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 REPLY BRIEF ON CROSS-APPEAL

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I. INTRODUCTION

The awards of attorneys' fees and costs in JSJBD's favor, either as a prevailing party or as special damages, were improper under Nevada law and must be reversed. JSJBD was not a prevailing party as the district court's ruling on the primary issue in contention—rent for the option period—was resolved strictly in accordance with Tropicana's position, and against JSJBD's request. Further, JSJBD's breach of implied covenant of good faith and fair dealing claim cannot support an award of attorneys' fees as special damages for numerous reasons. Regardless, JSJBD did not disclose or admit at or before trial any evidence of attorneys' fees incurred as a result of Tropicana's alleged actions, and, thus, any award of attorneys' fees as special damages is likewise legally unsound and must be reversed. Finally, JSJBD effectively concedes that the district court miscalculated the amount of unpaid rent owed to Tropicana, and, thus, the Court should correct the district court's judgment to align with the district court's own findings.

II. LEGAL ARGUMENT

A. SEVERAL ARGUMENTS IN JSJBD'S ANSWERING BRIEF WERE NOT RAISED BELOW AND, THUS, ARE WAIVED ON APPEAL.

As a preliminary matter, JSJBD raises several arguments for the first time on appeal, which are deemed waived and, therefore, should not be considered. *See*

Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

1. Application of NRS 18.010(2)(b)

JSJBD argues for the first time in its answering brief on cross-appeal that the district court's award of attorneys' fees was justified by NRS 18.010(2)(b), although JSJBD erroneously cites to this statute as NRS 18.010(3). *See* Reply Br. and Answering Br. on Cross-Appeal at 47–48. This statute permits an award of attorneys' fees when the opposing party brought or maintained its position "without reasonable ground or to harass the prevailing party." This argument was not raised in the lower court, and the Court should disregard it now as waived under *Old Aztec Mine*.

2. Post-trial "special proceeding" to determine attorneys' fees

Similarly, JSJBD argues for the first time in its answering brief on cross-appeal that the district court is able to award attorneys' fees in a post-trial "special proceeding" under NRS 18.010(3) and/or NRCP 54(d), and that this provision obviates this Court's long-standing requirement that special damages be pleaded and proven by competent evidence at trial. *See* Reply Br. and Answering Br. on Cross-Appeal at 55–56. Like the above statutory argument, this issue was not raised in the district court and is now waived; therefore, the Court should disregard it. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983.

B. JSJBD DID NOT PREVAIL ON THE MOST SIGNIFICANT ISSUE OF DETERMINING RENT FOR THE OPTION PERIOD.

JSJBD did not prevail on any significant issue, whereas Tropicana sought to affirm the option period under the agreed-upon rental terms, and the district court expressly ruled in Tropicana's favor on that issue. Both sides sought to affirm and enforce the option period of the lease; each side merely sought enforcement based on different terms. Tropicana sought to uphold the parties' agreement that extended the lease term for five years at an agreed-upon schedule of monthly rent, while JSJBD requested a court order that the rent for the option term be based on an asserted "market rental rate." Thus, the portion of the district court's ruling holding that the option was enforceable was in favor of both parties because both parties wanted the option to be enforced. In other words, JSJBD did not "win" anything by continuing to occupy the premises.

Further, any "value" to JSJBD in retaining possession must not be considered in determining a prevailing party because this would conflict with clear Nevada law requiring such determination be based on a simple offset of monetary damage awards. Moreover, the actual dispute between the parties—as to what rent amounts should apply to the option period—was unambiguously decided in Tropicana's favor, i.e., JSJBD argued that rent should be set at $1.05 per square foot, whereas Tropicana argued that the parties had an agreement for rent to be

$2.00 per square foot, and the district court determined rent was $2.00 per square foot.

