IN THE SUPREME COURT OF THE STATE OF NEVADA

JSJBD CORP, d/b/a Blue Dogs Pub, a Nevada corporation, STUART VINCENT, JEFFREY VINCENT, and JEFF WHITE Appellants, vs. TROPICANA INVESTMENTS, LLC, a California limited liability company, Respondent. _____ AND CROSS-APPEAL. _____	) Case No.: 80849)) (Dist. Ct. No. A-18-785311-B))))))))))))))	Electronically Filed Dec 31 2020 09:15 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANTS / CROSS-RESPONDENTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER

I.

ARGUMENT

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

Tropicana concedes that the district court committed error in its award of attorney fees. It admits this when it states that the district court failed to designate a prevailing party. *See* Ans. Br. at 44, 45. It states: "Tropicana agrees that the district court made a mistake of law by failing to declare a single prevailing party." Ans. Br. at 44. It also states: "[T]here can only be one prevailing party in a case," while admitting and conceding that the district court did not declare "one prevailing party." Ans. Br. at 45.

That the district court erred in failing to make a prevailing party finding also means that there is additional, substantial error: that the district court failed to engage in the required *Parodi*-type analysis that compares the respective claims and counterclaims, compares the value to a plaintiff of non-monetary claims such as those seeking CAM information and to avoid Eviction / forfeiture of lease rights, and the effect of a finding that the claims and counterclaims are interrelated[1]. The district court did not engage in any *Parodi*-type analysis, which is further error.

[1] If the claims are "interrelated" because the counterclaims are merely the flip-side, or mirror image, of JSJBD's claims (e.g., the Eviction counterclaim vis-a-vis JSJBD's Declaratory Relief claim seeking *Cassinari* confirmation of lease rights and

The district court's error is substantial, as the attorney fee awards represent approximately 95% of the monetary amounts awarded by the court—even when offsetting Tropicana's more extravagant fees and costs with JSJBD's fees and costs.

1. The proper standard of review is de novo, which Tropicana concedes by failing to provide any meaningful response regarding the appropriate standard of review.

Whether the district court's order and judgment, requiring the parties exchange their respective attorney fee obligations, is proper is an issue that presents a question of law. A district court's interpretation of a contractual attorney fee provision is a question of law. *See* Opening Br. at 25-27 (providing legal authorities). Interpretation of NRS 18.010, and related statutes, also presents a question of law. *See id.* Whether the American Rule regarding the granting of attorney fees permits a district court to switch the parties' respective attorney fee obligations also presents a question of law. *See* Opening Brief at 31 (providing legal authority). Determining who is a prevailing party under a statute or rule also presents a question of law. *See id.* Because such analysis present questions of law, they are addressed under the de novo standard.

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determination of rental amount), then the question becomes whether JSJBD succeeded "on any significant issue," which is the analysis in a case with no counterclaims. *See Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (A party prevails "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit.").

First, Tropicana concedes the standard of review where it states in its Answering Brief, "the district court made a ***mistake of law*** by failing to declare a single prevailing party." Ans. Br. at 45 (emphasis added).

Second, whereas JSJBD provided a detailed discussion of the legal authorities providing the applicable standard of review, Tropicana avoids any meaningful discussion of the issue. Failure to address a significant issue in the answering brief essentially concedes the matter. "We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal." *Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010) (citing numerous cases); *Bates v. Chronister*, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating respondent's failure to respond as a confession of error); *see also* NRAP 28(a)(10)(B) (failure to cite standard of review). Tropicana merely limits its discussion of the standard of review to a single paragraph on page 5 of its brief. The paragraph is devoid any forthright discussion of the pertinent standard of review.

Specifically, Tropicana merely cites *Frantz v. Johnson* for the proposition that a generalized question of "awarding or denying attorney fees" is subject to a given standard. *See* Ans. Br. at 5. *Frantz v. Johnson* does not purport to distinguish between the different situations where a district court commits legal error in its

application of legal questions relating to attorney fees.[2] Rather, this Court has repeatedly held that legal questions relating to attorney fees are reviewed under the de novo standard, as opposed to questions addressing factual findings. *See, e.g., Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) ("[W]hen the attorney fees matter implicates questions of law, the proper review is de novo.").[3] Here, the district court's determination involves questions of law.

The district court's attorney fee decision presents questions of law, which are subject to de novo review.

2. The district court erred in finding Tropicana entitled to attorney fees in situations where it is *not* the prevailing party.

First, the district court erred when it interpreted the parties' Lease to permit an award of attorney fees to Tropicana even where Tropicana is not the prevailing

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[2] Ironically, while *Frantz* references "abuse of discretion," its reasoning primarily makes legal determinations regarding the district court's award of attorney fees, engaging in statutory interpretation of NRS 18.010(2)(b) (i.e., that such statute does ***not*** contain language permitting attorney fees in the case) and NRS 600A.060(3) (i.e., that such statutes ***does*** have applicable language permitting attorney fees).

[3] *See also Arguello v. Sunset Station, Inc*., 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) ("Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." (internal quotation marks, alterations, and citation omitted)); *In re Estate & Trust of Rose Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009). (When the attorney fees matter implicates questions of law, the proper review is de novo)*; Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 8-11, 106 P.3d 1198, 1199-200 (2005) (reviewing de novo whether attorney fees awarded to prevailing parties under NRS 18.010(2)(a)).

party. As discussed in greater detail below, such interpretation fails to follow the requirements of NRS 18.010(4), and NRS 18.010 as a whole, which contain a prevailing party requirement for awarding attorney fees.

Second, the district court erred by failing to find any default committed by JSJBD, which is a requirement of the attorney fee provision of the Lease, itself.

a. The Court found that JSJBD was a prevailing party.

At the January 27, 2020 hearing addressing the parties' respective motions for attorney fees, the district court found that JSJBD had prevailing party status. (App. 3354.) In the Order granting JSJBD / Counterdefendants' motion for attorney fees, the district court stated at the outset of its Order: "***Plaintiff JSJBD Corp was, and is, the prevailing party in this matter*** as pertains to its claims in the Complaint filed by JSJBD Corp." (App. 3400 (emphasis added).)

Prior to trial, the district court had granted JSJBD's motion for partial summary adjudication, while denying Tropicana's motion for summary judgment. (App. 484-85.) The dispositive relief granted by such Order conferred prevailing party status on JSJBD as well. After such decision, and aside from CAM issues, the remaining substantial issue should have been determination of the ***amount*** of reasonable rent. (*See id.*)

In the Findings of Fact and Conclusions of Law following trial, the district court found that JSJBD prevailed on each of its three claims for relief. One, it stated:

"JUDGMENT is hereby entered in favor of Plaintiff JSJBD Corp, and against Defendant Tropicana Investments, LLC, on the First Claim for Relief for Declaratory Judgment establishing a reasonable rental schedule . . . ." (App. 2751-52.).

Two, the district court stated: "JUDGMENT is hereby entered in favor of Plaintiff JSJBD Corp, and against Defendant Tropicana Investments, LLC, on the Second Claim for Relief for Breach of Contract . . . ." (App. 2752.)

Third, the district court stated: "JUDGMENT is hereby entered in favor of Plaintiff JSJBD Corp, and against Defendant Tropicana Investments, LLC, on the Third Claim for Relief for Breach of the Implied Covenant of Good Faith and Fair Dealing in the amount of the attorney's fees and costs related to the CAM expense portion of the litigation only." (App. 2752.)

These determinations address all three claims for relief filed by JSJBD. JSJBD prevailed on all three claims.

While the district court thereafter found that judgment is entered in favor of Tropicana "on all other claims for relief contained in the Complaint," (App. 2752), ***there were no other claims for relief in the Complaint***. Rather, this is a residual findings made in case the district court overlooked a claim. Thus, JSJBD prevailed on each of its three claims for relief.

When it comes to Tropicana's Counterclaims, the Court found that there was only one interrelated case that was not capable of apportionment. (App. 3354.)[4] Further, while the district court found that Tropicana was entitled to Judgment "on the Second Claim for Relief for Breach of the Lease Agreement for the underpayment of rent according to ***the schedule*** in the amount of $13,000," (App. 2752), such determination specifically references ***"the schedule"*** listed as part of the Judgment entered in favor of JSJBD, and against Tropicana, in regard to JSJBD's First Claim for Relief for Declaratory Judgment (App. 2751-52.) Further, a party properly seeking a declaration cannot be deemed in breach of obligations announced in such declaration without being provided notice and an opportunity to comply. *See, e.g.*, NRCP 58(c) ("no judgment is effective for any purpose until it is entered"). The district court also found at ¶ 108 of its Findings of Fact and Conclusions of Law that "there were good faith disputes regarding the amount of rent for the option period" (App. 2751), which again shows the lack of any breach by JSJBD of its payment obligations.

As to the three other Claims for Relief in Tropicana's Counterclaim, the district court stated: "JUDGMENT is hereby entered in favor of Counterdefendant

[4] The Court stated: "Both of you have argued apportionment, I certainly understand your positions, but everything was interrelated in this case." (App. 3354.) Further, the Court awarded each side essentially all attorney fees, which again shows the court treated the matter as one case-as-a-whole.

JSJBD, and all other Counterdefendants, and against Counterclaimant Tropicana Investments, LLC, ***on all other claims for relief contained in the Counterclaim***." (App. 2752-53 (emphasis added).)

