

JSJBD CORP, d/b/a Blue Dogs Pub, a) Case No.: 80849
Nevada corporation, STUART VINCENT,)
JEFFREY VINCENT, and JEFF) (Dist. Ct. No. A-1
WHITE)

VS.

Respondent.

AND CROSS-APPEAL.

) Case No.: 80849

)

) (Dist. Ct. No. A-1

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

**APPELLANTS / CROSS-RESPONDENTS' OPPOSITION TO
TROPICANA INVESTMENTS, LLC'S MOTION TO STRIKE**

JSJBD Corp. and the related individual parties (collectively, “JSJBD”) oppose Tropicana Investments, LLC’s (“Tropicana”) motion to strike.

Motions to strike are generally disfavored, as “[i]t is the policy of this state that cases be heard on the merits, whenever possible.” *Schulman v. Bongberg-Whitney Elec., Inc.*, 98 Nev. 226, 227, 645 P.2d 434, 435 (1982), citing *Hotel Last Frontier v. Frontier Properties*, 79 Nev. 150, 380 P.2d 293 (1963).

In Tropicana's Reply Brief in Support of Cross-Appeal, it cited *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) for a proposition for which it does not stand. Specifically, Tropicana claimed that it stood for the

proposition that arguments made in response to Tropicana’s cross-appeal, and made by JSJBD in support of judgments made by the district court favorable to JSJBD, could not be supported with any legal authority that supposedly was not presented to the district court.

There is pertinent and significant authority showing that Tropicana cited *Old Aztec Mine* for a proposition for which it does not stand. As succinctly stated in the Notice of Supplemental Authority: “[T]he authority that applies to arguments presented in response to an appeal, or cross-appeal, is:

An ***appellant*** may not seek and obtain reversal based on an argument that was not presented to the district court unless it goes to subject matter jurisdiction, *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), but a ***respondent*** may defend judgment in its favor under any fairly presented legal basis. See *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877 n.9 (1999).

Notice of Suppl. Authority at 2, citing *Harvest Foundation, LLC v. Alternative Med. Ass’n, LC*, 477 P.3d 368, 2020 WL 7663460, at *2 (Nev. Dec. 23, 2020) (emphasis in original).

That Tropicana would cite *Old Aztec Mine* for a proposition for which it does not stand is something that plainly could not be known prior to the February 5, 2021 filing by Tropicana of its Reply Brief wherein it presented such argument.

After such date, JSJBD discovered the pertinent and significant authority, *Harvest Foundation, LLC v. Alternative Med. Ass'n, LC*, 477 P.3d 368, 2020 WL 7663460. As it happens, such decision is recent, as it was made on December 23, 2020, but, that said, its pertinence and significance could not be known until after February 5, 2021.

Tropicana argues that a Notice of Supplemental Authority must make a showing that it is “justified” and must assert that any “legal authority was only discovered after JSJBD’s final brief.” NRAP 31(e) contains no such proof, or “justification,” requirement. Rather, it requires succinct citation to the “pertinent and significant authority,” along with pertinent citations as to how the authority relates to the briefing.

While Tropicana downplays the significance of *Harvest Foundation* by labeling it “unpublished,” the quotation block that JSJBD provided in its Notice of Supplemental Authority expressly referenced two published cases: *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877 n.9 (1999). Further, it is incumbent on Tropicana to provide a response addressing whether *Harvest Foundation* is poorly-reasoned, not that it should just be ignored.

JSJBD’s Notice of Supplemental Authority also provides supplemental authority (i.e. support contained in the record) by citing the page numbers of the

appendix wherein the district court entered the pertinent decision sua sponte, as well as the page numbers of the appendix where JSJBD previously addressed Tropicana's arguments before the district court.