This analysis is not affected by Tropicana's assertion of an alternative claim, which sought restitution of the premises in the event the district court were to conclude that the option was not enforceable. Litigants are expressly permitted to maintain alternative theories of relief. *See* NRCP 8(a)(3); NRCP 8(d)(2); *see also Trans Western Leasing Corp. v. Corrao Construction Co., Inc.*, 98 Nev. 445, 448, 652 P.2d 1181, 1183 (1982) ("Inconsistent allegations in alternative claims cannot be used as admissions, for to do so 'would defeat the purposes of the liberal pleading provisions of NRCP 8 and render them a trap for the unwary.'") (quoting *Auto Fair, Inc. v. Spiegelman*, 92 Nev. 656, 658, 557 P.2d 273, 275 (1976)). In this case, based upon the arguments raised by JSJBD, there was a genuine uncertainty as to whether the option was properly exercised and enforceable at all. Tropicana took the primary position that the option was exercised, and that an agreement was reached as to rent (and Tropicana eventually prevailed on that position). However, Tropicana properly asserted an alternative claim that, if the exercise of the option was found to be unenforceable, then Tropicana was entitled to restitution of the premises on account of the lease having expired. Because Tropicana asserted both of these theories alternatively, the district court's ruling that the option was enforceable based on the terms proposed by Tropicana was in

no way a ruling in JSJBD's favor, nor did Tropicana "lose" on that issue. Rather, Tropicana clearly prevailed on the principal issue and was accordingly awarded money damages for underpaid rent. JSJBD's suggestion that Tropicana be punished for asserting an alternative theory of relief is baseless and contrary to Nevada law.

C. IN A CASE OF MONETARY AWARDS TO BOTH SIDES, THE PREVAILING-PARTY DETERMINATION DOES NOT INCORPORATE ANY "NON-MONETARY" VALUE OF A PARTY'S SUCCESS.

One of the primary arguments advanced by JSJBD in its Answering Brief on Cross-Appeal is that it should be considered the prevailing party based on the "non-monetary" value it obtained from the district court's ruling. This argument is flawed for numerous reasons.

First, JSJBD attempts to conflate the two separate tests for determining a prevailing party—the test described in *Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172, 175 (1999) and that used in *Pardee Homes of Nevada v. Wolfram*, 135 Nev. 173, 177, 444 P.3d 423, 426 (2019)—which apply to mutually exclusive factual scenarios. The two tests should not, and cannot, be combined. Because the "total net damages" test from *Parodi* plainly applies to the case at bar, and because this test results in the undeniable conclusion that Tropicana was the sole prevailing party below, there can be no question that JSJBD was <u>not</u> the prevailing party.

Thus, the award of attorneys' fees to JSJBD based on NRS 18.010(2)(a) must be reversed.

NRS 18.010(2)(a) permits a district court to award reasonable attorneys' fees to a "prevailing party" who recovers "not more than $20,000." NRS 18.010(2)(a). While the determination of a prevailing party is commonly straightforward where only one party succeeds on their claim and that party also recovers a monetary judgment, this Court has examined several different sets of facts where the determination is less obvious and has established unique rules in such cases. The two rules relevant to the instant discussion concern two mutually exclusive factual scenarios: (1) where only one party prevails on any significant claim but that party is not awarded any monetary damages award; and (2) where both parties prevail on significant issues, and both are awarded monetary damages. As the first scenario involves no monetary awards, and the second involves multiple monetary awards, there is simply no possible circumstance where both rules would apply to a single case.

As thoroughly explored in Tropicana's Answering Brief and Opening Brief on Cross-Appeal, it is the latter scenario—monetary awards being given to both opposing sides—that is present in this case. *See, e.g.*, Answering Br. and Opening Br. on Cross-Appeal at 57–60. For such an occurrence, this Court in *Parodi v. Budetti* set forth a straightforward, unambiguous, and objective test whereby the

prevailing party is determined by simply offsetting all monetary awards and arriving at the one party who receives the "net damages award." *Parodi v. Budetti*, 115 Nev. at 241, 984 P.2d at 175.

Here, Tropicana indisputably received the net damages award after offsetting the monetary amounts awarded to each party, and, thus, Tropicana is the sole prevailing party. As there can be only one prevailing party in that circumstance, JSJBD is not, and cannot, be a prevailing party.