Thus, JSJBD prevailed on three of the four Claims for Relief in the Counterclaims. JSJBD prevailed on the First and Third Claims (App. 32-35) in the Counterclaim for Declaratory Judgment and Breach of the Implied Covenant of Good Faith and Fair Dealing. JSJBD also prevailed on the Fourth Claim in the Counterclaim (App. 35) for "Eviction and Issuance of Writ of Restitution."

If the rent schedule referenced in the determination of the Breach of Contract Counterclaim is the same as in the Declaratory Relief Claim of the Complaint, which it must be since there is only one rent obligation, then JSJBD prevailed on all Claims for Relief in the Counterclaim.

The district court determined that JSJBD was a prevailing party.

b. The district court committed error in finding that Tropicana did not even need to be a prevailing party to obtain its attorney fees.

The district court set a January 27, 2020 hearing to discuss its novel theory wherein it would award both sides with their respective attorney fees and costs. The Court stated at the outset of the hearing:

> So, I wanted to have a discussion with you, which is one of the reasons I moved you to my oral calendar about who is the prevailing party and why, and then to have a discussion about the attorney fees awards that you may

> each be entitled to if I determine that each of you prevailed on a basis which entitles you to attorney's fees.

(App. 3346.) Whereas the district court found JSJBD to be entitled to its attorney fees because it was a prevailing party, the district court stated why it would also grant attorney fees to Tropicana: "In addition, the Defendant is entitled to attorney's fees under paragraph 24 of the Lease ***regardless of whether they are the prevailing parties***." (*Id.*) As further discussed below, granting attorney fees to a non-prevailing party is error, as it violates, inter alia, NRS 18.010(4).

The district court repeated this same reasoning—that it could properly grant attorney fees to a non-prevailing party—several times during the hearing. Thus, the following was stated early in the hearing:

> THE COURT: You got a contract; it doesn't say you have to be a prevailing party.
>
> MR. MOORE: It's -- you're absolutely correct. It just says I need –
>
> THE COURT: Paragraph 24 just says you have to have had the default issue.

(App. 3347.)

The district court returned to this same reasoning shortly thereafter, stating:

> THE COURT: I want to address why you're the prevailing party and are entitled to attorney's fees.
>
> MR. MOORE: That's exactly why, Your Honor.
>
> THE COURT: You got a contract and under paragraph 24,

you get them regardless of whether you win or not.

(App. 3347-48 (emphasis added).)

When Tropicana attempted to argue that it "did win," the district court again returned to the court's reasoning that Tropicana did not have to win:

> MR. MOORE: And, we did win -- so yes, and we did win.
>
> THE COURT: And, ***you sort of won.***

(App. 3348 (emphasis added).)

This reasoning that it was sufficient if Tropicana "sort of won" was largely repeated at the conclusion of the January 27, 2020 hearing wherein the district court reasoned that the real "somebody" who wins is whoever billed more in attorney fees.

> [Y]ou're going to each give me a revised judgment that includes whatever amount you won in the trial, plus your attorney's fees, and your adjusted costs. And then, I assume you're going to have a setoff between the two of you and ***somebody's going to win when you do that***.

(App. 3355 (emphasis added.)

At no point in the January 27, 2020 hearing did the district court find that Tropicana was a prevailing party. (*See* App. 3345-61.)

While Tropicana made a point of including prevailing party terminology in the draft Order it sent to the district court, no such finding was made by the district court at the January 27, 2020 hearing that the district court specifically set for discussing its reasoning for requiring an exchange of attorney fee obligations. The

district court's reasoning was simply that, whereas JSJBD was a prevailing party entitled to its attorney fees, Tropicana did not need to be a prevailing party to be awarded its attorney fees.

c. Interpretation of an agreement so as to grant attorney fees to a non-prevailing party violates NRS 18.010(4).

Attorney fee awards based on an attorney fee provision of a contract are governed by NRS 18.010(4). It requires one to be a "prevailing party" if seeking attorney fees based on an agreement: "Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the ***prevailing party*** to an award of reasonable attorney's fees."

NRS 18.010(2) has similar "prevailing party" terminology. It states: "In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees ***to a prevailing party*** . . . ."

The district court committed error when it found that a lease could provide grounds for granting attorney fees to Tropicana without it even being a prevailing party. Likewise, granting all attorney fees incurred by both sides in a single, undifferentiated case, fails to grant attorney fees to a prevailing party.

d. Tropicana fails to properly interpret NRS 18.010.

In its Answering Brief, Tropicana asserts that NRS 18.010 does not require that a litigant be a prevailing party to obtain attorney fees pursuant to contract language. *See* Ans. Br. at 42-43. Remarkably, Tropicana fails to address the

"prevailing party" terminology in NRS 18.010. Its only reference to the phrase comes at a point where it plainly minimizes and avoids discussion of the "prevailing party" requirement. *See* Ans. Br. at 43.

Tropicana argues that NRS 18.010(4) does not contain a "prevailing party" requirement in regard to attorney fees because the statute does not have the word "only." Yet, the word "only" is not needed when NRS 18.010(4) refers to "agreement" in conjunction with stating that one must be a "prevailing party." Once "prevailing party" is made a requirement, there is no need to use the word "only."

Tropicana also argues that the phrase "in addition to" in NRS 18.010(2) means that Tropicana is not subject to a "prevailing party" requirement. The phrase "in addition to" merely references that there are other Nevada statutes that permit an award of attorney fees in Nevada. Tropicana does not cite any other statute as purportedly eliminating the "prevailing party" requirement.

Tropicana argues that NRS 18.010 does not "limit existing law" that supposedly permits an award of attorney fees to a non-prevailing party. Ans. Br. at 43. Tropicana then fails to cite any existing law that supposedly allows attorney fees to non-prevailing parties. *See id.* Further, to the extent Tropicana is referring in its Answering Brief at page 43 to the two cases it cites on page 42 of its Brief, neither such case allows attorney fees to be awarded to a non-prevailing party.

First, in *Davis v. Bolling*, 128 Nev. 301, 278 P.3d 501 (2012), there were three pertinent attorney fee provisions at issue. Yet, all three of the attorney fee provisions in *Davis* required prevailing party status. *Davis*, 128 Nev. at 322, 278 P.3d at 515 "All three agreements provide . . . the ***prevailing party*** is entitled to attorney fees."). There was no issue regarding granting attorney fees to a non-prevailing party.[5]

Second, the other case that Tropicana cites on page 42 of its brief—*Trustees of Carpenters v. Better Bldg. Co.*—has no application to the issues here. In the case, this Court stated, in italics that the attorney fee provision, and NRS 18.010, both had ***"prevailing party"*** terminology. *Id.*, 101 Nev. 742, 747, 710 P.2d 1379, 1382.

Tropicana fails to properly interpret NRS 18.010(4). The statute does not permit attorney fees to be granted to a non-prevailing party.

e. The district court failed to find that there was a "default," which, in any event, could not be found because Tropicana conceded that it "never" asserted "default" and that doing so would be a "mistake."

Tropicana argues: "JSJBD did, in fact, default under the lease, and that Tropicana did, in fact, retain an attorney in connection with that default." Ans. Br. at 44. Tropicana cites to two pages in the Findings of Fact and Conclusions of Law that do not make any finding of default. (*See* App. 2749, 2752.) Rather, those citations are to the district court's finding, per *Cassinari*, regarding what the amount

[5] *Davis* also holds regarding such provisions, "[O]ur plenary review is implicated when questions of law, such as in the interpretation of a contract, are at issue." *Id*.

of rent shall be. The district court did not find JSJBD's *Cassinari* application to the court for a declaration to be a default. (*See id.*)

Likewise, at the January 27, 2020 hearing at which the district court presented its novel concept that the lease does not require JSJBD to be a prevailing party, the district court never found that JSJBD committed a "default." (*See* App. 3345-61.)

The second basis that Tropicana asserts for a finding of default is the attorney-drafted Order it presented to the district court for granting attorney fees, which contains no reference to "default." Of course, the record of the hearing is contained in the transcripts for the January 27, 2020 hearing (App. 3345-61), which do not contain any finding of "default" either.

"Default" under a lease provides grounds for eviction. What prompted the case was Tropicana's service of a Thirty Day Notice to Quit on November 14, 2018, which Tropicana attached as an exhibit (App. 94) to its Answer and Counterclaim (App. 19-94). The Counterclaim included Tropicana's Claim for Eviction and Issuance of Writ of Restitution. (App. 35.) The Eviction claim stated, inter alia, "On or about November 15, 2018, Counterdefendant was served with a Thirty Day Notice to Quit the Premises . . . ." (App. 35.) Yet, the district court ruled in favor of JSJBD, and against Tropicana, on the Counterclaim for Eviction. (App. 2752-53 (finding in favor of JSJBD "on all other claims for relief contained in the Counterclaim"). Thus, the district court did not make any finding of default.

Finally, Tropicana does not respond in its Answering Brief to its own principal-owner, Jeff Chauncey, testifying that JSJBD has ***"never"*** committed a default.[6] There cannot be a default when the owner-principal of Tropicana so emphatically states that JSJBD has never committed a default. JSJBD specifically cited such testimony in closing argument[7] at trial, and at the January 27, 2020 hearing for addressing attorney fee motions[8].

The district court did ***not*** find that JSJBD defaulted. Thus, it erred in granting attorney fees to Tropicana based on the attorney fee provision of the Lease.

3. The district court failed to follow the "American Rule" by failing to either (a) apportion fees on a claim-by-claim basis; or (b) granting fees to one prevailing party on a case-as-a-whole basis.

a. The district court did not apportion fees.

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[6] (App. 1741 ("***I never threatened them [JSJBD] with eviction. If I did, it was in error. They've never been in default*** except -- actually, they're not in default because we have sent a letter recently, but to my knowledge, they have not been in default."); (App. 1741 ("[N]o, they've [JSJBD] never been in default, and that was an error on my part."))

[7] (App. 2218-19) ("MR. LOVATO: Mr. Chauncey said it was a mistake to assert default. He either said mistake or error. . . . If it's a mistake to assert that, then it's a mistake to still have counterclaims for writ of restitution, eviction. It's also a mistake to assert counterclaims . . . .").

[8] (App. 3350) ("MR. LOVATO: I asked Mr. Chauncey on the stand about his assertion of default, and he said that was a mistake. I asked about his eviction claim, and he said that was an error. They even filed a motion for summary judgment trying to disavow the entire Lease, the 15 years of options; they lost on that. They continue pushing it even after Cassinari was cited . . . . They can't show default.").

The district court found, in regard to apportionment arguments comparing the claims vis-a-vis the counterclaims, that "***everything was interrelated in this case***." (App. 3354.) The district court found that "both of you have argued apportionment," but concluded apportionment was not possible. (App. 3354.)

Tropicana concedes there was no apportionment on a claim-by-claim basis when it states in its Answering Brief, "It is impossible and impractical to attempt to apportion prevailing parties on discrete claims and award fees as to only certain claims." Ans. Br. at 44.

Thus, the one possibility for awarding fees to opposite sides in a case—by apportioning as to separate parts of a case—is plainly something that the district court did not do.

By failing to apportion to claims and/or counterclaims, the district court committed error when it awarded attorney fees to both sides in the case.

b. The district court failed to grant fees solely to the prevailing party on the case-as-a-whole.

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

Tropicana concedes that the district court erred in failing to find a singular prevailing party. Ans. Br. at 44 ("However, there can be only one prevailing party in a case"), 45 ("the district court made a mistake of law").

Strangely, Tropicana makes a completely contradictory argument when it asserts that the district court is "correct in concluding that Tropicana was ***a*** prevailing party." Ans. Br. at 44. In an unportioned and interrelated matter, the court cannot grant fees by concluding that both sides are "a" prevailing party. In addition, the page of the Appendix Tropicana cites for the district court even finding that it is "a" prevailing party is one that states, inter alia, "Defendant is entitled to recover its reasonable attorney fees incurred int his litigation, ***regardless of whether Defendant is a prevailing party***." *See* Ans. Br. at 44 (*citing* App. 3363 (emphasis added).)

The district court erred in failing to grant fees solely to the prevailing party.

c. The district court erred by not following the only option left under NRS 18.010, which is to apply its discretion to not to grant fees in the situation of a close or "pyrrhic" victory.

In its Opening Brief, JSJBD cites substantial authority holding that a district court can, in close cases, exercise discretion to not grant fees. See Opening Br. at 36. This essentially involves finding that there is no prevailing party. (*See id.*)

The district court's failure to either grant fees to one party, or, alternatively, to find that there is no prevailing party, leaves no possibility other than that the

district court committed error. There is no option available under NRS 18.010 wherein the court can finding both sides to have prevailed.

On this, Tropicana agrees. It concedes that the district court did not make a finding that there is a singular prevailing party. *See* Ans. Br. at 44-45. Tropicana is incorrect, however, when it implies that a court only has the choice of finding that there is a prevailing party. Rather, the option remains wherein a district court has discretion to determine that the final result provides only for a pyrrhic victory.

The district court committed error when it failed to follow either of the two options under NRS 18.010 when making a determination as to whether to grant fees on a case-as-a-whole basis.

d. The district court erred in failing to determine the respective value of the parties' claims—including non-monetary claims—in making a prevailing party determination.

When the district court addressed the parties' motions for attorney fees, it not only failed to make a determination regarding a single prevailing party, it also failed to engage in any meaningful analysis as to how to gauge the value of the parties' respective claims for determining who was the prevailing party.

Any *Parodi*-type analysis that compares the relative success of the parties must also take into account the Declaratory Relief and "informational" claims sought by JSJBD. In the Opening Brief, JSJBD cited *Pardee Homes v. Wolfram*, 135 Nev. 173, 179, 444 P.3d 423, 427-28 (2019), wherein the plaintiff was a prevailing party

in light of its accounting claim, despite such claim not revealing substantial damages. *See* Opening Br. at 33. This Court stated: "Wolfram and Wilkes sought information through an accounting, which was eventually granted by the district court. It is inconsequential to the prevailing party determination that the brokers artfully framed their complaint in a limited way."

In the Answering Brief, Tropicana ignores the citation to *Pardee Homes*. Thus, at page 46 of the Answering Brief where there are arguments that implicate *Pardee Homes*, Tropicana chooses not to address it. Tropicana just ignores it.

Tropicana then argues at length in a footnote that the Declaratory Relief supposedly sought substantial damages and that JSJBD did not prevail. Yet, that argument ignores both *Pardee Homes* and *Cassinari*. In *Cassinari*, this court determined that a lessee is entitled to apply to a court for a determination of reasonable rent, which is what JSJBD did. In *Pardee Homes*, this Court stated:

> The complaint requests information; the district court granted this request. It is beyond the scope of prevailing party determination to consider if Wolfram and Wilkes' underlying motivation was to discover they were owed unpaid commissions because that was not one of their claims.

Pardee Homes, 135 Nev. at 179, 444 P.3d at 427-28.

JSJBD's Complaint (App. 1-14) does not demand "$720,000" or other amounts referenced in the footnote at page 47 of Tropicana's Answering Brief. So long as the district court makes a proper reasonable value determination under

Cassinari, there is no other status quo or benchmark by which Tropicana can calculate such amounts. Rather, the district court, per *Cassinari*, found that there is an option to extend / renew that is enforceable despite not having a rental amount for the option period. As in *Pardee Homes*, JSJBD asserted a Declaratory Relief claim, which merely sought to affirm its lease rights (including option to extend / renew) and have the district court determine the rental amount for the option period. (App. 8-10.)

JSJBD stated no amounts in the Declaratory Relief claim. (App. 8-10.) No amounts are stated in the General Allegation of the Complaint or any other section, other than referencing Tropicana's most recent offer. (App. 6.[9]) Thus, for example, the claim stated: "A declaration is requested, and the Court should so determine and declare, the amount of reasonable / market monthly rent for the premises, which is ascertainable from the market conditions as of the date of the exercise of the option and the renewal / extension of the Lease." (App. 9-10.) Such terminology follows *Cassinari* and *Pardee Homes*. Avoiding the prospect of Eviction presented by Tropicana's Thirty Day Notice to Quit by confirming JSJBD's Lease rights, and obtaining a declaration as to reasonable rent, is a victory under *Pardee Homes*.

[9] Paragraph 38 of the Complaint stating: "As recently as August 18, 2017, Tropicana Investment's counsel forwarded another edited version of the new Lease Agreement, and, on August 25, 2017, conveyed an offer to reduce base rent from $2.00 per square foot per month to $1.95 per square foot per month." (*See also* App. 321 (document referencing unsigned Lease documents and $1.95 offer).)

Tropicana attempts to argue that it was awarded fees pursuant to NRS 18.010(2)(a). Yet, the district court's finding that the counterclaims were "interrelated" with JSJBD's claims for relief eliminates the argument. If the counterclaims are the flip-side of the claims filed by the plaintiff, then the case remains essentially one of a plaintiff asserting claims against a defendant. So long as the plaintiff prevails on a significant issue, it is the prevailing party. Tropicana's arguments about $20,000 are merely repeating its failure to address this Court's *Pardee Homes* case and *Cassinari*, itself.

Thus, any proper analysis of prevailing party status requires that the district court engage in a *Parodi*-type analysis that takes into account the nature of the informational / non-monetary claims in the case, as discussed in *Pardee Homes*. The district court erred in failing to conduct such analysis.

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

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

Cassinari plainly applies because the parties entered into several options-to-extend / renew, none of which state what the amount of rent will be for the option

period. Regardless of which option-to-extend applies[10], none of them state the amount of rent for the given option period. Under *Cassinari*, an option-to-extend a lease is enforceable despite not stating an amount of rent.[11] What should have occurred, especially in light of the district court's ruling on the parties' respective motions for summary judgment, is that the district court should have made a determination of reasonable rent by looking at ascertainable market conditions.

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

In its Answering Brief, Tropicana fails to discuss the actual language of the August 31, 2016 letter from JSJBD's attorney that Tropicana claims as representing the offer that Tropicana thereafter supposedly accepted. *See* Ans. Br. at 32-33. Reviewing such letter is the first step in applying the Mirror Image Rule.

Such August 31, 2016 letter from JSJBD's attorney states, inter alia, that "JSJBD declines to go forward with a new lease as proposed." (App. 184.) Instead of entering into lengthy new Lease documents, it states: "Enclosed herewith for your review and comment is a proposed Amendment to the existing Lease." (*Id.*) What is attached to the August 31, 2016 letter is what is supposed to be a five-page

[10] *See* Opening Brief at 12 (referencing, in bold italics, the three different documents containing option(s)-to-extend).

[11] In its Answering Brief, Tropicana attempts to avoid *Cassinari* by essentially questioning its holding. *See* Ans. Br. at 28-32. Yet, none of the cases Tropicana cites on pages 28-32 have any application to the *Cassinari* situation.

Amendment to Lease. Yet, page 3 of such Lease Amendment is already missing from what is attached to the August 31, 2016 letter. (*See* App. 184-89.) The last page has signature lines for the parties (App. 189), who never signed.

The second step of applying the Mirror Image Rule is looking at the critical September 7, 2016 letter that Tropicana's transactional attorney sent in response. Remarkably, Tropicana chooses to avoid any actual discussion of the contents of that September 7, 2016 letter in its Answering Brief. *See* Ans. Br. at 32-33. Instead, Tropicana resorts to characterizing such letter by claiming it is "agreeing to everything" "except for a few nonmaterial terms." *See id.*

In the law of contracts, the Mirror Image Rule, also referred to as an unequivocal and absolute acceptance requirement, states that an offer must be accepted exactly with no modifications. Restatement (Second) of Contracts § 59. An attempt to accept the offer on different terms instead creates a counter-offer, and this constitutes a rejection of the original offer. Restatement (Second) of Contracts § 59. For an acceptance to be valid, it must not vary from the initial offer. Steiner v. Mobil Oil Corp., 569 P.2d 751, 757 (Cal. 1977) ("Under traditional common law, no contract was reached if the terms of the offer and the acceptance varied."); *see also Morrill v. Tehama Consol. Mill & Mining Co*., 10 Nev. 125, 136 (1875) (acceptance must correspond with an offer "entirely and adequately.").

Tropicana's September 7, 2016 letter (App. 191-94) did not "mirror" the August 31, 2016 letter from JSJBD's counsel. It certainly did not constitute a signing of the Lease Amendment by the parties. In the first paragraph of Tropicana's attorney's September 7, 2016 letter (App. 191), Tropicana's counsel communicates that this is his first communication with JSJBD's new counsel. He also makes clear that he is merely ***"commencing a dialogue"***:

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

(App. 191.)

In the next paragraph, Tropicana's counsel references the "Amendment to Lease" in quotations that JSJBD's counsel had sent in prior correspondence, no doubt, because Tropicana's principal had recently demanded (App. 295) entirely new lease documents.

Tropicana's counsel then proposes different terms for Parking, which is yet another material term:

> As far as the "Amendment to Lease" is concerned, your requested change set forth in Paragraph 6. "Parking" is ***not acceptable***.

(App. 191 (emphasis added).) Tropicana's counsel emphasizes that there must be an agreement ***on all other points*** for him to even contemplate changes to the parking spaces to be dedicated to JSJBD's customers. He states:

> ***Provided we are able to reach an agreement on all other points***, the Landlord will agree to provide six reserved parking spaces, three in front and three on the south side of the driveway, all to be designated on a Site Plan (see attached). Please note that if any of the designated spaces on the Site Plan are currently designated for handicapped use, then an adjacent space will be provided.

(App. 191 (emphasis added).)

When Tropicana argues at page 33 of its Answering Brief, in conclusory terms, that parking cannot be material, it is ignoring what Tropicana's own attorney put in writing in the September 7, 2016 letter, itself. All other points had to be agreed-upon for parking issues to even be resolved.

In the third paragraph of Tropicana's attorney's September 7, 2016 letter, Tropicana proposes new terms regarding how often Tropicana will account for CAM charges. (App. 191.) In its Answering Brief, Tropicana entirely ignores that its counsel proposed new terms for CAM charges. *See* Ans. Br. at 33. Instead, Tropicana argues that the September 7, 2016 letter only references "parking, security, and signage"—patently ignoring a counter-proposal regarding CAM charges.

The September 7, 2016 letter counters with new CAM terminology, seeking to have JSJBD agree to terms to which other tenants have supposedly agreed, stating:

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

(App. 191-92.)

Meanwhile, the new CAM terminology that Tropicana proposes is attached on an additional page of the letter, as an exhibit. It consists of three lengthy paragraphs (App. 194). In the Answering Brief, Tropicana ignores this additional page of proposed terms that are part of the September 7, 2016 letter its counsel sent. *See* Ans. Br. at 33.

The fourth, fifth, and sixth paragraphs of the September 7 ,2016 letter (App. 191-92) propose entirely new language regarding "patrol and security services." The letter also proposes how such costs will be included in CAM charges, thus, countering with a change to the CAM provision.

In the September 7 letter, Tropicana's counsel even refers to the new language as a "modification." (App. 192.) A modification is a counter, not an acceptance.

The seventh paragraph requests personal guaranties from principals of JSJBD, including of Bruno Mark, who has never signed a guaranty.[12] This is yet another counter. In its Answering Brief, Tropicana ignores this counteroffer as well. The paragraph in the September 7, 2016 letter regarding this states:

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

(App. 192 (parenthetical in original).) Seeking additional guarantors is a counter.

The guaranty documents are not even provided with the September 7, 2016 letter sent by Tropicana's counsel. (App. 192.) A letter cannot be an acceptance when it demands the signing of guaranty documents that it does not provide.

The eighth paragraph of the September 7, 2016 letter states that Tropicana seeks assent to "Shopping Center Rules and Regulations." (App. 192.) Demanding assent to new Rules and Regulations is another counter, not an acceptance.

In the September 7, 2016 letter, Tropicana makes the additional request that JSJBD agree to "promptly replace the exterior signs which are faded and in poor condition" (App. 192), which would be another significant obligation and cost item. In the Answering Brief, Tropicana casually refers to this as being "non-material," without discussing how that can possibly be the case. *See* Ans. Br. at 32-33.

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[12] *E.g.*, Bruno Mark is not a Counterdefendant. The Guaranty documents, signed by others, are attached to Tropicana's Answer and Counterclaim. (App. 60-67.)

The September 7, 2016 letter concludes by acknowledging that there is no agreement. It states: "I look forward to discussing these points with you and attempting to work through these final matters." (App. 192.) Such language communicates that there is no agreement.

"For an acceptance to be valid, it must not vary from the initial offer." *JSD Properties, LLC v. Grant, Morris, Dodds, PLLC*, 445 P.3d 225, 2019 WL 3489469, at *1 (Nev. 2019) (unpublished), *citing Steiner v. Mobil Oil Corp*., 569 P.2d 751, 757 (Cal. 1977); *Morrill v. Tehama Consol. Mill & Mining Co*., 10 Nev. 125, 136 (1875). Plainly, the September 7, 2016 letter was not acceptance or an agreement.

No Amendment, let alone new lease documents, were ever signed. After exchanging yet more emails indicating matters were still being reviewed (App. 305), on November 22, 2016, JSJBD's counsel sent yet another email stating that the proposal was still being reviewed in light of "substantial difference from the prior lease." (App. 305.)

In its Answering Brief, Tropicana argues "there was substantial evidence presented to support the district court's finding." Ans. Br. at 33. Yet, the only evidence that Tropicana cites is the August 31, 2016 letter sent by JSJBD's attorney, along with the September 7, 2016 letter sent in response by Tropicana's attorney.

See Ans. Br. at 33.[13] Tropicana's reference to its attorney testifying that there was a private acceptance that he made orally after rejecting alleged offers by sending his September 7, 2016 letter fails to establish anything, as there was nothing left to accept once a rejection occurs. The September 7, 2016 letter rejected any and all items proposed in the August 31, 2016 letter.

The district court erroneously applied to the Mirror Image Rule to the August 31, 2016 letter sent by JSJBD's attorney, and to the September 7, 2016 letter sent by Tropicana's counsel that countered with numerous additional points.

Rather than make a determination of reasonable rent at trial, the district court's Findings of Fact and Conclusions of Law state that there was an agreement on the amount of rent for the option period, finding that a September 7, 2016 letter from Tropicana's counsel constituted an agreement. (App. 2745 ¶ 45). The district court's decision erroneously applies the Mirror Image Rule and erroneously fails to make a reasonable rent determination under *Cassinari* by looking to ascertainable market conditions.

3. Tropicana presents extensive arguments as to whether a court can reconsider prior rulings, which fails to address the issue at hand.

There is no issue on appeal regarding whether a district court can change its mind. In the Opening Brief, JSJBD argues that the district court correctly applied

[13] Tropicana cites its Respondent's Appendix at 405-10, but this includes the same September 7, 2016 correspondence that is in Appellants' Appendix at 191-94.

the Mirror Image Rule at the summary judgment stage, and incorrectly applied such rule in its Findings of Fact and Conclusions of Law. Since both the August 31, 2016 letter and the September 7, 2016 contain plain language that is in writing, it simply presents a matter of document interpretation.

Thus, the question here is whether the district court properly applied the Mirror Image Rule to the two letters in its Findings of Fact and Conclusion of Law.

4. In addition, an attorney does not have authority to enter into a lease on behalf of a client without express authorization, and testimony by a landlord's attorney regarding an oral agreement merely between counsel is irrelevant.

Tropicana's argument that it reached an oral argument with JSJBD's transactional attorney is made in ignorance of basic agency principles. "It is well established that absent some expressed authority the attorney has no implied plenary power to make, enter into, or alter a contract on behalf of his client." Carol McCoy, *An Attorney's Implied Authority to Bind His Client's Interests and Waive His Client's Rights*, THE JOURNAL OF THE LEGAL PROFESSION, *citing Wilson v. Eddy*, 82 Cal. Rptr. 826 (Cal App. Ct 1969); *Miller v. Mueller*, 242 A.2d 922 (Md. 1975); 1 E. Thornton, A TREATISE ON ATTORNEYS AT LAW § 202.

There should not even be a need to address the Mirror Image Rule because, "absent express authority, it is established that an attorney does not have implied plenary authority to enter into contracts on behalf of his client." *Blanton v. Womancare, Inc*., 38 Cal. 3d 396, 407, 696 P.2d 645, 652, 212 Cal. Rptr. 151, 158

(1985) (en bank), *citing Wilson v. Eddy* 2 Cal. App. 3d 613, 618, 82 Cal. Rptr. 826 (1969) ("[T]he client has a right to be consulted, and his consent obtained"). In *Blanton*, the Supreme Court of California held that such was the case—even for a matter that related to litigation, i.e. the signing of an arbitration agreement. The party seeking to enforce the alleged agreement must show that the opposing ***party*** agreed to it. *See id.*

The Ninth Circuit soundly rejected the same type of argument that Tropicana presents here, i.e. where a plaintiff claimed it had an oral agreement with the defendant's attorney. In *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 775 (9th Cir. 1989), the Ninth Circuit rejected the notion that the attorney can even enter into a contract on behalf of a client, absent express authorization. It stated: "Further, we note that [the attorney] alone could not memorialize the agreement between the parties even if he intended to do so, absent [the client's] signature on the letter or some express authorization from her." *Id.*

In this case, and unlike in *Valente*, there is not even a memorialized lease or lease amendment. When Tropicana put its attorney Sacco on the stand to claim that he had a private oral agreement on rental amount with JSJBD's attorney, after he had presented all manner of different lease terms, he was presenting an utterly irrelevant argument. Aside from Sacco's own correspondence already rejecting all

manner of possible terms, Sacco's testimony failed to do anything to show an agreement with JSJBD, itself.

When Tropicana repeatedly argues that JSJBD's counsel was "authorized to send" letters, it is making an irrelevant argument. It must show that there was express authorization for Leslie Miller to sign the lease documents on behalf of JSJBD, which never occurred. Authority to send a document means nothing when the parties must enter into any Lease documents in question. Tropicana ignores that attorneys do not have authority to enter into binding contracts for the client.

5. The district court's exclusion of testimony relating to the Rule 30(b)(6) deposition has no effect on application of the Mirror Image Rule.

As argued above, the plain language of the parties' August 31, 2016 and September 7, 2016 correspondence shows that there is no agreement as to rent. The district court's ruling as to the organizational deposition cannot change what the parties' correspondences state. It does not change application of the Mirror Image Rule to those documents.

Tropicana does not respond to this argument in its Answering Brief. The closest it comes is when it states that the exclusion of testimony "was, at most, harmless error" because Tropicana "agree[s]" that it "should have no effect on making a reasonable rent determination." *See* Ans. Br. at 41 & n.10. Yet, what

JSJBD plainly argued is that the district court's order could not alter application of the Mirror Image Rule.

In addition, it is improper to exclude testimony at trial where there is no predicate discovery order. NRCP 37 authorizes discovery sanctions only if there has been ***willful noncompliance with a discovery order*** of the court. *Fire Ins. Exchange v. Zenith Radio Corp*., 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). In its Answering Brief, Tropicana presents no responding argument about the lack of any predicate discovery order. Thus, the district court erred in sanctioning JSJBD.

As background, Tropicana argued it was entitled to the "organization's interpretation of the documents," (App. 600, 1015-16), including red-lined drafts between counsel that were never entered-into. "[I]f an organization truly does not possess knowledge as to matters listed in the notice, and is unable to prepare a designee, it has no duty to make a designation under Rule 30(b)(6) . . . ." Moore's Fed. Prac. § 30.25[3] (citing various cases). As stated at the hearing for Tropicana's motion for sanctions:

> MR. LOVATO: There were a lot of I don't knows. But when they have to do with documents drafted by other people ***and attorneys*** that are not Jeff Vincent it's hard for him to be able to testify about these documents, ***especially when they were never executed, never became anything binding***.

(App. 1024 (emphasis added).) In addition, the questioning is irrelevant where the district court has ruled on dueling motions for summary judgment and found that the parties did ***not*** agree on an amount of rent for the option periods. (App. 481).[14]

Such testimony, whether viewed as proper or not, cannot affect application of the Mirror Image Rule to the plain language of the August 31, 2016 and September 7, 2016 letters sent between counsel. Thus, as much as Tropicana attempts to capitalize on such organizational deposition, it cannot affect the meaning of the two letters that Tropicana argued as representing an enforceable contract.

Finally, Rule 30(b)(6) is ***not*** a rule that precludes witnesses from testifying at trial. Deposition responses are "binding" to the extent that the witness can be confronted at trial as having presented inconsistent testimony at deposition. *See* Opening Br. at 49-50, *citing inter alia* Wright & Miller Fed. Prac. & Proc. § 2103 ("they are not 'binding' in the sense that the corporate party is forbidden to call the same or another witness to offer different testimony at trial."); *R&B Appliance Parts, Inc. v. Amana Co*., 258 F.3d 783, 786 (8th Cir. 2001) ("A witness is free to testify differently from the way he or she testified in deposition, albeit at the risk of having his or her credibility impeached").

[14] Consistent with this, at the conclusion of the deposition, JSJBD also moved to strike most of the deposition in light of the district court's ruling on the parties' respective motions for summary judgment. (App. 531.)

Regarding ***preclusion*** of testimony, Tropicana merely argues that a witness's testimony is "binding" on the witness, which is not the issue. *See* Ans. Br. at 38-40. In its Answering Brief, Tropicana fails to cite any legal authority in response other than to cite *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 396 P.3d 783, which only discusses general discovery disclosure obligations, and not whether a district court can properly preclude witness testimony at trial. *See* Ans. Br. at 40.

6. Continued payments of rent do not constitute an agreement where there is already an enforceable option-to-extend per *Cassinari*, and where a lessee is required to continue making good faith payments as the lessees did in both *Cassinari* and *Bealick*.

A tenant with an enforceable option to extend does not "accept via performance" because there is no need to accept anything in order to have an enforceable option to extend. *Cassinari* already holds that the tenant has an enforceable option to extend despite the lack of an agreement as to rental amount.

The tenant must nevertheless pay sufficient rent, despite not knowing the amount to pay, as the tenant must remain in compliance with lease obligations to be able to enforce them. In *Cassinari* and *Bealick*, the tenant continued paying in the approximate amount of the old lease obligations. Paying in an amount that the landlord demands certainly protects the tenant's rights as well.

The doctrine of "part performance" has no application to the issues here. "Part performance" is an exception to the statute of frauds where there is no enforceable agreement, and where a written agreement is otherwise required. *Capital Mortg.*

Holding v. Hahn, 101 Nev. 314, 315-16, 705 P.2d 126, 127 (1985). In this case, the options to extend are enforceable. The options to extend are already in writing and signed by the parties. JSJBD does not need "part performance" to prove the existence of the options-to-extend. The doctrine does not apply to this case.

II.

CONCLUSION

Respectfully, JSJBD requests the relief requested at the Conclusion of its Opening Brief. JSJBD requests reversal of the district court's decision regarding attorney fees such that JSJBD is not adjudged liable for Tropicana's attorney fees and costs. JSJBD seeks and requests reversal of the district court's plain language application of the Mirror Image Rule to the August 31, 2016 and the September 7, 2016 letters sent between the parties' transactional attorneys.

The matter should be remitted to the district court for further proceedings, including a proper determination of reasonable rent.

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

JSJBD and Counterdefendants request any further relief consistent herewith.

ANSWERING BRIEF TO CROSS-APPEAL

I.

ISSUES PRESENTED

1. Does Nevada's prevailing party analysis take into account the significance of informational and non-monetary claims (i.e. declaratory relief and accounting-type remedies), as well as claims involving the confirmation of property rights (i.e. confirming lease rights and avoiding Eviction) when determining if a party prevailed on a significant issue in filing the case?

2. Does Nevada law allow a district court to award attorney fees under NRS 18.010, and otherwise, that were incurred as a result of a landlord's bad faith misconduct in refusing to provide CAM accounting and attempting to Evict?

3. Can a district court that finds bad faith and related misconduct by a defendant determine during the bench trial that it is reserving its decision on attorney fees, as to both sides in the case, for post-trial motions, or must a court solely require that attorney fees incurred in the same case be proven during the course of the trial?

4. Has Tropicana shown the district court abused its discretion in its determination of rent obligations in light of all the facts and circumstances in this case including the more substantial issues herein?

II.

STATEMENT OF THE CASE.

Tropicana ignores that any *Parodi*-type analysis that compares the relative success of the parties must also take into account "informational" and non-monetary claims sought by JSJBD. In the Opening Brief, JSJBD cited *Pardee Homes v. Wolfram*, 135 Nev. 173, 179, 444 P.3d 423, 427-28 (2019), wherein the plaintiff was a prevailing party in light of its accounting claim, despite such claim not revealing substantial damages. *See* Opening Br. at 33. Tropicana ignores the case. In so doing, it fails to take into account the significance of informational and non-monetary claims, including those seeking confirmation of substantial property rights that would avoid Tropicana's threat and subsequent claim for Eviction.

JSJBD and Counterdefendants sought attorney fees pursuant to NRS 18.010(1), which allows such fees where less than $20,000 is recovered. JSJBD's claim sought to enforce significant non-monetary rights, such as confirming its Lease and option rights, and seeking information as in *Pardee Homes* (and *Cassinari*) regarding reasonable rent. It also sought information about CAM charges in light of Tropicana's failure to properly account for such charges, which the district court so found. Finally, Tropicana's counterclaims were interrelated, and, indeed, pursued Eviction to the conclusion of the case. Such counterclaims also entitled JSJBD to fees under NRS 18.010.

Attorney fee applications made pursuant to NRS 18.010 are subject to the timing and other requirements of NRCP 54(d). This case involved a bench trial.

The district court applied the same NRCP 54(d) process for seeking attorney fees to both sides. To the extent that *Sandy Valley*'s three basis shed light on entitlement to attorney fees for amounts less than $20,000, its bases are consistent with what the district court granted to JSJBD and Counterdefendants.

Finally, the rather trivial arguments that Tropicana makes regarding payment calculations provided by the district court pale in comparison the errors that Tropicana either concedes (e.g., that the district failed to determine a single prevailing party) or that it concedes by failing to respond in its Answering Brief (e.g., application of the Mirror Image Rule, that the district court erroneously found that rent can only increase, etc.). Tropicana's calculation arguments are poorly made here.

III.

ARGUMENT

A. THE DISTRICT COURT PROPERLY FOUND THAT JSJBD / COUNTERDEFENDANTS HAVE PREVAILING PARTY STATUS, ESPECIALLY CONSIDERING TROPICANA'S FAILURE TO TAKE INTO ACCOUNT *PARDEE HOMES'* RECOGNITION OF THE SIGNIFICANCE OF INFORMATIONAL / NON-MONETARY CLAIMS.

Plaintiff and Counterdefendants are the prevailing parties in this case. For the reasons stated in the Reply brief, above, they were properly determined to be the prevailing parties.

In its Cross-Appeal, Tropicana completely ignores that any *Parodi*-type analysis that compares the relative success of the parties must also take into account the "informational" and non-monetary claims sought by JSJBD. In the Opening Brief, JSJBD cited *Pardee Homes v. Wolfram*, 135 Nev. 173, 179, 444 P.3d 423, 427-28 (2019), wherein the plaintiff was a prevailing party in light of its accounting claim, despite such claim not revealing substantial damages. *See* Opening Br. at 33.

In the Answering Brief, Tropicana ignores the citation to *Pardee Homes*. See Ans. Br. at 46. Tropicana adopts the exact same strategy in its Cross-Appeal. *See* Ans. Br. at 57-60. Tropicana makes no reference in those pages whatsoever to *Pardee Homes* in addressing how to determine prevailing party status when comparing claims that do not directly seek monetary amounts.

Tropicana's Cross-Appeal also ignores the effect of the district court finding that the claims are interrelated. Tropicana ignores that the rent payment obligations announced by the district court involve the same exact "schedule" that the district court determines as part of adjudging JSJBD to be the prevailing party on its claim for Declaratory Relief against Tropicana.

Of course, there is the additional problem that the district court mis-applied the Mirror Image Rule rather than make a reasonable rent determination as required in *Cassinari*. *See* Reply Br., above. When it comes to such Mirror Image Rule

application, Tropicana ignored the arguments of the Opening Brief and provided no meaningful response. *See* Ans. Br. at 32-33.

Applying *Pardee Homes*, JSJBD prevailed on its Declaratory Relief (which referenced Tropicana's Thirty Day Notice to Quit, and on Tropicana's interrelated claim in its Counterclaim for Eviction and Issuance of Writ of Restitution. On November 14, 2018, Tropicana served JSJBD with a Thirty-Day Notice to Quit. The title of the Notice stated:

THIRTY DAY NOTICE TO QUIT THE PREMISES
NRS 40.251

(App. 94 (emphasis in original).)

In its opening paragraph, such Notice stated:

> PLEASE TAKE NOTICE that your tenancy at the above Premises ("Premises") ***is hereby terminated***. You must vacate within thirty (30) days from the date of service of this Notice the Premises . . . .

(App. 94 (emphasis added).) Thus, the Notice "terminated" all Lease rights of JSJBD and demanded that JSJBD vacate the premises within a month's time.

The Notice also stated that Tropicana would "initiate an eviction action" if the premises were not vacated. (App. 94.)

JSJBD was properly determined to be the prevailing party, as it was required to file suit to affirm its option rights. A party prevails "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing

suit." *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 (2015), *quoting Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (internal quotations omitted). Under *Cassinari*, a tenant can confirm its option / lease rights and apply to a court for a determination of reasonable rent. JSJBD obtained a favorable result in confirming its Lease / option rights. It prevailed on the claim in Tropicana's counterclaim for Eviction.

In post-trial motion practice, Tropicana presented bizarre arguments claiming that it did not assert its Counterclaim for Eviction and Issuance of Writ of Restitution ("Eviction"). (App. 3253.) In fact, Tropicana continued asserting the claim for Eviction through to the end of trial (App. 3261-62.) For example, on November 8, 2019, Tropicana filed its Individual Pre-Trial Memorandum wherein Tropicana identified the following Counterclaims that Landlord was continuing to pursue:

> 1. First claim for Relief--Declaratory Relief
>
> 2. Second claim for Relief--Breach of Lease Agreement
>
> 3. Third Claim for Relief—Breach of the Implied Covenant of Good Faith and Fair Dealing
>
> ***4. Fourth Claim for Relief—Eviction and Issuance of Writ of Restitution***

(App. 1075, 3261 (emphasis added).) Tropicana further stated: "[N]o claims or defenses are being abandoned by either party." (App. 1080, 3261.)

At no time did Tropicana dismiss the Eviction claim. Unlike JSJBD, which voluntarily dismissed minor allegations regarding roof issues (App. 2726 (n.2)), Tropicana never dismissed its claim for Eviction, leading the district court to adjudge the Claim in favor of JSJBD and Counterdefendants. (App. 2752-53.)

JSJBD was adjudged a prevailing party in regard to its Breach of Contract claim. (App. 2751.) In light of *Cassinari*, which the district court stated it was enforcing in its Findings of Fact and Conclusions of Law (App. 2748), JSJBD should also have been adjudged to prevail on such claim in light of Tropicana improperly terminating the lease via service of the Thirty Day Notice to Quit.

The section of the Complaint dedicated to such claim states, inter alia:

> 81. Plaintiff and Defendant are parties to a Lease and Option Agreement, as well as subsequent lease documents incorporating the same, which set forth rights and obligations of the parties.
>
> 82. Rather than comply with Lease, as well as the related lease documents, Landlord has engaged in conduct contrary to the rights and obligations under the same, and has breached the Lease and related documents as a result of the conduct described above and herein.
>
> 83. The parties are subject to a rent requirement that reasonable / market rent be paid, which can be ascertained from market conditions for the premises and the surrounding area.

(App. 10-11.)

The reference to "conduct described above" referred to the General Allegations, including, inter alia:

> 48. Tropicana Investments then threatened to terminate the lease, contrary to the Lease and subsequent lease documents, which granted Blue Dog's a right to renew and extend the lease, which Blue Dog's exercised in 2016.
>
> 49. Contrary to the Lease and related lease documents, Tropicana Investments served a "Thirty Day Notice to Quit the Premises" dated November 14, 2018.
>
> 50. On November 16, 2018, Blue Dog's responded by disagreeing with the "Third Day Notice to Quit the Premises" and reminding Tropicana Investments of Blue Dog's exercise of its option right to renew and thereby extend the durational term of the Lease.

(App. 7.)

The district court found in favor of JSJBD regarding its second claim for Breach of the Implied Covenant of Good Faith and Fair Dealing regarding the common area maintenance charges and Tropicana's failure to properly account for those charges. (App. 2752.) The General Allegations of the Complaint included the allegations stating:

> 53. Tropicana Investments has charged amounts for the common area maintenance costs that are in excess of the actual common area maintenance costs and Blue Dog's proportionate share.
>
> 54. Blue Dog's has requested an accounting to which it is entitled under the Lease and related documents.

> 55. Tropicana Investments has breached by failing and refusing to comply with the request for accounting.

(App. 7.)

The section of the Complaint dedicated to such claim stated, regarding the CAM misconduct, inter alia:

> 85. Tropicana Investments has charged amounts in excess of the common area maintenance charges, for which restitution and reimbursement to should be made to Blue Dog's.
>
> * * *
>
> 89. **Accounting:** Tropicana Investments has breached its obligation to provide an accounting and related accounting documents to Blue Dog's in regard to the common area maintenance charges, and this Court should order that an appropriate accounting take place.

(App. 11.)

In the Third Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing, JSJBD alleged and stated:

> 103. Tropicana Investments also breached the implied covenant of good faith and fair dealing by refusing to produce a proper accounting of its CAM costs.
>
> * * *
>
> 105. Blue Dog's has been required to obtain the services of an attorney in order to enforce its rights, and is entitled to an award of attorney fees and costs.
>
> 106. **Accounting**: Tropicana Investments has breached its obligation to provide an accounting and related accounting documents to Blue Dog's in regard to the common area maintenance charges, and this Court should order that an appropriate accounting take place.

(App. 13.)

Tropicana failed and refused to produce CAM documentation in the course of the litigation. The Court so found in its Order (App. 828-29), granting JSJBD's motion to compel (App. 533-73) and sanctioning Tropicana. In its Findings of Fact and Conclusions of Law, the district court found that Tropicana persisted through trial in its failure to properly account for CAM charges. (App. 2745 ("Defendant has failed to provide a CAM accounting").)

At paragraphs 94-98, 104 of its Findings of Fact and Conclusions of Law, the district court found that Tropicana overcharged for CAMs. (App. 2749-50.) The overcharges included overcharges for "parking reserves" as well as "painting reserves." (App. 2749-50.)

Also, Tropicana Investments chose to assert Counterclaims against third parties who were not even Plaintiffs in the case. (App. 19-94.) It asserted Counterclaims against person who had signed Guaranty documents, i.e., Jeff White, Stuart Vincent, and Jeff Vincent. (App. 19-94.) Those Guaranty documents guaranteed the "faithful performance by Tenant of all the terms" of the Lease. (App. 60-67.) Tropicana chose to assert claims against these additional parties despite Tropicana's owner-principal's testimony at trial that JSJBD had never defaulted on the terms of the Lease, and, if Tropicana had asserted default, such assertion was a mistake. (App. 1741.)

JSJBD and Counterdefendants were properly adjudged to have prevailing party status.

B. JSJBD AND COUNTERDEFENDANTS WERE PROPERLY DETERMINED TO BE ENTITLED TO ATTORNEY FEES UNDER MULTIPLE GROUNDS.

1. JSJBD was a prevailing party under NRS 18.010.

JSJBD prevailed as a party under NRS 18.010 that was required to assert claims to confirm its possessory right to real property under its Lease, and five-year options to extend such lease. JSJBD cited NRS 18.010 as one of the bases for granting fees to it. (App. 3077.)

NRS 18.010(2)(a) states in pertinent part:

> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees
> to a prevailing party:
>
> (a) When the prevailing party has not recovered more than $20,000 . . . .

NRS 18.010 also allows an award of attorney fees for what are essentially bad faith counterclaims or defenses. NRS 18.010(3) ("counterclaim . . . or defense . . . maintained without reasonable ground or to harass"). "The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." *Id.* "[M]aintained without reasonable ground," liberally construed, should encompass a district court's finding that a defendant has engaged

in bad faith misconduct, such as relates to a claim for breach of the implied covenant of good faith and fair dealing.

The attorney fees awarded under any of the sections of NRS 18.010 can be sought via motion practice in a "special proceeding" post-trial, which appears to refer to the timelines of NRCP 54(d). *See* NRS 18.010(3) ("the court may pronounce its decision on the fees at the conclusion of the trial ***or special proceeding***"); *Winston Products Co. v. DeBoer*, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006) (referring to attorney fees granted via "***special order after final judgment***"). The same timeline applies to the attorney fees sought under 18.010(4) by Tropicana in this case. Indeed, both sides were provided the same deadline for seeking their fees, putting neither to a disadvantage in discovery attorney fees incurred in the case.

NRS 18.030(3) states that a district court can award the attorney fees in NRS 18.010 "without written motion." That would certainly appear to allow it to award attorney fees ***with*** written motion. It would also appear to allow a district court to announce at trial, or in its subsequent Findings of Fact and Conclusion of Law, that it intends to entertain the requests for attorney fees via post-trial motion practice.

JSJBD was required to file a case to confirm its Lease / option rights, after being served with a Notice purporting to terminate its rights. JSJBD prevailed. The district court specifically cited *Cassinari* as providing relief. (App. 2748.)

As in *Pardee Homes*, JSJBD did not inflate its Complaint with damage amounts for a rental determination that could not be known at the time of filing, but rather, merely sought the declaration of reasonable rent that a party following *Cassinari* is entitled to request. Accordingly, JSJBD is entitled to attorney fees for having to proceed to determination of such claim, which does not involve damages in excess of $20,000.00.

Likewise, JSJBD did not assert a damage amount for CAM overcharges because Tropicana had failed to even provide proper accounting for CAM charges, as the district court ultimately found in its Findings of Fact and Conclusions of Law. (App. 2745.) As in *Pardee Homes*, JSJBD filed a simple claim that sought information about unknown CAM calculations.

Tropicana chose to assert the Counterclaim for Eviction and Issuance of Writ of Restitution. Ordinarily, an Eviction claim not demanding a substantial amount in past due rent would proceed in Justice Court where attorney fees would be granted to the prevailing party. NRS 69.030 ("The prevailing party . . . shall receive . . . a reasonable attorney fee. . . . taxed as costs against the losing party."). Such counterclaim, asserted in district court, falls under NRS 18.010(2)(a).

JSJBD prevailed as to Tropicana's effort to evict it and terminate its lease rights. JSJBD prevailed in confirming its Lease / option rights and in its assertion that it is entitled to a determination of reasonable rent. As stated in its Reply Brief

(above at Section A(2)(a)), JSJBD prevailed on all claims and counterclaims in this case. Accordingly, the district court properly determined that JSJBD, and Counterdefendants, had prevailing party status.

2. To the extent they relate to, or are even needed in light of, NRS 18.010, the three bases for recovering attorney fees under *Sandy Valley* and its progeny each provide proper grounds for granting attorney fees to JSJBD / Counterdefendants.

"*Sandy Valley* discussed three scenarios in which attorney fees as special damages may be appropriate." *Pardee Homes of Nevada v. Wolfram*, 444 P.3d 423, 426, 135 Nev. Adv. Op. 22 (2019), *citing Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 957-58, 960, 35 P.3d 964, 970 (2001).

In the 2019 *Pardee Homes* case, this Court held that attorney fees cannot be sought as "special damages" post-trial in cases involving two-party breach of contract actions. For example, this Court stated:

> Sandy Valley, however, 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***. Liu, 130 Nev. at 155 n.2, 321 P.3d at 880 n.2 (observing Sandy Valley did not permit a plaintiff to recover attorney fees as special damages in a suit for ***breach of contract***).

Pardee Homes, 135 Nev. at 178, 444 P.3d at 426 (emphasis added). Explaining further, this Court stated that, "Under Wolfram and Wilkes' theory, ***any breach-of-contract suit*** would warrant attorney fees as special damages . . . ." *Id.* (emphasis added).

The district court did not, however, award attorney fees as special damages for a mere two-party breach of contract claim. Rather, the attorney fees were sought via NRS 18.010 and the district court's own findings of "bad faith," especially when viewed in conjunction with the Eviction arguments presented by Tropicana.

Prior to seeking damages, the parties were already placed on notice by the district court that it recognized sufficient grounds for granting attorney fees, which it sought to have both sides address via post-trial motion. Thus, midway through trial, the district court stated that it was inclined to grant attorney fees to JSJBD relating to Tropicana's bad faith misconduct. It stated: "[Tropicana's] 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." (App. 1887). In its subsequent Findings of Fact and Conclusion of Law, the district court stated: "In light of the awards on both the Complaint and Counterclaim, the issue of attorney's fees as sought in both the Complaint and Counterclaim is reserved for post-trial motion practice." (App. 2753.) As stated above, the district court found that Tropicana had failed to provide account for CAM charges, which it failed to do even after motion practice resulting a discovery order compelling the production of the CAM documents.

When it comes to *Sandy Valley*, to the extent that the case and its progeny shed light on the availability of damages under NRS 18.010, JSJBD directly

addressed each category in seeking attorney fees for JSJBD and Counterdefendants. (App. 3077.)

"First, '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.'" *Pardee Homes*, 44 P.3d at 426 n.3, *citing Sandy Valley*, 117 Nev. at 957, 35 P.3d at 970. This provides clear basis for the Counterdefendants to recover attorney fees since Tropicana brought each of them into a dispute that resulted from Tropicana's own breach in serving a Thirty Day Notice to Quit.

Second, "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." *Pardee Homes*, 44 P.3d at 426 n.3 (emphasis added), *citing Sandy Valley*, 117 Nev. at 957, 35 P.3d at 970. A claim challenging the validity of options-to-extend a lease is a claim that challenges the lessee's title. *See, e.g., Aikins v. Nevada Placer*, 54 Nev. 28, 113 P.2d 1103, 1104 (1932). In *Aikins*, the owner-landlord filed a complaint to quiet title, asserting the lack of any enforceable lease by defendant in regard to additional five-year periods. This Court held that it was defendant's burden to "plead and prove a ***good title*** in himself," and further explained, "[T]he crux of this case is whether the lease is valid or void. We believe that it is valid." *Id.*

Here, Tropicana's Notice that purported to terminate the lease clouded leasehold title by purporting to eliminate such title. An action for declaratory relief is a proper claim for relief for removing a cloud on title. "Generally, an action to clarify or remove a cloud on title is either an action in equity or an ***action for declaratory relief***." *Liu v. Christopher Homes*, LLC, 130 Nev. 147, 154, 321 P.3d 875, 879 (2014) (emphasis added).

Tropicana forced JSJBD to continue to accrue attorney fees, as well as being put at risk of an Eviction that also involved potential attorney fee liability, despite Tropicana's owner-principal's testimony at trial that JSJBD never defaulted on its obligations. (App. 1741.) Indeed, Tropicana's argument in post-trial motion practice that it had supposedly abandoned its Eviction claim (App. 3253)—while falsely made since it indeed continued with the claim through trial—firmly establishes that the claim was poorly made and should entitle JSJBD and Counterdefendants to attorney fees under *Sandy Valley* for having to respond to the claim and risk eviction.

Thus, this case falls squarely within the parameters for allowing attorney fees where the landlord has served documents clouding title. As this Court stated in *Liu*: "[W]hen a plaintiff incurs attorney fees as a result of a defendant's intentional effort to cloud title, the plaintiff deserves the fees because he or she had no choice but to litigate." *Liu*, 130 Nev. at 154, 321 P.3d at 879. "Otherwise, absent slander of title,

the plaintiff shoulders the debt for the attorney fees that he or she risked accruing when deciding to clarify or remove a cloud on title by suing the defendant." *Id.*

"Third, injunctive or declaratory relief actions compelled 'by the opposing party's ***bad faith conduct***.'" *Pardee Homes*, 44 P.3d at 426 n.3 (emphasis added). Here, "bad faith conduct" is shown by, inter alia, Landlord's disavowing of any right to lease the property at all, disavowing the five-year options, as well as failure to properly account for CAM costs.

In this case, NRS 18.010 was the statute providing the basis for seeking fees. Where there is a basis under NRS 18.010 for seeking fees, the "special damage" requirements referenced in *Pardee Homes* do not apply, as this Court itself found for the NRS 18.010(4) basis that permitted fees to be granted in that case. JSJBD filed a Complaint that allows for attorney fees under NRS 18.010(2) and related grounds reference above. Tropicana's claim in its Counterclaim for Eviction and Issuance of Writ of Restitution does as well. Under NRS 18.010(3), the district court could properly announce that the attorney fee application for both sides would be addressed via post-trial motion, especially in light of the case being litigated solely before the court in a bench trial.

3. The attorney fees are further governed by NRCP 54(d)'s deadline because they were incurred in this action, and *not* a prior matter.

Whether the district court judge who oversaw this entire case could review the attorney fees sought is something that involves detailed factual knowledge of the

court. It involves detailed factual knowledge because it concerns the district court's own oversight of the case through numerous hearings, filings, and the trial itself. Such determination is properly subject to the abuse of discretion standard.

JSJBD only sought attorney fees for its litigation counsel herein litigating this case. (App. 3075-98.) JSJBD did not seek attorney fees for some prior matter, or even for prior attorneys. (App. 3075-98.)

JSJBD properly detailed its allegations in 107 detailed paragraphs of its Complaint. It properly requested attorney fees incurred in this case in paragraphs 79, 88, and 105 of its Complaint. (App. 1-14.)

JSJBD also requested attorney fees in the Prayer for Relief of the Complaint, as well as "An award of any and all additional relief that the Court finds just and proper." (App. 14.) There was no obligation to identify attorney fees with greater particularity, as JSJBD was not alleging attorney fees for other, prior matters, but rather, sought attorney fees incurred in this case.

NRCP 54(d) specifically deals with "attorney fee" motions. It is the rule that governs the deadline and method of seeking attorney fees incurred in "this" case.

While NRCP 9 deals with "special damages," it does not specifically provide the rules for seeking "attorney fees," especially where there are other grounds provided by substantive statute, such as NRS 18.010. Interpreting the similar federal

rules, Wright & Miller states that Rule 9 should be interpreted in light of other specific rules.

> Rule 9 must be read in light of the basic pleading philosophy set forth in Rule 85 and in conjunction with the directives as to the form of the pleadings that appear in Federal Rule of Civil Procedure 10. This has traditionally meant that those portions of Rule 9 that require specific or detailed allegations should not be construed in an unduly strict fashion.

Wright & Miller, Fed. Prac. & Proc. § 1291 (footnotes omitted).

NRCP 54 provides a 21-day deadline for filing motions seeking attorney fees incurred in the same case. In *Summa Corp. v. Greenspun*, this Court found that NRCP 9 does not preclude the district court from determining fees incurred "in this case" via post-trial motion. This Court stated: "In an action to remove a cloud upon the title to real property it is permissible to assess as damages the attorneys' fees incurred incident to that action." *Summa Corp. v. Greenspun*, 96 Nev. 247, 254-55, 607 P.2d 569, 573-74 (1980) (emphasis added). This Court affirmed the district court's finding that "attorneys' fees in the amount of $53,204.61 were incurred by Greenspun for legal representation ***in this case*** and awarded them judgment for that sum." *Id.* In *Summa Corp*., this Court found that the district court "had presided over all proceedings in the case and was fully aware of the scope and complexity of

the legal services rendered by counsel for Greenspun." *Id.*[15]; *see also Tarkanian v. National Collegiate Athletic Ass'n*, 103 Nev. 331, 341-42, 741 P.2d 1345, 1351-52 (1987) (holding that a complaint need not expressly provide the authority for attorney fees, but rather, need only provide "sufficient" factual basis).

Tropicana chose to include Counterdefendants as additional parties in a case in which they were otherwise not involved. The Counterdefendants' Reply to Counterclaim included the following affirmative defense, referencing that JSJBD had at all times sought to pay rent that would be sufficient to protect its Lease and option rights:

> 5. Landlord's claim(s) involve such a de minimum amount, which is unsupported by the express terms of the Lease, such that ***Landlord's claim(s) against Counterdefendants are asserted for vexatious and other improper purposes, entitling Counterdefendants to attorney fees, costs, and other damages.***

(App. 114-17 (emphasis added).) The Counterdefendants also sought attorney fees in the Prayer for Relief. (App. 117.)

The district court properly found JSJBD and Counterdefendants to have complied with the timing and disclosure requirement for seeking attorney fees

[15] While *Summa Corp.* contained additional reasoning regarding whether attorney fees can be proven via two accountants' summary of attorney fees, there is no question here that the attorney fees sought by JSJBD were submitted in a proper motion attested to JSJBD's counsel and supported by detailed entries that were reviewed by the district court. (App. 3075-98.)

incurred in this case, which falls under NRCP 54's rule that the motion seeking the same be filed within 21 days after notice is provided of the entry of judgment.

C. TROPICANA'S ARGUMENT REGARDING A MINOR ADDITIONAL AMOUNT IN RENT IGNORES NUMEROUS INCONSISTENCIES IN THE DISTRICT COURT'S DECISION THAT RENDER ITS ARGUMENT MERITLESS BY COMPARISON.

Tropicana's final argument in its Cross-Appeal ignores that it has conceded that the district court erred in its failure to grant attorney fees solely to one party. Tropicana also ignores that its Answering Brief chooses not to apply the Mirror Image Rule to JSJBD's counsel's August 31, 2016 letter and Tropicana's counsel's September 7, 2016 response. Tropicana also failed to respond in its Answering Brief to JSJBD's argument about numerous inconsistent findings entered by the district court that ignored *Cassinari*. *See* Opening Br. at 51-55.

Among the additional erroneous findings was the district court's finding that rent could only increase (App. 2748), contrary to the decision it made at the summary judgment hearing where Tropicana presented the same argument (App. 466-68). *See* Opening Brief at 52-53 (addressing the same). This appears to be a matter on which Tropicana's argument regarding calculation depends, despite Tropicana failing to even address the issue in its Answering Brief.

At the January 27, 2020 hearing, the district court heard Tropicana's calculation arguments. (App. 3357-59.) The district court appeared to explain that it engaged in a simpler, more holistic, approach than Tropicana. Similar to what

JSJBD stated at the January 27, 2020 hearing, Tropicana's arguments are no more comprehensible than the Findings of Fact and Conclusion of Law taken in their entirety. (App. 3357.) In light of all the inconsistencies and improper findings contained in the district court's Findings of Fact and Conclusions of Law, Tropicana's argument for a minor additional amount is trivial and poorly-made. The amount pales in the face of the district court's novel and unsupported decision on attorney fees, as well as its decision ***not*** to make a determination of reasonable rent in light of its improper application of the Mirror Image Rule.

IV.

CONCLUSION

Respectfully, no relief should be granted to Tropicana in regard to its Cross-Appeal. Rather, this Court should grant the relief requested by JSJBD and Counterdefendants in their respective arguments made on Appeal herein.

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ATTORNEY'S CERTIFICATE THAT COMPLIES WITH RULE 28.2.

1. I certify this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(A)(5), and the type style requirements of NRAP 32(A)(6) as it has been prepared in a proportionally spaced typeface using Microsoft Word 14-font size and Times New Roman type style.

2. I certify this brief complies with page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 14,000 words and the "word count" feature counts 13,184 words.

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

Dated: December 31, 2020.

/s/ Mario Lovato

CERTIFICATE OF SERVICE

I hereby certify that, on December 31, 2020, I submitted **APPELLANTS / CROSS-RESPONDENTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL** for service via electronic service to the parties registered for service with the Nevada Supreme Court in this matter, including the following:

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