Providing succinct citation to the district court's sua sponte decision shows that *Old Aztec Mine* does not apply, and that *Harvest Foundation* does, because this is a matter where Tropicana is appealing a district court decision that is favorable to JSJBD. Showing the pages in the Appendix where JSJBD previously addressed Tropicana's arguments in a similar manner while still before the district court also shows that the rule of *Old Aztec Mine* does not apply whereas the "fairly presented" standard of *Harvest Foundation* does apply.

Tropicana confuses the purpose of NRAP 31(e)—which is to provide supplemental *authority*—with something akin to a prohibition on any type of supplementation. NRAP 31(e) is entitled "Supplemental Authorities." It is the Nevada-tailored version of Federal Rule of Appellate Procedure, which refers to "pertinent and significant authorities." NRAP 31(e)'s opening sentence references "pertinent and significant authorities." NRAP 31(e) uses the phrase "supplemental authorit(ies)" three more times in the rule.

While NRAP 31(e) requires "references to the page(s) of the brief," that is plainly to assist the court in understanding the pertinence and significance, not because of some sort of prohibition on providing anything that supplements the

briefing. When it comes to providing references to the pages of the briefs, JSJBD's Notice of Supplemental Authority repeatedly provides such references to the briefing. It contains five footnotes that provide succinct reference to the page numbers of each of the briefs that have been filed in this case, including to JSJBD's reply brief and answering brief on cross-appeal. *See* Notice Suppl. Authority at 2 n.5 (citing JSJBD's Reply Br. / Ans. Br. on Cross-Appeal at 47-48, 55-56). Finally, it cites Appendix pages 3318-28, which is where JSJBD previously addressed Tropicana's arguments on cross-appeal before the district court, which Tropicana failed to inform this Court of in claiming that JSJBD has not previously addressed Tropicana's arguments.

Every sentence of the Notice of Supplemental Authority contains a citation to case law and/or the record in this appeal. This leads to the final sentence, which merely repeats the "fairly presented" legal standard expressly stated in *Harvest Foundation*, which cites two published cases as its legal authority.

NRAP 31(e) states that Tropicana may file a "response." Accordingly, Tropicana's argument that a Notice of Supplemental Authority represents an improper attempt at "the last word" is meritless. NRAP 31(e) specifically allows Tropicana the last word, so long as it is done via a "response."

Any such response "must be similarly limited." In other words, Tropicana should have cited "pertinent and significant authority" addressing *Old Aztec Mine*,

Harvest Foundation, Saavedra-Sandoval, Nevada Power Co. v. Haggerty, and/or citations to the record. Tropicana did not, however, provide any responding “pertinent and significant authority.” Instead, Tropicana repeats the poorly-made argument that demands that the Nevada Supreme Court ignore pertinent legal authority. Such argument was poorly made when Tropicana cited *Old Aztec Mine* for a proposition for which it does not stand. It is poorly-made when asserted in a motion to strike.

Tropicana’s motion to strike should be denied. NRAP 31(e) permits the filing a Notice of Supplemental Authority, as well as a response thereto, so that the pertinent and significant legal authority is provided to the Court.

DATED: March 18, 2021.

LOVATO LAW FIRM, P.C.

/s/ Mario Lovato
MARIO P. LOVATO
Nevada Bar No. 7427
7465 W. Lake Mead Blvd. Ste 100
Las Vegas, NV 89129
(702) 979-9047
mpl@lovatolaw.com
Attorney for Appellants /
Respondents on Cross-Appeal

CERTIFICATE OF SERVICE

I hereby certify that, on March 18, 2021, I submitted **APPELLANTS / CROSS-RESPONDENTS' OPPOSITION TO TROPICANA INVESTMENTS, LLC'S MOTION TO STRIKE** for service via electronic service to the parties registered for service with the Nevada Supreme Court in this matter, including the following:

Terry A. Moore
Marquis Aurbach Coffing
10001 Park Run Dr.
Las Vegas, NV 89145
Attorneys for Defendant / Counterclaimant
Tropicana Investments, LLC

 /s/ Mario Lovato
An employee of Lovato Law Firm, P.C.