The second reason that JSJBD's arguments are flawed concerns its tortured interpretation of the *Pardee Homes* case. The *Pardee Homes* case concerns the other unique prevailing-party test, which only applies in the absence of <u>any</u> monetary awards. In such an event, where no monetary award is available to guide the determination, a party who prevails on "any significant issue … which achieves some of the benefit it sought in bringing suit" will be considered the "prevailing party." *Pardee Homes*, 135 Nev. at 179, 444 P.3d at 427.[1] However, because a

[1] JSJBD inaccurately asserts that Tropicana "ignores" *Pardee Homes* in its Opening Brief on Cross-Appeal. Reply Br. and Answering Br. on Cross-Appeal at 40. In truth, Tropicana both cited *Pardee Homes* as exhibiting the rule that attorneys' fees cannot be awarded as special damages unless such damages are pleaded and proven at trial, and Tropicana further compared the instant case to *Pardee Homes* in analyzing why JSJBD would only be entitled to contract damages on its breach of implied covenant claim where none of the narrow and limited exceptions permitting attorneys' fees as special damages apply. *See* Opening Br. at 69–72. However, this is where *Pardee Homes*' applicability to this case ends.

monetary award is required to recover fees under NRS 18.010(2)(a), *Pardee Homes* is only applicable to cases in which a party succeeds on a significant claim, receives no monetary award, and seeks to recover fees under a statute, rule, or agreement other than NRS 18.010(2)(a). *See Smith v. Crown Fin. Servs.*, 111 Nev. 277, 285, 890 P.2d 769, 774 (1995) (monetary judgment is prerequisite to award of fees pursuant to NRS 18.010(2)(a)). Nothing in *Pardee Homes* suggests that a non-monetary achievement may be given a particular "value" for the purposes of awarding attorneys' fees, as this would be contrary to the rule stated in *Crown Financial Services*.

JSJBD fails to recognize that these two unique rules are not universally applicable to all cases and, indeed, cannot both be applied to any single case. This resulted in JSJBD's misguided argument suggesting that "non-monetary claims" from *Pardee Homes* should be assigned some uncertain "value" for purposes of determining the net monetary judgment under *Parodi*. *See* Reply Br. and Answering Br. on Cross-Appeal at 40–46. In truth, *Pardee Homes* does not lend any support to this approach, as that decision is founded on the absence of any "monetary value." These two sets of rules simply cannot be conflated in the way JSJBD suggests, as the policy reasoning behind each of them would be usurped were they to be applied other than to the specific unique situations in which each rule was set forth by this Court.

In short, the *Parodi* and *Pardee Homes* tests apply to entirely different factual circumstances, and they cannot both apply here. While JSJBD seeks to distort the "prevailing party" rule used in *Pardee Homes* to create an ambiguous and amorphous "value" it supposedly achieved by filing suit and losing on the principal arguments it advanced, the more applicable rule to these circumstances is that stated in *Parodi* and relied upon by Tropicana, whereby the Court offsets all monetary judgments and determines the prevailing party based on total net damages. *Parodi v. Budetti*, 115 Nev. at 241, 984 P.2d at 175. The two analyses are each limited to their unique, mutually exclusive factual situations—one where both parties receive monetary awards, and the other where neither party receives a monetary award—and, thus, they cannot be applied simultaneously. Moreover, there is no reliable way to combine the two tests, as the "value" of any given non-monetary success is far too subjective and speculative to be incorporated into a "total net damages award" test, and, thus, such a ruling would cause confusion and inconsistency in future cases. Rather, the Court should maintain the consistent and objective analysis provided in *Parodi* and reverse the district court's award of attorneys' fees to JSJBD under NRS 18.010(2)(a).

D. JSJBD MIS-STATES THE LAW ON THE MIRROR IMAGE RULE.

The Answering Brief on Cross-Appeal also inaccurately suggests that Tropicana's Opening Brief "ignored" JSJBD's arguments pertaining to the mirror

image rule. Reply Br. and Answering Br. on Cross-Appeal at 40–41. Tropicana's Opening Brief on Cross-Appeal was not responding to anything, so there could not be any "ignoring" of JSJBD's arguments. However, JSJBD's argument warrants correcting as Tropicana did discuss the mirror image rule in its Answering Brief. Answering Br. and Opening Br. on Cross-Appeal at 30.

As was noted in Tropicana's Answering Brief, JSJBD's argument on this point continues to misstate the law as JSJBD deliberately ignores that an acceptance is sufficient to form a contract when the material terms are agreed upon, and further negotiation of non-material terms does not destroy the legally enforceable acceptance of those material terms. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

E. JSJBD DID NOT PREVAIL ON THE DECLARATORY RELIEF CLAIMS.

Regardless of the objective "total net damages" analysis that should single-handedly resolve the issue of who was the "prevailing party" here, JSJBD maintains the deluded position that it prevailed on the competing declaratory relief claims pertaining to rent for the option period. Tropicana concurs that this issue was the primary issue being litigated, but in no way, shape, or form did JSJBD prevail on this issue.

JSJBD exercised its option, which Tropicana accepted. Then, 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, and filed suit. In its complaint, and all the way through trial, JSJBD's declaratory relief claim sought to impose a "market rental rate" on the option period, pursuant to which JSJBD retained an expert to opine on what the "market rental rate" for the property should be. [1 AA 9]. Tropicana, meanwhile, asserted its own declaratory relief claim, seeking to declare that JSJBD had agreed to the schedule of rent proposed by its counsel, had performed consistent therewith, and that JSJBD had defaulted after two years of performance when JSJBD failed to pay the increased rent. [1 AA 25–37]. Following trial, the district court's findings of fact agreed with the entirety of Tropicana's case on this issue, finding that JSJBD had agreed to the rent schedule, that JSJBD had performed under the rent schedule for two years, and that JSJBD had defaulted by not paying rent increases. [11 AA 2742–48]. As a result, the district court ruled that JSJBD had breached its lease by underpaying the rent, and awarded monetary damages to Tropicana. [11 AA 2749, 12 AA 2751–52].

In sum, JSJBD's attempt to label the district court's ruling as somehow in its favor is nothing more than wishful thinking. The determination that the option was controlled by the rent schedule advanced by Tropicana was indisputably a ruling in Tropicana's favor. JSJBD failed in its effort to secure "market rent" for the option,

and Tropicana prevailed in its effort to secure rent based on the parties' agreement and JSJBD's part performance. As such, this case is not even comparable to *Pardee Homes*, where in that case the plaintiffs received every ruling they sought, and prevailed on the counterclaim against them. Thus, even were it not for the fact that *Parodi* provides a tailor-made test for determining the prevailing party in this case, the *Pardee Homes* "prevailing party" test is entirely inappropriate here.

F. JSJBD HAS NOT OFFERED ANY COGENT ARGUMENT FOR AWARDING ATTORNEYS' FEES AS SPECIAL DAMAGES, UNDER *SANDY VALLEY* OR OTHERWISE.

JSJBD's Answering Brief on Cross-Appeal only serves to further muddle the alleged basis for the district court's grant of attorneys' fees to JSJBD, as it improperly attempts to combine the tests for NRS 18.010 (such as *Pardee Homes*) with those for special damages (under *Sandy Valley*). In reality, this confusing attempt to fit round pegs into square holes further confirms Tropicana's arguments that no grounds existed for the award of attorneys' fees to JSJBD on either of those bases. As such, not only should the full award of attorneys' fees and costs to JSJBD be reversed, but the district court's award of a portion of JSJBD's attorneys' fees as special damages on the breach of implied covenant claim is likewise legally unsound and should be rejected.

1. JSJBD's Breach of Implied Covenant of Good Faith and Fair Dealing Claim Could Not Support an Award of Attorneys' Fees as Special Damages.

First, JSJBD's Answering Brief on Cross-Appeal does not offer any response to the impropriety of the district court's award of damages to JSJBD on both its breach of contract claim and its breach of implied covenant of good faith and fair dealing claim. As noted in Tropicana's Opening Brief on Cross-Appeal, these two claims are mutually exclusive on account of one requiring a breach of a contract, and the other requiring literal compliance with a contract. *See* Answering Br. and Opening Br. on Cross-Appeal at 65–67. Thus, the district court erred by finding in JSJBD's favor on both claims based on the same factual finding (Tropicana's charging for a "reserve" fund as part of the CAMs assessed to JSJBD). Additionally, JSJBD failed to respond to Tropicana's cited case law stating that only contract damages are awardable on a breach of implied covenant claim. *Id.* at 67–70. The Court should interpret JSJBD's silence on these points as a concession that Tropicana's position is meritorious.

Additionally, contrary to JSJBD's claims, JSJBD did not seek attorney fees under NRS 18.010 within the complaint or at any time prior to the district court's Findings of Fact and Conclusions of Law. The first mention of this statute appeared after the district court issued its ruling awarding JSJBD its attorneys' fees under the breach of implied covenant claim. As such, in addition to JSJBD not

being a prevailing party, JSJBD could not have been awarded attorneys' fees under any subsection of NRS 18.010 because it did not seek such fees; rather, the only basis for the award of fees as special damages was on the breach of implied covenant claim.

JSJBD has conceded that no evidence of attorneys' fees was presented at any time leading up to or at trial, as it offers no counterarguments on this point, much less record citations showing that any evidence of such fees was actually admitted at trial. Rather, JSJBD argues that it requested attorneys' fees in its complaint, and that the district court was capable of measuring the attorneys' fees herself. Reply Br. and Answering Br. on Cross-Appeal at 55–56 (citing *Summa Corp. v. Greenspun*, 96 Nev. 247, 254–55, 607 P.2d 569, 573–74 (1980)).

Tropicana does not disagree that a district court is able to assess the merits of a post-trial attorneys' fees motion (under the *Brunzell*[2] factors), where such fees are awarded under NRS 18.010. However, the *Summa Corp.* holding and provisions of NRCP 54(d) referenced in JSJBD's brief apply only in that situation, and do not apply to instances of attorneys' fees being awarded as special damages. Rather, this Court's unambiguous requirement that any element of damages be pleaded and proven by competent evidence controls in such a case. Thus, here, the district court's award of attorneys' fees as special damages, before a motion for

[2] *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

fees and costs was filed and with no evidence of fees presented at trial, was clear error and must be reversed.

Similarly, JSJBD argues that the parties were "placed on notice" of the possibility of attorneys' fees when the district court's oral ruling on Tropicana's 52(c) motion included the (incorrect) observation that such damages were possible on the breach of implied covenant claim. Reply Br. and Answering Br. on Cross-Appeal at 51. For the same reasons discussed in Tropicana's Opening Brief, the district court's denial of Tropicana's 52(c) motion was an error of law, and, to the extent it "placed [the parties] on notice" of the availability of attorneys' fees as special damages, this is irrelevant to the issue at bar because no actual evidence of such fees was ever offered or disclosed before or at trial.

Tropicana moved for judgment on partial findings because, at the close of JSJBD's case in chief, it had presented no evidence as proof of damages from the alleged CAMs issue. [8 AA 1885–86]. The district court's statement that "part of the damages that can be assessed in that type of claim relates to the attorney's fees related to this litigation" was an incorrect statement of law, as detailed in Tropicana's Opening Brief. Put simply, even in the limited circumstances where attorneys' fees are available as special damages, the requirement that such damages be pleaded and proven by competent evidence at trial absolutely still applies. Indeed, this was exactly the factual scenario present in *Sandy Valley*,

where the district court awarded damages based entirely on amounts presented in post-trial motions. *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956–57, 35 P.3d 962, 969 (2001). The Nevada Supreme Court reversed that ruling, observing that the plaintiff "did not allege attorney fees as special damages caused by SVA's conduct," and "[t]he complaint merely mentions attorney fees as a part of the general prayer for relief." *Id.* at 958, 33 P.3d at 970. JSJBD's argument on this point mirrors exactly this scenario, as JSJBD only sought attorneys' fees in its complaint "as a general prayer for relief," and failed to present any evidence of such fees at trial. Thus, as in *Sandy Valley*, the district court was unable to and should not have granted JSJBD any amount of special damages. Indeed, the district court should not have even allowed that claim to proceed past Tropicana's 52(c) motion.

2. JSJBD has Not Presented Any Grounds for a *Sandy Valley* Exception to Apply.

While Tropicana previously addressed each of the *Sandy Valley* exceptions to the general no-attorneys-fees-as-special-damages rule, JSJBD continues to assert that all of the *Sandy Valley* exceptions apply here. Each of JSJBD's contentions is lacking, and, thus, the award of attorneys' fees as special damages must be reversed.

First, this case was not a third-party legal dispute but, rather, was a first-party dispute between a landlord and its tenant and with individual guarantors

included due to their personal liability for the same issues. JSJBD very clearly misunderstands the meaning of "third-party legal dispute." As explained by this Court, *Sandy Valley* allows a plaintiff to seek, as special damages, legal fees it incurred defending or prosecuting a claim brought by a third-party that arose from the defendant's breach of its contract with the plaintiff. *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 970. Here, there was no third-party legal dispute, as all claims asserted by Tropicana were against JSJBD and its individual guarantors, and no other party was involved. JSJBD concedes this point as it admitted that the attorneys' fees it sought were entirely incurred in this matter. [13 AA 3079–80, 14 AA 3383]. Moreover, attorneys' fees were not awarded to the individual guarantors, but, rather, solely to JSJBD, so this issue is entirely inapposite. [12 AA 2752, 14 AA 3384].

Second, this case did not involve JSJBD "recovering real or personal property," nor "removing a cloud upon the title to property." To be clear, JSJBD was a commercial tenant. JSJBD never sought to recover any lost "real or personal property," nor was any such loss of real or personal property ever alleged in the complaint or at trial. Rather, JSJBD remained in possession of the premises throughout the case, and possession, thus, could not have been "recovered" in the action. Moreover, as JSJBD was found to have defaulted on the lease by failing to pay full rent, Tropicana was within its rights to pursue its remedies as the landlord,

including potential eviction, and, therefore, Tropicana's conduct was not "wrongful."

Additionally, JSJBD did not have any "title" to the real property from which it sought to remove a cloud. JSJBD was simply a tenant of the premises. Title to land is synonymous with ownership. *See* Title, Black's Law Dictionary (11th ed. 2019) ("The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; … Legal evidence of a person's ownership in property."). Further, JSJBD never alleged a cloud upon title of any sort. Rather, this action involved the interpretation and enforceability of a commercial lease. Neither party alleged a quiet title claim, nor did JSJBD ever assert any sort of ownership interest in the real property at issue. Accordingly, this case does not, and did not, give rise to any alleged cloud upon the title to the landlord's real property.

JSJBD's analysis of *Aikins v. Nevada Placer*, 54 Nev. 281, 13 P.2d 1103 (1932) is both inaccurate and irrelevant. The *Aikins* case concerned a quiet title claim brought by a plaintiff against a defendant regarding mining rights. In answering the complaint, the *Aikins* defendant admitted that it "has not any estate, right, title, or interest to said mining claims," but, rather, claimed to exercise mining rights under a lease. There were two issues on appeal in that case, which JSJBD erroneously merges: first, the Court considered the *Aikins* defendant's

position that the complaint did not properly plead a quiet title claim, and, second, the Court considered the plaintiff's claim that the defendant's lease was invalid under a statute limiting any lease of real property to twenty years. The Court noted the defendant's appeal was based on "failure of the complaint to allege possession and legal title to the mining claims," and rejected this argument, holding that the complaint's allegation that the plaintiff was the owner of the mining claims was sufficient. In so doing, the Court examined a statute concerning quiet title claims, and concluded that, in a quiet title action, it is the resisting defendant's burden "to plead and prove a good title in himself." Thus, this ruling had nothing to do with a leasehold interest; rather, the accurate but misleading quotation cited in JSJBD's brief is taken from a rule statement in a prior case concerning the shifting of burdens in a quiet title action—which is entirely irrelevant to the case presently at bar.

The second issue in *Aikins* concerned a lease, but it had nothing to do with title. Rather, the plaintiff argued that the defendant's purported lease was invalid under a statute precluding any lease of real property extending more than twenty years. As the first issue (concerning the sufficiency of the complaint) was summarily rejected, the *Aikins* Court made the observation quoted in JSJBD's brief that "the crux of this case is whether the lease is valid or void." Once again, this is completely inapposite to the issue presently before the Court.

JSJBD's attempted reliance on *Liu v. Christopher Homes, LLC* is likewise misplaced. *Liu* involved an action brought by a subcontractor against a general contractor, developer, and homeowner seeking to foreclose on its mechanic's liens and the appeal related to a cross-claim filed by the homeowner against the general contractor and developer asserting breach of contract and seeking attorneys' fees and costs incurred in defending against the subcontractor's action. *Id.*, 130 Nev. 147, 321 P.3d 875 (2014). The focus of the *Liu* holding concerned the applicability and scope of this Court's ruling in *Horgan v. Felton*, 123 Nev. 577, 579, 170 P.3d 982, 983 (2007) concerning the recovery of attorney fees in cloud-on-title cases. Notably, the *Liu* Court affirmed the holding in *Horgan* "that slander of title must be pleaded as a prerequisite for a party to recover attorney fees as damages in an action to clarify or remove a cloud on title to real property." *Liu*, 130 Nev.at 149, 321 P.3d at 876 (emphasis added).

Given the foregoing, *Liu* squarely holds that JSJBD is not entitled to special damages in this case. JSJBD did not plead or prove a slander of title claim. JSJBD did not plead or prove that this action involved a "cloud upon title to real property" either. On those two points alone, JSJBD's arguments fail and should be rejected. JSJBD, however, brushes aside this Court's requirements that a slander of title claim must specifically be pled in order to recover attorneys' fees as special damages in actions involving "a cloud on title to real property," and attempts to

shoehorn in a new application of *Sandy Valley* to situations involving an alleged cloud upon a tenant's "leasehold title." The Court should reject JSJBD's argument in its entirety as nothing in *Liu, Sandy Valley, Horgan* or any of their progeny allow for or endorse such a tortured interpretation.

Third, once again, there was no finding that Tropicana's "bad faith conduct" necessitated JSJBD's declaratory relief claim. Not only was such a finding never made by the district court, but both parties filed competing declaratory relief claims seeking to have the court establish rent for the option period. The fact that the district court entered findings that the rent amounts were exactly in line with Tropicana's position, further demonstrates that JSJBD did not prevail on its declaratory relief claim. On top of this, the district court agreed with Tropicana, finding that JSJBD had underpaid rent, thereby giving credence to the legal basis for Tropicana's alternative claim for a Writ of Restitution. Notwithstanding these fatal flaws in JSJBD's position on appeal, there is no evidence of any bad faith conduct by Tropicana, particularly in light of the fact that the district court found in favor of Tropicana on all of the material points relating to the enforceability of the option and the amount of rent applicable to the option period.

In sum, even if JSJBD had presented evidence during the trial of the attorneys' fees it had incurred, which it did not, none of the *Sandy Valley* exceptions that would permit an award of attorneys' fees as special damages would

apply here. Thus, the district court's award of attorneys' fees as special damages to JSJBD as to the breach of implied covenant claim was an error of law and must be reversed.

G. JSJBD DOES NOT CONTEST TROPICANA'S REQUEST TO HAVE THE DISTRICT COURT'S DAMAGES AWARD CORRECTED.

As a final matter, JSJBD offers zero contradictory argument or facts as to the last issue on Tropicana's cross-appeal. This is because even JSJBD cannot argue with simple math. The district court's calculation of underpayment of rent was clearly inaccurate based on the facts as stated in the district court's own findings, and this Court should reverse on this basis and remand with instructions for the district court to enter judgment in Tropicana's favor for $16,780, rather than $13,000, on the breach of contract claim.

III. CONCLUSION

The award of attorneys' fees and costs to JSJBD should be reversed. The district court erred as a matter of law in finding that JSJBD was a prevailing party, and also in awarding JSJBD any amount of attorneys' fees as special damages. JSJBD's Answering Brief on Cross-Appeal fails to present any compelling refutation of the undisputed and voluminous facts in the record on appeal supporting these conclusions. As such, this Court should reverse the Judgment below 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 own findings as to Tropicana's damages in the amount of $16,780 on its breach of contract claim.

Dated this 5th day of February, 2021.

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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 32(a)(7) 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 5,395 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 5th day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL** was filed electronically with the Nevada Supreme Court on the 5th day of February, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Mario Lovato

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