, and, further, the award of attorneys' fees to JSJBD was unsupported by law or fact. As such, this Court should reverse the judgment with respect to all attorneys' fees and costs of suit granted to JSJBD either as special damages or pursuant to NRS 18.010(2)(a). Additionally, this Court should instruct the district court to amend its judgment to accord with the district court's findings, in that Tropicana is entitled to damages in the amount of $16,780 on its breach of contract claim.

Dated this 4th day of November, 2020.

MARQUIS AURBACH COFFING

By /s/ Terry A. Moore
Terry A. Moore, Esq.
Nevada Bar No. 7831
Collin M. Jayne, Esq.
Nevada Bar No. 13899
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent/Cross-Appellant, Tropicana Investments, LLC

CERTIFICATE OF COMPLIANCE

1. I hereby 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 18,405 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that 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 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 and volume number, if any, 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 that the

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

Dated this 4th day of November, 2020.

MARQUIS AURBACH COFFING

By /s/ Terry A. Moore
Terry A. Moore, Esq.
Nevada Bar No. 7831
Collin M. Jayne, Esq.
Nevada Bar No. 13899
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent/Cross-Appellant, Tropicana Investments, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL AND RESPONDENT/CROSS-APPELLANT'S APPENDIX, VOLUMES 1–3** were filed electronically with the Nevada Supreme Court on the 4th day of November, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Mario Lovato, Esq.

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing