Case No. 71941

In the Supreme Court of Nevada

ROSE, LLC,

Appellant,

vs.

TREASURE ISLAND, LLC,

Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable ELIZABETH GOFF GONZALEZ, District Judge
District Court Case No. A719105

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. Appellant Rose, LLC is a limited-liability company.

2. Michael C. Van and Samuel A. Marshall of Shumway Van; Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith of Lewis Roca Rothgerber Christie LLP; and James J. Pisanelli and Jarrod L. Rickard of Pisanelli Bice PLLC represented Rose in the district court. Messrs. Polsenberg, Henriod, and Smith have appeared in this Court.

3. No publicly traded company has any interest in this appeal.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 24th day of July, 2017.

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JURISDICTION

Rose, LLC appeals from a final judgment and an order awarding Treasure Island, LLC attorney's fees. NRAP 3A(b)(1), (8). Treasure Island served written notice of entry on January 11, 2017, and Rose timely amended its notice of appeal on January 17.[1] (*See* 5 App. 1058.)

ROUTING STATEMENT

This appeal, which involves a straightforward application of settled contract principles, is presumptively assigned to the Court of Appeals. NRAP 17(b)(7).

ISSUE PRESENTED

To terminate a tenancy under a long-term lease, a landlord must first provide notice of default exactly as the written lease requires. Treasure Island tried to terminate Rose's 30-year lease after giving notice of default in a manner that violates the written lease as amended, contending that an alleged oral request from Rose's president controls over the written contract. Is the lease terminated?

---

[1] On December 7, 2016, Rose filed a premature notice of appeal from the district court's November 7 findings of fact and conclusions of law. (*See* 4 App. 977.) *See* NRAP 4(a)(6). The jurisdictional defect was resolved by the entry of a final judgment on January 11, 2017. (5 App. 1053.)

STATEMENT OF THE CASE

This is an appeal from a final judgment entered after a bench trial before the Honorable Elizabeth Goff Gonzalez, District Judge of the Eighth Judicial District Court, Clark County.

This case arises from Treasure Island LLC's attempt to terminate a lease with Rose, LLC after Rose missed a quarterly percentage-rent payment, one of the two types of rent. The parties' lease as amended requires Treasure Island to mail a notice of default to Rose's controller with a copy to Rose's sublessee, Señor Frog's, and to Señor Frog's counsel. Treasure Island never sent a notice of default to any of those people. Instead, Treasure Island sent a notice to Rose's president, allegedly at his oral request, with a purported e-mail copy to Rose's vice president. Treasure Island took no action in reliance on the oral request other than sending the notice, and Rose is now current in all rent payments.

After a bench trial, the district court decided the lease was terminated based on theories of oral modification, waiver, estoppel, actual notice, and substantial compliance with the lease. (4 App. 938 ¶¶ 1–2.) The district court barred Rose from asserting Treasure Island's failure

to copy Señor Frog's or its counsel and in fact blamed Rose for not forwarding the notice per the sublease. (4 App. 941 ¶ 3.) The district court also awarded Treasure Island attorney's fees. (5 App. 1048.)

Rose appeals.

STATEMENT OF FACTS

Treasure Island wants Rose, its tenant, out of a lease negotiated during a low point in the Las Vegas real-estate market. The market's rebound has made Rose's long-term lease unattractive to Treasure Island. To take advantage, Treasure Island purported to extinguish Rose's property rights by a hypertechnical application of the lease's default provision, even though Treasure Island did not comply with the notice requirement necessary to make a default effective.

A. Rose and Treasure Island Enter a Long-Term Lease

In 2011, Treasure Island agreed to lease strip-front space to Rose for 10 years, with options for another 20 years. (2 App. 270 § 2.3; *see also* 2 App. 311 § 1.) Rose in turn sublet space to Señor Frog's, a Mexican restaurant. (*See generally* 2 App. 317.)

The parties contract for a detailed notice of default

Proper notice and the opportunity to cure a default are integral parts of the lease. Failure to pay rent ripens into a default justifying termination only after a 10-day cure period following "Landlord's written notice to Tenant":

> **15.1 Events of Default.** Tenant shall be deemed to be in default of this Lease if . . .
>
> **15.1.1** Tenant shall fail to pay any installment of Rent or any other amount or charge required to be paid by Tenant to Landlord pursuant to the terms of this Lease, **and such failure continues for ten (10) days *from Landlord's written notice to Tenant*** that any such Rent installment or other amount or charge is due . . . .
>
> * * *
>
> **15.2 Remedies.** Upon the occurrence of an Event of Default . . .
>
> **15.2.1** Landlord may terminate this Lease and Tenant's estate hereunder by written notice of such termination; provided, however that the mere giving by Landlord of a Notice to Pay (or perform) or a Notice to Quit shall not, of itself, constitute a notice of termination of this Lease . . . .

(2 App. 283 § 15.1.1, 2 App. 283–284 § 15.2.1 (emphasis added).)

"Notice" is "deemed to have been given" "to Tenant" only if addressed as specified in the lease, i.e., with copies both to Rose's control-

ler, Susan Markusch, and to Operadora, the company operating the Señor Frog's restaurants:

> **19.6 Notices.** Any notice or other communication required or permitted to be given by a party hereunder shall be in writing, and shall be deemed to have been given by such party to the other party or parties (a) on the date of personal delivery, (b) on the date delivered by a nationally recognized overnight courier service when deposited for overnight delivery, (c) on the next Business Day following any facsimile transmission to a party at its facsimile number set forth below; provided, however, such delivery is concurrent with delivery pursuant to the provisions of clauses (a), (b) or (d) of this Section 19.6, or (d) three (3) Business Days after being placed in the United States mail, as applicable, registered or certified, postage prepaid addressed **to the following addresses** (each of the parties **shall be entitled to specify a different address *and/or contact person* by giving notice as aforesaid**):
>
> If to Landlord: Treasure Island, LLC
> 3300 Las Vegas Blvd., South
> Las Vegas, NV 89109
> Attn: Najam Khan
> Facsimile: 702-894-7680
> E-mail: nkhan@treasureisland.com
>
> With a copy via facsimile to:
> Brad Anthony, General Counsel
> Facsimile: 702-894-7295
> E-mail: banthony@treasureisland.com
>
> If to Tenant: Rose, LLC
> 8301 E. Prentice Ave., Suite 210
> Greenwood Village, CO 80111
> **Attn: Susan Markusch**

Facsimile: 303-221-5501
E-mail: susan@gdare.com

With a copy to:

Operadora Andersons S.A. de C.V
Boulevard Kukulkan km 14.2
Cancun, Mexico
C.P. 77500 Zona Hotelera

(2 App. 289–290 § 19.6 (emphasis added).) E-mail alone is not an acceptable delivery method. (2 App. 289–290 § 19.6; 2 App. 314 § 11.) Rose's president, Gary Dragul, testified that the designation of Ms. Markusch was critical because Mr. Dragul travels frequently and does not track the accounts of individual properties, while Ms. Markusch seldom travels and is responsible for monitoring and making payments on those accounts. (4 App. 860:16–24.)

The lease prohibits oral waivers and modifications

The lease is fully integrated (2 App. 290 § 19.7) and specifies that a waiver or modification must be in writing (2 App. 290 § 19.9), and that even then previous written waivers of nonconforming conduct do not excuse later nonconformance (2 App. 288 § 19.3, 2 App. 290 § 19.9):

> **19.3 Waiver of Rights.** Failure to insist on compliance with any of the obligations and covenants hereof shall not be deemed a waiver of such agreements, obligations and covenants, nor shall any waiver or relinquishment of any right or power hereunder

> at any one or more time or times be deemed a waiver or relinquishment of such rights or powers at other times. Exercise of any right or remedy shall not impair Landlord's or Tenant's right to any other remedy.
>
> * * *
>
> **19.9 Amendment, Modification and Waiver.** No supplement, modification, waiver or termination of this Lease shall be binding **unless executed in writing by both parties**. No waiver of any of the provisions of this Lease shall be deemed or shall constitute a waiver of any other provisions (whether or not similar), **nor shall such waiver constitute a continuing waiver** unless otherwise expressly provided.

(2 App. 288 § 19.3, 2 App. 290 § 19.9 (emphasis added).)

Treasure Island initially complied with that provision, mailing a letter on August 31, 2012 to the attention of Ms. Markusch, with a copy to Operadora (Señor Frog's). (1 App. 155.)

The parties amend their agreement to reinforce Rose's protection against default

Throughout their relationship, the parties followed the procedure for written waivers and modifications, as memorialized in five written amendments. (*See* 2 App. 299, 302, 307, 311.)

Rose and Señor Frog's eventually changed their relationship so that Rose could withdraw from operating the restaurant and remain as property manager, a shift reflected in the fifth amendment to the lease.

That amendment created a new section (2 App. 313–314 § 9) expressly for Señor Frog's benefit so that it would have notice and the right to cure a default by Rose. In turn, the provision aimed to further safeguard Rose from an inadvertent default by assuring delivery of any notice of default to multiple individuals, each of whom had the ability to cure the default. The amended notice provision updated Rose's street address and directed that "copies of notices sent to Tenant per the Lease *shall also be sent to Subtenant* . . . and *to Subtenant's counsel*." (2 App. 314 § 11 (emphasis added).)[2] In turn, Señor Frog's under the sublease had the right to cure a default on Rose's behalf. (2 App. 367, 1 App. 217–218.) Although the lease contemplates that the parties may "specify a different address and/or *contact person*" by giving written no-

[2] Below is the complete provision:

> The Parties agree that for purposes of Section 19.6 of the Lease, Tenant's notice address is updated to 5690 DTC Boulevard, Suite 515, Greenwood Village, CO 80111, and that copies of notices sent to Tenant per the Lease shall also be sent to Subtenant addressed to: Operadora Andersons S.A. de C.V, Boulevard Kukulkan km 14.2, Cancun, Mexico, C.P. 77500 Zona Hotelera, and to Subtenant's counsel, addressed to: Ronald R. Fieldstone, Esq. and Susan Trench, Esq., Arnstein & Lehr LLP, 200 South Biscayne Boulevard, Suite 3600, Miami, Florida 33131.

tice (2 App. 289 § 19.6), the parties did not change the designation of Ms. Markusch as Rose's "contact person" for official notice. (2 App. 314 § 11).; 3 App. 678:16–19 (Mr. Anthony admits no written waiver of notice to Ms. Markusch).)

The strengthened notice was central to the bargain Rose struck with Treasure Island. In consideration for Rose's additional layer of protection against a default, Rose released Treasure Island from its obligation under the original lease to conduct the famous pirate show. (2 App. 312, § 7 (deleting Lease § 17.1(e)).)

The fifth amendment, too, contains a nonwaiver clause and an integration clause superseding prior agreements:

> [9(d).] This Agreement . . . (c) constitutes the entire agreement of the parties hereto concerning its subject matter except as outlined herein; and, (d) may not be modified except in writing signed by both parties or by their respective successors in interest.
>
> * * *
>
> 10. Except as otherwise set forth herein or in any other applicable instruments as outlined in [the new section[3]] of the Agreement as amended, the terms and

[3] The provision refers to "Section 20(c)," but that is likely a typo, as that specific subsection does not refer to the sublease or "any other applicable instruments." The provision should probably just read "Section 20," whose other subsections do reference the sublease.

> conditions of the Agreement shall remain in full force and effect.

(2 App. 314 §§ 9(d), 10.)

B. Treasure Island Tries to Terminate the Lease

Over time, the neighboring retail space became more valuable. Although Rose now pays approximately $56 per square foot in base rent and quarterly percentage rent, CVS next door pays as much as $400 per square foot. (3 App. 736:8–9, 3 App. 738:20–739:1.)

Treasure Island sends a notice of default that does not comply with the written lease

One overdue quarterly percentage-rent payment gave Treasure Island the chance to pounce. On May 14, 2015, Treasure Island's general counsel mailed Mr. Dragul a letter asserting that Rose missed a quarterly rent payment and advising that "if you do not pay in full within 10 days of the date of this letter, you will be in default." (2 App. 430; 1 App. 172.) The letter did not dispute that Rose had timely paid its base rent. (*Id.*) The letter stated that Elizabeth Gold, Rose's vice president, was copied via e-mail, but she received no such e-mail, and none was ever produced. (*Id.*; 4 App. 910:19–23.)[4] The letter was *not* sent to Ms.

[4] Mr. Anthony also claimed that Ms. Gold called him the day after no-

Markusch, the person designated under the lease to receive such notices for Rose, nor to anyone representing Señor Frog's. (3 App. 679:23–680:2.)

From Treasure Island's standpoint, the improperly addressed letter was a success. The letter purported to start the clock for a default at a time Mr. Dragul and most of his staff were actually at a convention in Las Vegas, not receiving mail at Rose's office in Colorado. (2 App. 375–376, ¶¶ 21–25.) In addition, Mr. Dragul faced a family medical emergency: he had to care for his seriously ill sister and brother who were in the hospital for spinal-cord procedures. (4 App. 769:1–770:4.) Treasure Island's general manager did not mention the alleged default when he spoke with Mr. Dragul at a dinner at Señor Frog's on May 16. (2 App. 375–376, ¶¶ 21–24; 3 App. 725:17–21, 4 App. 772:21–773:10.) Ms. Markusch was one of the few staff members left in Colorado to receive mail and would have seen the notice had it been addressed to her attention. (4 App. 876:1–22.) Treasure Island designed its deadline for payment to expire the Sunday before Memorial Day. (2 App. 430.)

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tice was sent, but the substance of that conversation was inadmissible hearsay. (3 App. 661 at 79.)

Treasure Island sends a notice of termination and files suit

Treasure Island immediately exploited Rose's inaction on the improperly addressed letter to develop a direct leasing relationship with Señor Frog's. Two weeks after the letter, Treasure Island's counsel sent a termination letter to Mr. Dragul, again without copying Ms. Markusch. (2 App. 432; 1 App. 200.) That letter, however, was properly copied to Señor Frog's operator and its counsel. (*Id.*) David Krouham, the president and CEO of Señor Frog's licensor, testified that he would have flown to Las Vegas "personally to cure the alleged breach and default through cash payments" had proper notice been given. (2 App. 369, ¶ 28; *accord* 3 App. 648:15–22.) The letter also invited Señor Frog's counsel to "enter into negotiations for a new leasing agreement." (2 App. 432.)

Treasure Island had already engaged outside counsel to prepare a complaint for breach of lease and declaratory relief, which it filed that same day. (1 App. 1.)

Rose learns of the default and attempts to cure

After Mr. Krouham called to alert Mr. Dragul to the termination letter, Rose immediately and repeatedly attempted to pay in full. On

May 29, 2015, Rose attempted a wire transfer. (2 App. 376, ¶¶ 28; 2 App. 460–461.) When Treasure Island refused the transfer, Rose attempted again on June 3. (2 App. 460–461.) That same day, when Treasure Island again refused, Rose overnighted a cashier's check. (*Id.* at 2 App. 462.) Treasure Island refused again. (*Id.* at 2 App. 468–470.) Treasure Island eventually accepted payment with the district court's permission. (1 App. 88.) Rose is now current in its rent payments. (3 App 661:25–662:1; 728:17–23.) Treasure Island suffered no damages (*see* 5 App. 1053), but the campaign to oust Rose from Treasure Island's plans for the property has continued unabated.

C. The District Court Declares the Lease Terminated

After a bench trial, the district court entered a declaratory judgment terminating the lease based on the alleged 2012 oral modification, estoppel, waiver, actual notice, and substantial compliance. (4 App. 938 ¶ 2; 5 App. 1043.)

The district court finds an oral modification of the notice provision

Despite that the parties established a pattern of amending the lease in writing—on October 10, 2011; December 22, 2011; April 20,

2012; April 18, 2013; and April 30, 2014—the district court found that about two years *before* the fifth amendment, Mr. Dragul orally told Treasure Island's general counsel to send "all future correspondences dealing with the Treasure Island-Rose relationship directly and only to him." (4 App. 933 ¶ 10.)[5] Mr. Dragul disputes that he waived any right to notice under the lease. (4 App. 762:18–763:16.) And Treasure Island's general counsel conceded that the conversation involved Rose's repayment of a construction loan, not a pre-termination notice of default. (3 App. 686:15–23; 1 App. 162–63.)

The district court found that the only "detriment" Treasure Island suffered in reliance on the alleged oral modification was its having sent "the notice to the attention [of] Mr. Dragul instead of Ms. Markusch." (4 App. 939–940 ¶ 2(B).)

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[5] The district court prejudged the evidence for its conclusion, serving up a "when did you stop beating your wife?" interrogative of its own:

> Did you ever tell Mr. Anthony you wanted him to go back to the original notice *after you told him you only wanted him to send them to you*?"

(4 App. 821:15–20 (emphasis added).)

The district court precludes Rose from raising the lack of notice to Señor Frog's

Although the written lease as amended requires notice "to Tenant" to include a copy to Señor Frog's and its counsel, the district ignored that requirement. The district court held that because Señor Frog's was not a party to this case, Rose could not rely on the provision requiring notice to Señor Frog's and its counsel. (4 App. 941 ¶ 3.)

The district court rewrites the parties' agreement

The district court decided that it was enough that Treasure Island had addressed the notice to Rose's president and allegedly copied Ms. Gold in an e-mail. (4 App. 936 ¶¶ 31–36.) The court assumed that notice to the contracted-for individuals and entities was unnecessary because "Ms. Gold was the person who signed all of the contracts in this matter" (4 App. 935 ¶ 23).

The district court finds that Ms. Markusch received notice

The district court in passing asserts that Ms. Markusch received notice. (4 App. 940–941 ¶ 2(D).) The only basis for such a claim was counsel's argument that Ms. Markusch had attempted to mail a partial payment, but no letter or check was ever produced or admitted into evidence. (4 App. 869:1–10.) Mr. Dragul explained that such a payment, if

one had been made, would be consistent with Ms. Markusch's own discovery of the omitted payment and sending what she calculated to be the percentage rent. (4 App. 870:8–13.) Given the complexity of calculation and the frequency of disagreement, it is likely that if Ms. Markusch had sent such a check it would not match the amount demanded in Treasure Island's notice of default. (*See generally* 4 App. 855:9–856:25.) Treasure Island did not call Ms. Markusch to testify, and no one from Treasure Island testified to having received anything from Ms. Markusch.

The district court enters judgment against Rose

Based on these court's findings and legal interpretations, the court judgment against Rose, declaring the lease terminated. (4 App. 938–941 ¶ 2; 5 App. 1043.) The court found that Rose breached its duty to provide Señor Frog's a copy of the May 14 default notice. (4 App. 937 ¶¶ 40–41.)

The court dismissed as moot Treasure Island's claims for breach of lease and denied Rose's counterclaims under the lease. (5 App. 1053.)

The district court awarded Treasure Island $126,000 in attorney's fees under the lease. (*See* 5 App. 1048; 2 App. 291 § 19.14.)

SUMMARY OF THE ARGUMENT

Courts interpret contracts. They should not write them.

This case is in part about a notice of default under a lease—the legal doctrines that entitle long-term tenants to rely on written notice requirements, the equitable doctrines that make landlords strictly comply with those requirements, and the law's general aversion to forfeitures. But this case is also about power[6]—the power of private parties to negotiate tailored protections for themselves and others, the power of those contracting parties to enforce those protections, and the power of the judiciary to second-guess the bargain the parties struck.

Here, the district court did not merely err in the application of correct legal principles or even apply the wrong principles. The district court asserted power it does not have, telling Rose that the safeguards it secured through contract are unnecessary—even though the facts of this case demonstrate precisely why Rose needed them.

1. Rose and Treasure Island had a written lease that entitled Rose to notice in a specific manner. Treasure Island violated that notice

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[6] *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (Stevens, J., dissenting).

requirement, which invalidates a termination based on the defective notice. Doctrines of "substantial compliance" and "actual notice" are inapposite to the serious matter of forfeiting a tenant's real-property rights. The tenant has a right to a notice of default exactly as the lease requires, and here it is undisputed that two-thirds of the designated recipients for notice "to Tenant"—Señor Frog's and its counsel—never received it.

2. Rose was entitled to enforce the notice provision in its entirety. The district court erred in barring Rose from enforcing its own notice provision on grounds that the provision also benefited Señor Frog's, a nonparty. And it was improper for the district court to reweigh the necessity of the notice for which Rose had contracted.

3. The district court erred in substituting an alleged oral understanding for the written lease agreement. The district court should not have even considered Treasure Island's testimony that Mr. Dragul orally asked in 2012 to redirect "all notices" to him. The statute of frauds and the parties' contractual prohibitions against oral modifications or waivers made any oral request ineffective, particularly after the parties renewed and reinforced the notice requirement by written

amendment in 2014. Any oral request was also unenforceable as an estoppel because Treasure Island both knew about the later written amendment and suffered no detriment from having relied on the oral request.

4. Equitable principles do not operate to facilitate forfeiture, as the district court would have it. They intervene to *avoid* forfeitures. Here, under ordinary contract principles Rose was not even technically in default. Yet the district court misapplied equity to revitalize Treasure Island's contractually invalid notice, and did so to let Treasure Island extinguish a 30-year lease moments after the judicially-deemed default, refusing three times a tender that would avoid the forfeiture. That is not how law or equity works.

ARGUMENT

The district court's judgment terminating the lease misapplies the doctrines of modification, waiver, and estoppel. Although principles of equity and good faith counsel against forfeiture, the district court invoked those principles to create a forfeiture, excusing Treasure Island's noncompliance and clearing the path for disgorging Rose's property rights.

Standard of review: The district court's interpretation of the lease and the legal implications of the parties' conduct are subject to plenary review. *See Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 803, 963 P.2d 488, 494 (1998); *Merrill v. DeMott*, 113 Nev. 1390, 1396, 951 P.2d 1040, 1044 (1997).

I.

TREASURE ISLAND'S "NOTICE" WAS DEFECTIVE BECAUSE IT DID NOT STRICTLY COMPLY WITH THE LEASE PROVISIONS

Rose had bargained for specific notice requirements preceding any attempt to terminate the lease. Treasure Island had to comply strictly with those requirements. Its letter to the wrong people at Rose and to no one at Señor Frog's or its counsel was not a valid notice of default.

A. The Letter to Mr. Dragul was Ineffective

1. Equity Requires Strict Compliance with a Notice Requirement Preceding Termination

To terminate a lease, a landlord must provide notice exactly as the lease requires. 49 AM. JUR. 2D *Landlord and Tenant* § 220 (updated 2017); *Bickerstaff v. SunTrust Bank*, 770 S.E.2d 903, 907 (Ga. Ct. App. 2015), *rev'd on other grounds*, 788 S.E.2d 787 (Ga. 2016); *Lincoln Terrace Assocs., Ltd. v. Kelly*, 635 S.E.2d 434, 438 (N.C. Ct. App. 2006); *Ar-*

len Realty, Inc. v. Dozier, 393 So. 2d 489, 491 (Ala. Ct. Civ. App. 1980); *Woodall v. Pharr*, 168 S.E.2d 645, 647–48 (Ga. Ct. App. 1969), *aff'd*, 172 S.E.2d 404 (Ga. 1970); *see also* 52 C.J.S. *Landlord & Tenant* § 192 ("The notice must be given by the lessor to the *persons specified in the lease*." (emphasis added)).[7] Such a provision is a condition precedent to the right to terminate, and conditions must be "exactly fulfilled." 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 38:6 (4th ed. updated 2016); *accord Hardy v. McGill*, 47 P.3d 1250, 1257 (Idaho 2002) ("[a]ny forfeiture must strictly follow the terms of the contract . . . and the terms of a notice of default or termination" (internal citations and quotation marks omitted)). The rule of strict construction applies with particular force in this context because the court in equity is being asked to disgorge real-property interests. *Moore v. Prindle*, 80 Nev. 369, 376–77, 394 P.2d 352, 356 (1964); *accord Humphrey v. Sagouspe*, 50 Nev. 157, 254 P.

[7] *Cf. generally Schindler Elevator Corp. v. Tully Constr. Co.*, 30 N.Y.S.3d 707, 709–10 (N.Y. App. Div. 2016) (requiring strict compliance with notice requirement for claims under construction contract, which was not relieved by "actual knowledge" of the claims); *Mendelsohn v. Port Auth. Trans-Hudson Corp.*, 11-CV-03820 ADS, 2012 WL 3234107, at *7–*8 (E.D.N.Y. Aug. 3, 2012) (rejecting "substantial compliance" standard and citing authorities).

1074, 1079 (1927) ("The law abhors a forfeiture.").[8]

2. Strict Compliance Requires Notice to Everyone Exactly as Listed in the Lease

Substantial compliance in this circumstance is insufficient. In *Oxford Assocs. Real Estate, L.P. v. TSI Society Hill, Inc.*, the federal district court confronted a lease, like this one, that required notice "to Tenant" to be mailed to two specific individuals—one with the tenant and one a member of the tenant's legal team. CIV.A.05 CV 04445, 2007 WL 128886, at *2 (E.D. Pa. Jan. 11, 2007). The landlord, however, addressed the notice to *other* individuals in the tenant's organization at the same addresses, so the court held that "from the face of the letter . . . it does not constitute 'notice' as defined in the Lease." *Id.* The court rejected the landlord's argument that it "substantially complie[d]" with the notice requirement, noting that "*strict compliance* is a prereq-

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[8] The only exception to strict compliance with express conditions is when the failure of the condition would lead to a forfeiture. In that situation, the policy favoring strict enforcement of conditions rubs against the policy disfavoring forfeitures. The desire to avoid forfeitures prevails, meaning the party can satisfy the condition (and thus avoid forfeiture) with just "substantial compliance."

Here, by contrast, the policies *amplify* one another. The condition is the protection against a forfeiture. It must be strictly satisfied *both* because conditions in general are strictly construed and because strict compliance is necessary to minimize the risk of forfeiture.

uisite to forfeiture." *Id.* at *3 (emphasis added). The tenant, not the landlord, was entitled to summary judgment that the attempted termination was ineffective. *Id.*

Likewise, *In re C & C TV & Appliance* involved a lease that required "[a]ll notices to Tenant" to copy a second entity. 103 B.R. 590, 591–93 (E.D. Pa. 1989). Mailing the notice of default to just *one* of the two addresses did not strictly comply with the notice provision, so the attempted default failed. *Id.*

Similarly, in *Saladino v. Rault Petroleum Corp.*, the court rejected a notice of default sent to an address where the tenant hotel maintained its office. 436 So. 2d 714, 716 (La. Ct. App. 1983). Even though the lease did not specify any particular recipient, and there was evidence that the president of the hotel had *actual notice* of the default, the landlord was not excused from sending the notice to the address specified in the lease, so the landlord's action was dismissed. *Id.*

And in *Murray Hill Mello Corp. v. Bonne Bouchee Restaurant, Inc.*, a notice of default sent *to* the correct individuals was still ineffective because it was sent *by* the wrong people—the attorneys for a secured party and not the landlord itself. 449 N.Y.S.2d 870, 873–74 (N.Y.

Civ. Ct. 1982). Because "there must be strict observance with the provisions of the lease," the wrong sender invalidated the notice. *Id.*

3. Strict Compliance Aids in Preventing Forfeitures

To reflect the idea that "the law abhors a forfeiture," *Humphrey v. Sagouspe*, 50 Nev. 157, 254 P. 1074, 1079 (1927), the law in different circumstances imposes different burdens.

The district court erred in applying the substantial–compliance standard from mechanic's-lien cases. *See Hardy Cos. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010). Under that special regime, liberal construction in favor of the lienor avoids a forfeiture of the lienor's time and materials.

Avoiding forfeitures in lease-termination cases, by contrast, requires the opposite rule—strict construction against the landlord to protect the tenant's estate. *See Del Lago Ventures, Inc. v. QuikTrip Corp.*, 764 S.E.2d 595, 599 (Ga. Ct. App. 2014) ("Strict compliance is the exception, applying to cases concerning termination notices that result in forfeiture of real property rights under a lease or easement, or revocation of a surety." (internal brackets and quotation marks omitted)). In that circumstance, the doctrine of strict compliance serves the goals of equity

to avoid forfeitures:

> If the lessee's rights under the lease are to be forfeited for failure to pay the rent on demand, there must be a strict compliance with the terms of the lease. Forfeitures are not favored, and a court of equity will never enforce a forfeiture, but will frequently relieve against a forfeiture.

Ellison v. Foster, 19 Ohio Dec. 849, 854–55 (Com. Pl. 1909) (citing *Adams v. Parnell*, 5 Circ. Dec. 190 (11 R. 565), *aff'd,* 1909 WL 610 (Ohio Cir. Ct. Dec. 4, 1909); *accord* 49 AM. JUR. 2D *Landlord and Tenant* § 79 (updated 2017).

4. The Letter to Mr. Dragul Did Not Comply

Here, because the notice provision operated as Rose's protection against a forfeiture of the lease, Treasure Island had to comply exactly. It did not. Rather than sending the notice to Ms. Markusch, Señor Frog's, and Señor Frog's counsel, Treasure Island mailed a copy to Mr. Dragul and allegedly e-mailed Ms. Gold, though no such e-mail was ever produced. (2 App. 430; 4 App. 910:19–23.) That was not effective notice under the lease.

B. Noncontractual Notice to Mr. Dragul was Insufficient

That Treasure Island did not discharge its obligation merely by

copying Mr. Dragul on the letter that should have gone to those specified in the lease.

1. Noncontractual Notice is Not a Substitute for Strict Compliance

A party entitled to *strictly* compliant notice does not incur a duty to act upon receiving defective notice. For example, a party who actually receives a summons and complaint despite defective service has no duty to respond. *Slaughter v. Legal Process & Courier Serv.*, 209 Cal. Rptr. 189, 197–98 (Cal. Ct. App. 1984).

Actual notice is relevant only in a regime of substantial compliance, not strict compliance. *Iliescu v. Steppan*, 133 Nev., Adv. Op. 25, 394 P.3d 930, 934 (May 25, 2017). In the recent case of *Iliescu v. Steppan*, the Supreme Court made that point in clarifying the case from which the district court erroneously drew the substantial-compliance standard. *Id.* (clarifying *Hardy Cos. v. SNMARK, LLC*, 126 Nev. 528, 245 P.3d 1149 (2010)). The Court held that a property owner's "actual notice of the potential lien claim" makes the pre-lien notice *substantially* compliant with the statute, so long as the owner is not prejudiced. 133 Nev. at ___, 394 P.3d at 934. But actual notice does not satisfy a demand for *strict* compliance. *Id.* at ___, 394 P.3d at 935.

Here, the law requires *strict* compliance, so Treasure Island's defectively addressed letter created no obligation for Rose. Rose is entitled to rely on the lease's promise of *strictly* compliant notice.

2. The District Court Misapplied Cases where Actual Notice Constituted Substantial Compliance

In saying noncontractual notice was enough, the district court misapplied cases that allow actual notice as a *defense* to contract termination—when only substantial compliance is required. For example, one case did not involve a forfeiture of real-property rights at all. There, a homebuilder had its counsel *repudiate* the development contact in written correspondence with the developer. On appeal, the homebuilder could not escape liability under the contract by complaining that the developer responded to builder's counsel rather than the contact listed in the notice provision. *Stonehenge Land Co. v. Beazer Homes Invs., L.L.C.*, 893 N.E.2d 855, 864 (Ohio Ct. App. 2008). In the second case, a landlord was not permitted to invoke a technically defective notice of renewal to *terminate* the lease when the contractually-named contact acknowledged receipt of the renewal. *Polizzotto v. D'Agostino*, 129 So. 534, 536 (La. 1930).

Far from supporting the termination here, those cases aid Rose: a

"technical objection . . . seized upon" to terminate a lease constitutes an act of bad faith, *Polizzotto*, 129 So. at 536.

3. The Improperly Addressed Letter was Not Actual Notice "to Tenant"

Here, there was no actual notice because those appointed to receive notice never received it. Rose is an entity, so it matters *who* can receive notice on Rose's behalf. The district court erred in holding that service on any officer within the company effects notice to "Rose." The lease specified that notice to Rose is complete only when it is sent to Ms. Markusch, Señor Frog's, and Señor Frog's counsel. (2 App. 289 § 19.6; 2 App. 314 § 11.) Anything less is no notice at all.

Although Treasure Island initially made no claim that Ms. Markusch received notice, at trial counsel attempted to argue that notice to her could be presumed because she had allegedly sent a partial payment the day after Treasure Island mailed its letter to Mr. Dragul. (4 App. 845:15–25.)

That trial by ambush was procedurally improper. NRCP 15(b), (d); *Sanders v. Sears-Page*, 131 Nev., Adv. Op. 50, 354 P.3d 201, 212 (Ct. App. 2015) (reversing a judgment entered after "trial by ambush"). And without the letter admitted into evidence or any testimony by its author

or recipients, it is impossible to determine what it might have shown. (4 App. 869:1–10; *see also* 4 App. 870:8–13 (Mr. Dragul speculating that if such a partial payment existed, it would likely be the result of Ms. Markusch's own discovery of the omitted payment, not the notice addressed to Mr. Dragul).

Regardless, there is no dispute that neither Señor Frog's nor its counsel received the letter so as to complete actual notice "to Tenant" under the lease.

4. Even Actual Notice Would Have Been Insufficient

Treasure Island made no showing that its defectively served notice made it into the hands of Ms. Markusch, Señor Frog's, *and* Señor Frog's counsel. But even if it had, that would not have been enough. Rose in that circumstance would still have been entitled to require notice exactly as specified in the lease. *See Saladino*, 436 So. 2d at 716.

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Because Treasure Island did not give notice of default exactly as the parties' written lease required, the district court erred in declaring the lease terminated.

II.

ROSE WAS ENTITLED TO ENFORCE THE ENTIRE NOTICE PROVISION AS WRITTEN

A. Rose is Entitled to Enforce the Notice to Señor Frog's and its Counsel

For the first time at trial, Treasure Island argued that Rose could not enforce the notice to Señor Frog's because Señor Frog's was not a party. The district court agreed, saying it could not consider that aspect of the parties' lease, which was made for Señor Frog's benefit. That finding offends basic principles of contract law and upends Nevada's jurisprudence on necessary and indispensable parties.

1. As a Party to the Lease, Rose has Standing to Enforce All of its Provisions

a. PARTIES TO A CONTRACT CAN ENFORCE PROVISIONS MADE FOR THIRD PARTIES

The district court was wrong to disregard the lack of notice to Señor Frog's and its counsel. While the rights of third parties to enforce contractual provisions are sometimes murky, the rights of contracting parties are not: they enjoy "an undisputed right to enforce the contract made for the benefit of third parties." *Associated Teachers of Huntington, Inc. v. Bd. of Educ.*, 306 N.E.2d 791, 794 (N.Y. 1973); *accord Filer v. Keystone Corp.*, 9 N.Y.S.3d 480, 483 (N.Y. App. Div. 2015) ("It is well es-

tablished that a contractual obligation imposes a duty in favor of the promisee and intended third-party beneficiaries of the contract . . . ." (ellipses and brackets omitted)); *In re Spong*, 661 F.2d 6, 10–11 (2d Cir. 1981) ("In a third party beneficiary contract, benefits flow to both the promisee and the third party, and *either may sue* to enforce the contract." (emphasis added)). The district court's bar "completely ignores the well-established rule in contract law that even though a third-party beneficiary contract creates a duty to the beneficiary, the promisee still has a right to performance." *Campbell v. Parkway Surgery Ctr., LLC*, 354 P.3d 1172, 1180 (Idaho 2015). *See generally* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:54 (4th ed. updated 2016) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 305(1) (1981)); *see also* RESTATEMENT (FIRST) OF CONTRACTS § 138 (1932).

In conceding that Señor Frog's could have enforced the contract, the district court undermines its own ruling: "[t]he beneficiary for whose advantage a contract is made cannot acquire a better standing to enforce the contract than that occupied by the contracting party itself." *Stonewall Ins. Co. v. Modern Expl., Inc.*, 757 S.W.2d 432, 434–35 (Tex. App. 1988). That is just as true in leases creating a benefit for subles-

sees as in any other contract. *See* 52A C.J.S. *Landlord & Tenant* § 778 (updated 2016).

b. THE DISTRICT COURT MISAPPLIED CASES THAT DO NOT INVOLVE A PARTY'S STANDING TO ENFORCE A CONTRACT

In precluding Rose from enforcing its own lease, the court misapplied the law of other states on an obscure and unrelated issue. Each of the cases the district court cites deals with a *statute* governing a midterm cancelation of insurance.[9] In some cases, such statutes require the insurer to notify both the named insured and the purchaser of the policy or a mortgage holder. Courts sometimes enforce the cancelation against a party that received notice, even if the cancelation would be ineffective against another party who did not receive notice. *Pierce v. Sentry Ins.*, 421 N.E.2d 1252, 1253 (Mass. App. Ct. 1981) (interpreting Massachusetts statute); *Ellegood v. Am. States Ins. Co.*, 638 N.E.2d 1193, 1194 (Ill. App. Ct. 1994) (interpreting Illinois statute and observing that there was no privity between the plaintiff and the mortgage holder);

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[9] Nevada's statutory regime regarding midterm cancelation of insurance is stricter than those of other states and allows cancelation only for specific enumerated reasons after notice to the policyholder. *See Daniels v. Nat'l Home Life Assur. Co.*, 103 Nev. 674, 677, 747 P.2d 897, 899 (1987) (citing NRS 687B.320); *see also* NRS 687B.325.

Bryce v. St. Paul Fire & Marine Ins. Co., 783 P.2d 246, 247 (Ariz. Ct. App. 1989) (holding that Arizona statute did not require insurer to notify insured); *Allstate Ins. Co. v. McCrae*, 384 S.E.2d 1, 4 (N.C. 1989) (holding that North Carolina statute did not require effective notice to the DMV to cancel policy). One Florida case cited by the district court has nothing to do with *how* notice was sent—"with that simple provision there seems to have been meticulous compliance"—but the adequacy of the notice's contents. *Bradley v. Assocs. Disc. Corp.*, 58 So. 2d 857, 859 (Fla. 1952).

These inapposite cases led the district court into error. They do not discuss a tenant's right under a *lease* to enforce a provision designating third parties to receive notices for the tenant. The difference is critical because *statutory* notice is not part of contractual package that parties have bargained to enforce; it exists independent of the contract. *See Bryce*, 783 P.2d at 247. Where the contract calls for notice, the provision is enforceable. *See Johnson v. Metzinger*, 156 So. 681, 688 (Fla. 1934) (assignee of mortgage notes was entitled to enforce notice to "mortgagee" required by lease).

Nothing in the cited cases supports the district court's ruling

barring Rose as tenant from fully enforcing what the parties' lease defines as notice "to Tenant."

c. NOTICE TO SEÑOR FROG'S IS A PROVISION FOR ROSE'S OWN BENEFIT

The notice to Señor Frog's, moreover was not merely for Señor Frog's benefit. Rose secured the extra failsafe in part for its *own* protection. Under the sublease, Señor Frog's had the right to cure a default by Rose (1 App. 217–218 § 9(d)), and the amended lease ensured that Señor Frog's would get notice directly from Treasure Island (2 App. 314 § 11), giving Señor Frog's the chance to cure Rose's default even if Rose missed the notice. Rose can assert the lack of notice as a primary beneficiary of that provision.

2. Señor Frog's was a Necessary Party whom Treasure Island Failed to Join[10]

The district court held that because Señor Frog's was not a party, Rose could not raise as a defense Treasure Island's failure to copy Operadora or Señor Frog's counsel. (4 App. 941–942 ¶ 3(A).)

That holding implies one of two things: either Rose should have joined Señor Frog's as a party to be able to raise that defense, or Señor Frog's participation was unnecessary to terminate the lease. Both notions are wrong.

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[10] **Standard of Review:** Although a court has discretion in determining *who* is a necessary or indispensable party, *Schulz Partners, LLC v. State ex rel. Bd. of Equalization*, 127 Nev. 1173, 373 P.3d 959 (2011), the consequences of that determination are "not a matter of discretion, but of absolute judicial duty," *Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979) (quoting *Robinson v. Kind*, 23 Nev. 330, 338, 47 P. 1, 3–4 (1896)); *see also Humphries v. Eighth Jud. Dist. Ct.*, 129 Nev., Adv. Op. 85, 312 P.3d 484, 487 (2013) (interpretation of rules of civil procedure draws *de novo* review). The court must join a necessary party, if feasible. *Humphries v. Eighth Judicial Dist. Court*, 129 Nev., Adv. Op. 85, 312 P.3d 484, 487 (2013). "If joinder is not feasible, the court must determine, in equity and good conscience, whether the action should proceed or be dismissed." *Id.*

This issue is not subject to waiver. *Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 395–96, 594 P.2d 1159, 1163 (1979). Even if the parties do not raise the issue in the trial court, "[f]ailure to join an indispensable party is fatal to a judgment and may be raised by an appellate court sua sponte." *Schwob v. Hemsath*, 98 Nev. 293, 294, 646 P.2d 1212, 1212 (1982) (citing *Provident Bank v. Patterson*, 390 U.S. 102 (1968); *Johnson v. Johnson*, 93 Nev. 655, 572 P.2d 925 (1977)).

a. IT IS THE PLAINTIFF'S DUTY TO JOIN ALL NECESSARY PARTIES

A defendant can force a new party into the action in just two circumstances: (1) to join a new party to an existing counterclaim or crossclaim (NRCP 13(h)), or (2) to file a third-party complaint against a third party for indemnity or contribution (NRCP 14(a)). *See generally Lund v. Eight Judicial Dist. Court*, 127 Nev. 358, 361–63, 255 P.3d 280, 282–84 (2011). In both cases, the defendant has a claim against the party it is joining. *Id.* A defendant cannot force the plaintiff to sue additional parties. *Humphries v. Eighth Judicial Dist. Court*, 129 Nev., Adv. Op. 85, 312 P.3d 484, 490 (2013). And a nonparty is never obligated to intervene:

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.

Gladys Baker Olsen Family Trust ex rel. Olsen v. Eighth Judicial Dist. Court, 110 Nev. 548, 553, 874 P.2d 778, 781 (1994) (quoting *Marin v. Wilks*, 490 U.S. 755, 765 (1988)).

Instead, in an action for declaratory relief, the burden rests with the plaintiff to join everyone whom the declaration would affect. *Crowley v. Duffrin*, 109 Nev. 597, 601–03, 855 P.2d 536, 539–40 (1993).

b. TREASURE ISLAND FAILED TO JOIN SEÑOR FROG'S, A NECESSARY PARTY TO AN ACTION TERMINATING THEIR RIGHTS

Señor Frog's was a necessary party to any declaration that diminished or eliminated its contractual rights. There is no question that a declaration terminating Rose's lease does so. Although Treasure Island has to "enter into negotiations for a new leasing agreement" with Señor Frog's, Señor Frog's has no assurance that the lease will be on the same terms it has with Rose now. (*See* 1 App. 205 § 9(a)(i).)

It was not Rose's responsibility to join Señor Frog's to this action, nor was it Señor Frog's obligation to intervene. To terminate the lease—and with it, Señor Frog's rights under the sublease—Treasure Island needed to join Señor Frog's. Treasure Island's failure to do so is "fatal to the judgment" declaring a termination. *Schwob v. Hemsath*, 98 Nev. 293, 294, 646 P.2d 1212, 1212 (1982) (citing *Provident Bank v. Patterson*, 390 U.S. 102 (1968); *Johnson v. Johnson*, 93 Nev. 655, 572 P.2d 925 (1977)).

c. THE JUDGMENT IN TREASURE ISLAND'S FAVOR CANNOT STAND

The judgment terminating the lease eliminates a necessary party's contractual rights and cannot stand.

If this Court declines to rule for Rose as a matter of law, this Court should remand for the district court to join Señor Frog's or dismiss the action. *Blaine Equip. Co. v. State*, 122 Nev. 860, 864–66, 138 P.3d 820, 822–23 (2006); *Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979); *Robinson v. Kind*, 23 Nev. 330, 338, 47 P. 1, 3–4 (1896). The district court would first have to ascertain the feasibility of joining Señor Frog's. NRCP 19(a); *Humphries*. 129 Nev. at ___, 312 P.3d at 487. If Señor Frog's can be joined, the Court would have to allow Señor Frog's to interject its claims and defenses, participate in discovery, and eventually retry the case. *See Blaine Equip Co.*, 122 Nev. at 866, 138 P.3d at 823 (directing the district court to "conduct proceedings with [the necessary party] as a party").

d. THE COURT CAN RULE IN ROSE'S FAVOR WITHOUT AFFECTING SEÑOR FROG'S RIGHTS

Conversely, a ruling in Rose's favor avoids the need for a new trial. Although Señor Frog's is a necessary party to any judgment declaring the lease terminated, this Court could direct the district court to enter judgment for Rose without Señor Frog's joinder. In that circumstance, Señor Frog's existing rights under the lease and sublease are protected. (*See also* 2 App. 324, § 9(i) (Señor Frog's "shall not have the right or au-

thority to determine whether or not [Rose] in fact complied with its obligations" under the lease.).)

B. The District Court Had No Power to Weaken the Notice the Parties had Agreed to

Treasure Island's disregard for the parties' written notice provision is dispositive. It makes no difference that the district court thought something less should have sufficed, and it was error for the district court to rewrite the parties' agreement.

1. The Slippery Slope: Courts Cannot Start Altering Private Contracts

The Nevada Supreme Court has long warned that courts "are not free to modify or vary the terms of an unambiguous agreement." *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev., Adv. Op. 49, 376 P.3d 151, 156 (2016) (quoting *All Star Bonding v. State*, 119 Nev. 47, 51, 62 P.3d 1124, 1126 (2003) and citing *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 20 (2001)). Indeed, courts have no *power* to second-guess the contract the parties themselves created. *Id.* (citing *Reno Club., Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947)).

The prohibition is a bright-line rule because once courts start de-

ciding what contracting parties might or should have thought acceptable, courts find it hard to stop. The majority in *Golden Road Motor Inn*, declining to "blue pencil" an overbroad noncompete agreement, feared "setting a precedent that establishes the judiciary's willingness to partake in drafting," which "conflicts with the impartiality that is required of the bench." *Id.* at ___, 376 P.3d at 157. Such judicial trespass, no matter how minimal, is indefensible. *Id.* at 157.[11]

For that reason, the Supreme Court has declined to reallocate the risk and protections that the parties have negotiated for themselves. In *Paul Steelman, Ltd. v. Omni Realty Partners*, the Supreme Court upheld the parties' contract as written, even though it left the plaintiff with an uncollectible judgment:

> Steelman alone is responsible for not protecting against [insolvency] by insisting on individual guarantees from shareholders who were financially capable of satisfying its claims . . . .

110 Nev. 1223, 1226, 885 P.2d 549, 551 (1994).

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[11] Even the dissent agreed that, while an overbroad agreement might be reformed to make it enforceable, an otherwise valid contract should be enforced as written. *Id.* at ___, 376 P.3d at 164 (Hardesty, J., dissenting) (citing *All Star Bonding* and *Kaldi*).

2. The District Court Substituted its Own Judgment for the Parties' Contractual Notice Provision

Here, the parties had allocated the risk of default with a carefully drafted notice requirement. The district court ignored it. By deciding for itself what should have been sufficient, the district court substituted its own assumptions for the parties' actual concerns. It had no power to do so.

Rose contracted to have notice given to its controller, the one responsible for arranging rental payments and reinforced this in subsequent amendments. (2 App. 289 § 19.6; 2 App. 314 § 11.) The district court decided notice addressed to Rose's president in contravention of the lease provision was enough. (4 App. 936 ¶¶ 31–36.) The court felt it was important that "Ms. Gold was the person who signed all of the contracts in this matter" (4 App. 935 ¶ 23) and had allegedly received e-mail notice, though no documentary evidence supported that (3 App. 661). In the district court's view, as long as Rose's *president* was aware of the notice (4 App. 936 ¶¶ 31–36), it did not matter whether Rose's *controller*—the one responsible for payment—was aware.

Rose also provided additional consideration—eliminating Treasure Island's obligation to perform the pirate show—so that notice "to

Tenant" would require notice to Señor Frog's and its counsel. (2 App. 312, § 7 (deleting Lease § 17.1(e)).) The district court declared that extra protection unnecessary, instead blaming *Rose* for not forwarding the defective notice to Señor Frog's. (4 App. 941 ¶ 3.)[12]

The district court's intrusive reassessment of the parties' risks and obligations ignores the actual concerns, habits, schedules, and other nuances that motivated the parties that contracted for these provisions. For example, the court ignored that Mr. Dragul's travel schedule made him an inappropriate recipient for default notices on his hundreds of properties. (4 App. 86:16–24.) Ms. Markusch was the one who stayed "at home." (4 App. 860:16–24.) The court ignored the possibility that requiring notice to multiple parties within and without the company could protect against such risks as occurred here, Mr. Dragul's family emergencies. (2 App. 375–376 ¶¶ 21–24.) Hypotheticals are scarcely necessary; the very risks this notice provision was intended to avoid played out here. (4 App. 775–776 (the reason for notice provision "was so that this exact situation would not happen").

[12] Because the notice was not addressed to Ms. Markusch, she never had the opportunity to forward the notice in the ordinary course to Señor Frog's.

Disregarding the repeated warnings from the Supreme Court, the district court flung itself into the drafting process. It was manifest error for the district court to decide that lesser protections than those Rose negotiated and paid for were enough.

III.

THE WRITTEN NOTICE PROVISION, NOT AN ORAL UNDERSTANDING, CONTROLS

In addition to questioning the necessity of the written notices, the district court tried to avoid the parties' written agreement by relying on an alleged oral understanding from three years before the default. Such an understanding could not have been effective either initially or after the parties executed a *written* amendment reaffirming and strengthening the original notice requirements. It was error for the district court to hold that the oral understanding controlled.

A. The Purported Oral Modification was Ineffective

1. The Multiyear Lease Could Not Be Modified Orally Because it was Subject to the Statute of Frauds[13]

Although most written contracts may be orally modified, "[w]hen the Statute of Frauds requires a contract to be in writing, the whole contract must be in writing, and oral changes or additions, either contemporaneous or subsequent, are necessarily invalid regardless of the parol evidence rule." 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 33:13 (4th ed. updated 2016).[14] Allowing oral modifications to agreements governed by the statute of frauds would "would expose the contract to all the evils that the statute is intended to remedy" because

> anyone who had any contract in writing could make an entirely different contract by parol using the written one as a basis for the change. The result would be

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[13] **Standard of review:** "[T]he district court's application of the statute of frauds is a question of law, which this court reviews de novo." *Khan v. Bakhsh*, 129 Nev., Adv. Op. 57, 306 P.3d 411, 413 (2013) (citing *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1033, 923 P.2d 569, 574 (1996)).

[14] *See also* 17A C.J.S. *Contracts* § 572; RESTATEMENT (SECOND) OF CONTRACTS § 149 (1981); *Ctr. of Hope Christian Fellowship v. Wells Fargo Bank Nev., N.A.*, 781 F. Supp. 2d 1075, 1080 (D. Nev. 2011) (in *dicta* recognizing the rule under Nevada law); *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824, 833 (S.D. 2007); *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 257 (Mich. 2003); *Ikovich v. Silver Bow Motor Car Co.*, 157 P.2d 785, 789 (Mont. 1945).

> that oral contracts preceded by written contracts would be valid, although quite different therefrom, while wholly oral contracts would be unenforceable.

72 AM. JUR. 2D *Statute of Frauds* § 180; *accord* 17A AM. JUR. 2D *Contracts* § 502.

Rose's lease for an initial term of 10 years could be modified only in writing. The district court, citing authority on contracts outside the statute of frauds,[15] ignored that this multiyear lease was subject to the statute. *See* NRS 111.210(1). The imprecision of Mr. Dragul's alleged oral request—which notices? on which subjects?—illustrates the risks the statute of frauds aims to avoid. It violates the statute to let the uncorroborated testimony of Treasure Island's general counsel on a four-year-old offhand comment override a carefully negotiated 30-year lease. Any attempted oral modification would have been ineffective.

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[15] The district court cited two cases; neither supports the conclusion that a contract subject to the statute of frauds may be orally modified. *Jensen v. Jensen* involved a premarital agreement from the era before Nevada required such agreements to be in writing. *Jensen v. Jensen*, 104 Nev. 95, 98, 753 P.2d 342, 344 (1988); *cf.* 1989 Stat. 1003 (enacting NRS 123A.040). And contrary to the district court's citation, the Supreme Court in *Jensen* based its finding on the fact that "the Agreement expressly provided that its terms could be changed" and "did not require any subsequent modifications to be in writing." *Id.* at 98 & n.2, 753 P.2d at 344 & n.2. *Silver Dollar Club v. Cosgriff Neon Co.* involved installation contracts not subject to the statute of frauds. 80 Nev. 108, 389 P.2d 923 (1964).

2. The Lease Prohibited Oral Modification

Even apart from the statute of frauds, any oral modification would be ineffective because the lease prohibits it. (2 App. 290 § 19.9; 2 App. 314 § 9(d).) As contrasted with contracts not subject to the statute of frauds, *see Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964), such a prohibition in a *lease* is enforceable. 49 AM. JUR. 2D *Landlord and Tenant* § 71 (updated 2016); *see also Merrill v. DeMott*, 113 Nev. 1390, 1399–401, 951 P.2d 1040, 1045–47 (1997) (suggesting that to waive a provision in a lease, the parties to that lease could have executed "a written modification agreement *as required by the merger clause*" (emphasis added)).

3. There was No Clear and Convincing Evidence of an Oral Modification

Even if neither the statute of frauds nor the lease barred the alleged oral alteration here, the district court did not substantiate its finding. Because of the potential for confusion, "[o]ral modification must be proved by clear, precise, and convincing evidence." 17A C.J.S. *Contracts* § 570. The district court did not purport to have such "stringent proof." *See id.* And as a matter of law, the evidence is not so conclusive. The divergent recollection of the phone conversation, coupled

with the parties' practice of executing written amendments, leaves substantial doubt that Mr. Dragul wanted to keep Rose's controller and Señor Frog's and its counsel out of the loop on a notice of default.

B. The Subsequent Written Amendment Superseded any Prior Oral Modification

Regardless of the statute of frauds, an integrated written agreement controls over any prior oral understandings; that earlier parol evidence cannot be considered. *See Galardi v. Naples Polaris, LLC*, 129 Nev., Adv. Op. 33, 301 P.3d 364, 366 (2013).

Here, the fifth written amendment in 2014 superseded any alleged oral understanding from 2012. Because that amendment constitutes the "complete agreement" of the parties (2 App. 314 § 11), its notice provision controlled. It added a requirement to notify Señor Frog's counsel. (2 App. 314 § 11.) It followed the directive of the original lease to "specify a different address and/or contact person" by updating Rose's street address but making no change to Ms. Markusch as Rose's "contact person" under the lease. (2 App. 289 § 19.6; 2 App. 314 § 11.) If there were any doubt, the amendment affirms the remaining provisions of the original lease—which required notice to Ms. Markusch. (2 App. 314 § 10.)

The district court erred in considering evidence of the alleged

contradictory oral agreement from two years earlier and ignoring the later writing altogether.[16]

C. The District Court Erred in Applying the Concepts of Waiver and Estoppel

Waiver and estoppel are different concepts that serve different purposes. 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:16 (4th ed. updated 2016). "A waiver is an *intentional* relinquishment of a known right." *Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 987, 103 P.3d 8, 18 (2004) (emphasis added). A party cannot forfeit a right by waiver without intending to do so. By contrast, "[e]stoppel involves

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[16] Although parol evidence is sometimes admissible to determine the parties' intention when the written agreement is ambiguous, *State ex rel. List v. Courtesy Motors*, 95 Nev. 103, 107, 590 P.2d 163, 165 (1979), the district court made no finding of ambiguity in the Fifth Amendment. And if it had, then the rule disfavoring forfeitures would have required the district court to construe the ambiguity in Rose's favor to avoid termination.

A contract may be read to permit a forfeiture only if plain, clear, unequivocal language requires it. *Am. Fire & Safety, Inc. v. City of N. Las Vegas*, 109 Nev. 357, 360, 849 P.2d 352, 355 (1993) (quoting 4 WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 602A (3d ed. 1961)); *Moore v. Prindle*, 80 Nev. 369, 376–77, 394 P.2d 352, 356 (1964); *accord Flatley v. Phenix Ins. Co.*, 70 N.W. 828 (Wis. 1897), *quoted with approval in Clark v. London Assur. Corp.*, 44 Nev. 359, 195 P. 809, 810 (1921). Ambiguous language alone cannot support a forfeiture because "the law abhors a forfeiture." *Humphrey v. Sagouspe*, 50 Nev. 157, 254 P. 1074, 1079 (1927).

the situation in which the fault or conduct of one party induces the other to change its position for the worse." *Stonewall Ins. Co. v. Modern Expl., Inc.*, 757 S.W.2d 432, 436 (Tex. App. 1988).

Courts occasionally have difficulty distinguishing the two concepts because sometimes conduct can both imply an actual intent to waive a right and give rise, because of reliance, to estoppel. *See Bernhard v. Rochester German Ins. Co.*, 65 A. 134, 135–36 (Conn. 1906), *quoted in* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:27 (4th ed. updated 2016); *see also Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984) (recognizing that either theory might apply in certain circumstances). It is important, however, to observe the distinction between *intent*-based waiver and *effect*-based estoppel because only estoppel can overcome contractual protections against waiver.

1. Rose Could Not Orally Waive a Future Right to Notice

The district court erred in finding a waiver. As a legal matter, the lease's nonwaiver clause precludes a waiver. Rose, moreover, lacked the authority to waive a provision for Señor Frog's benefit. And as a factual matter, there is no evidence clearly indicating that Rose intended to waive—and never reinstated—its right to a notice of default per

the lease.

Standard of review: Although waiver is generally a question of fact, whether the facts underlying the district court's conclusion actually constitute a waiver is a legal question this Court reviews *de novo*. *Merrill v. DeMott*, 113 Nev. 1390, 1399, 951 P.2d 1040, 1045–46 (1997) (reversing the district court's finding of waiver); *accord Mill-Spex, Inc. v. Pyramid Precast Corp.*, 101 Nev. 820, 822, 710 P.2d 1387, 1388 (1985) (same).

a. THE NONWAIVER CLAUSE PRECLUDED A FINDING OF WAIVER

A contract can expressly limit how waiver can occur. *Violin v. Fireman's Fund Ins. Co.*, 81 Nev. 456, 467, 406 P.2d 287, 293 (1965). Such provisions, known as nonwaiver (or "antiwaiver") clauses, may—for example—recognize only written waivers, *e.g.*, *id.*, or provide that a party who fails to enforce a right today can still enforce it tomorrow, *e.g.*, *Merrill v. DeMott*, 113 Nev. 1390, 1400, 951 P.2d 1040, 1046 (1997).

Here, the lease did just that. It specified that "[f]ailure to insist on compliance . . . shall not be deemed a waiver," that waivers have to be in writing, and that no waiver "at any one or more time or times [shall] be deemed a waiver or relinquishment of such rights or powers

at other times," disclaiming the possibility of "a continuing waiver." (2 App. 288 § 19.3, 2 App. 290 § 19.9.) Although it was a focus of Treasure Island's case at trial, Rose did not waive any right to proper notice by not correcting earlier, deficient notices. Mr. Dragul's supposed oral waiver was ineffective. And even if it had been effective for that one occasion, it does not bar Rose from now enforcing its right to proper notice of default.

b. ROSE HAD NO AUTHORITY TO WAIVE NOTICE

Given that the notice was in part for Señor Frog's protection, Mr. Dragul did not have the *authority* to waive that notice requirement. *See Woodman ex rel. Woodman v. Kera LLC*, 785 N.W.2d 1, 8 (Mich. 2010) ("the freedom to contract does not permit contracting parties to impose obligations upon and waive the rights of third parties"); *cf. also Deptula v. Simpson*, 164 P.3d 640, 645 (Alaska 2007) (party cannot waive statutory rights where "rights of third parties . . . are involved"); *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 821 (Tenn. 2003) (same); *State ex rel. Wallace v. State Med. Bd.*, 732 N.E.2d 960, 965 (Ohio 2000) (same). Treasure Island never presented any evidence that Mr. Dragul had the capacity to execute such a waiver, and it is undisputed that Se-

ñor Frog's did not waive its right to notice under the lease.

c. THERE WAS INSUFFICIENT EVIDENCE OF ROSE'S INTENT TO WAIVE PROPER NOTICE

Even without the nonwaiver clause, there was no evidence from which the district court could have concluded that Rose's conduct was "so inconsistent with an intent to enforce the right" as to "clearly indicate [Rose's] intention" to waive its right to a compliant notice of default. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007).

The Supreme Court has held that a tenant's failure to correct the landlord's breaches does not, without more, constitute a waiver of those breaches. "[D]elay alone is insufficient to establish a waiver." *Id.* And in *Mill-Spex, Inc. v. Pyramid Precast Corp.*, the Supreme Court rejected the district court's finding that renewing the lease despite ongoing breaches waives the tenant's right to demand repairs. 101 Nev. 820, 822, 710 P.2d 1387, 1388 (1985).

Here, too, Rose's failure to correct how Treasure Island addressed other, less consequential communications is not a clear indication that Rose intended to waive proper notice of a default preceding termination of the lease. Until May 14, 2015, Treasure Island had never served

such a notice for Rose to waive or object. The waiver finding based on past acquiescence is particularly problematic because, unlike cases where the Supreme Court has upheld a waiver, the district court said Rose's conduct preemptively barred Rose from contesting a deficient notice that had not yet occurred.

The district court erred in finding a waiver.

d. ROSE RETRACTED ANY WAIVER WITH THE WRITTEN AMENDMENT

A party who has waived a right can generally retract the waiver for future performance by notifying the other party. *See* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:20 (4th ed. updated 2016); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. f (1981).

Even if Mr. Dragul had orally waived Rose's right to notice per the lease, Rose retracted any waiver in the clearest way possible: by reiterating and strengthening the lease's notice provision in a written amendment. Because only clear language will effect a forfeiture, any ambiguity in whether the affirmation of the original lease restored the notice requirement to Ms. Markusch must be resolved in Rose's favor. *See Am. Fire & Safety, Inc. v. City of N. Las Vegas*, 109 Nev. 357, 360, 849 P.2d 352, 355 (1993); 14 RICHARD A. LORD, WILLISTON ON CON-

TRACTS § 42:3 (4th ed. updated 2016) ("forfeitures are not favored in the law and cannot be based on ambiguous provisions"). There is no dispute that the amendment requires notice to Señor Frog's and its counsel. (2 App. 314 § 11.)

2. Rose is Not Estopped from Enforcing Proper Notice

The only way around a nonwaiver clause is the doctrine of equitable estoppel. But that doctrine, too, is inapplicable as a matter of law. The district court's findings indicate that Treasure Island was aware of the written notice requirement and suffered no detriment from relying on the supposed oral agreement.

Standard of Review: Although the application of estoppel is usually reviewed for abuse of discretion, "when the facts are undisputed or when only one inference can be drawn from the facts, then the existence of equitable estoppel becomes a question of law." *In re Harrison Living Trust*, 121 Nev. 217, 222, 112 P.3d 1058, 1061 (2005); *accord Merrill v. DeMott*, 113 Nev. 1390, 1396, 951 P.2d 1040, 1044 (1997) (reviewing *de novo* whether the party seeking estoppel had shown detrimental reliance).

a. ESTOPPEL REQUIRES JUSTIFIABLE IGNORANCE AND DETRIMENTAL RELIANCE

As an equitable defense, "estoppel requires a *clear* showing that the party relying upon it was *induced* by the adverse party to make a *detrimental change in position*, and the burden of proof is upon the party asserting estoppel." *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990) (emphasis added) (citing *In re MacDonnell's Estate*, 56 Nev. 504, 508, 57 P.2d 695, 696 (1936)). This "clear showing" requires four things: (1) the party to be estopped must either know the "true facts" or deceive the other party into so thinking; (2) the party invoking estoppel must have a reasonable basis for thinking the party to be estopped intended its conduct to be acted upon; (3) the party invoking estoppel cannot know the "true facts"; and (4) that party must detrimentally rely on the conduct of the party to be estopped. *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 596–97, 691 P.2d 421, 423 (1984). In combination, these elements ensure that the relying party has acted more reasonably—and is in greater need of the law's protection—than the party to be estopped.

Recognizing that the remedy of estoppel strips away bargained-for legal rights, the Supreme Court has directed its cautious, and sparing,

application:

> The doctrine should be applied with caution, and invoked only when clearly required by considerations of equity and justice, for if used arbitrarily in dubious cases it could easily become an odious rather than a beneficent doctrine. In considering each individual case, courts should keep in mind the purpose of the defense of equitable estoppel, which is to prevent a party from asserting his legal rights when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove such rights.

Noble Gold Mines Co. v. Olsen, 57 Nev. 448, 66 P.2d 1005, 1010 (1937).

At least three of these elements are missing here.[17]

b. TREASURE ISLAND KNEW ABOUT THE WRITTEN NOTICE REQUIREMENT

The court's finding that "Treasure Island was clearly ignorant to any change in direction by Rose to change the person who the notice needed to be sent to" (4 App. 939–940 § 2(B)) disregards the fifth

[17] The remaining element—Rose's knowledge of the "true facts"—just shows how poorly the doctrine fits this case. Ordinarily, the party to be estopped knows some external or empirical fact—a "true fact"—that the relying party does not. *See, e.g.*, *Noble Gold Mines Co. v. Olsen*, 57 Nev. 448, 462 66 P.2d 1005, 1010 (1937) (plaintiff, but not defendant, knows that defendants are mining his land on the mistaken belief that it is federal land); *Topaz Mut. Co., Inc. v. Marsh*, 108 Nev. 845, 853–54, 839 P.2d 606, 611–12 (1992) (utility, but not its investor, knows that utility did not obtain regulatory approval for the investor's loan). Here, if the "true facts" are Rose's rights under the lease, that information is available to both parties.

amendment that Treasure Island signed as the parties' "complete agreement" (*see* 2 App. 314 § 11). That "change" in the notice provision proved that—whatever Mr. Dragul's previous direction—Rose was affirming the notice provision under the original lease, updating its notice address, and requiring notice to Señor Frog's and its counsel. Even assuming Mr. Dragul could have orally designated himself as Rose's contact person prior to that amendment, Treasure Island assented to give "full force and effect" to "the terms and conditions" of the original lease "[e]xcept as otherwise set forth" in the applicable *written* amendments, thus restoring Ms. Markusch as the designated contact person.

c. TREASURE ISLAND DID NOT HAVE A REASONABLE BASIS FOR ASSUMING ROSE WANTED NOTICE THAT DID NOT COMPLY WITH THE WRITTEN LEASE

Given the subsequent written amendment and its reinforced notice provision, it was not reasonable for Treasure Island to assume that Rose wanted Treasure Island to disregard that written provision when attempting to terminate the lease.

d. TREASURE ISLAND SUFFERED NO DETRIMENT

A substantial, detrimental change in position is integral to the concept of estoppel, but that element is missing here.

Estoppel requires a real expenditure of resources or commitment to an irrevocable path

The Nevada Supreme Court upholds the remedy of estoppel only for parties who have expended substantial resources or made an irreversible decision relying on the promise.

In *Cheqer Inc. v. Painters & Decorators Joint Comm., Inc.*, a union was estopped from holding a general contractor liable for a subcontractor's nonpayment. 98 Nev. 609, 613, 655 P.2d 996, 998 (1982). The union failed to alert the general contractor of the breach, leading the general contractor to pay the subcontractor without conditions. *Id.* Had the general contractor known, it would not have continued paying the subcontractor. *Id.*

In *NGA #2 LLC v. Rains*, a buyer expended resources after the original escrow deadline to record a parcel map, an expense incurred only because the seller had not indicated it would impede closing. 113 Nev. 1151, 1160, 946 P.2d 163, 169 (1997). Had the buyer known the seller was going to retroactively enforce the original escrow deadline, it would not have spent the time and money on recording. *Id.*

In *Noble Gold Mines Co. v. Olsen*, a landowner let a mining company keep performing work on his land knowing that the mining com-

pany believed it was federal land. 57 Nev. 448, 462 66 P.2d 1005, 1010 (1937). The mining company would have otherwise halted work. *Id.*

In *Topaz Mutual Co., Inc. v. Marsh*, a utility induced an investor to lend money by misrepresenting that the Public Services Commission had approved the loan; otherwise, the investor would not have made the loan. 108 Nev. 845, 853–54, 839 P.2d 606, 611–12 (1992).

And in *Summa Corp. v. Richardson*, a landlord led its tenant to believe it was unnecessary to remedy the tenant's breaches before exercising a purchase option. 93 Nev. 228, 234–35, 564 P.2d 181, 184–85 (1977). Had the tenant been told that landlord was going to require such remedy, the tenant would have done so in time to exercise the option. *Id.* The Supreme Court, relying on the doctrine disfavoring forfeitures in leases, held that the landlord was estopped from terminating the lease based on the breaches that were now too late to cure. *Id.*

De minimis *expenditures are not detrimental reliance*

De minimis expenditures do not constitute detrimental reliance, however. In *Breliant v. Preferred Equities Corp.*, a property owner initiated negotiations with a neighboring apartment complex on the assumption that the complex had an easement in the property owner's

parking lot. 112 Nev. 663, 673–74, 918 P.2d 314, 320–21 (1996). Counsel later advised the property owner that the easement had extinguished, prompting the owner to discontinue negotiations with the complex. *Id.* Whatever resources the complex spent on the failed negotiations as a matter of law did not constitute a "detrimental change of position" warranting estoppel. *Id.*[18]

Sending defective notice is not detrimental reliance

Treasure Island suffered no detriment. The district court's finding on this point is circular: Treasure Island "relied to its detriment by sending the notice to the attention of Mr. Dragul instead of Ms. Markusch"—i.e., by relying on the alleged oral agreement. (4 App. 939–940 § 2(B).) There is scarcely a clearer example where reliance did *not* cause any detriment. Unlike the cases involving an expenditure of resources or an irreversible commitment, here there is no evidence that Treasure Island is worse off for having "relied" on Mr. Dragul's alleged oral request. Sending proper notice under the lease would not have saved Treasure Island any meaningful expense or entitled it to termi-

[18] *See also Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990) (no detrimental reliance where the bank answered a complaint that had never been served).

nate; indeed, the unrebutted testimony shows that Rose or Señor Frog's would have timely cured the default—as they did immediately after Treasure Island sent the termination notice to Señor Frog's. (2 App. 369 ¶ 28; *accord* 3 App. 648:15–22.) The district court itself recognized that Treasure Island's claim of damages had to be "dismissed as moot" (5 App. 1056–1057), given that Rose rectified the default and is now current in its payment obligations.

* * *

The written notice provisions requiring notice to Ms. Markusch, Señor Frog's, and Señor Frog's counsel superseded any oral understanding at the time Treasure Island attempted to declare a default.

IV.

EQUITY FAVORS ROSE, THE PARTY AVOIDING A FORFEITURE, NOT TREASURE ISLAND, THE PARTY SEEKING TO IMPOSE ONE

Finally, the district court entered a series of bizarre findings excusing Treasure Island from strict compliance while disgorging Rose's property interest based on a technical infraction. That upends the equities.

"[F]orfeitures are not favored in the law, and lease provisions

which lead to a forfeiture will always be construed strictly in such a way as to prevent, rather than aid, the forfeiture." 49 AM. JUR. 2D *Landlord and Tenant* § 79 (updated 2017) (footnotes omitted). Moreover, while a landlord must strictly comply with the lease in sending a notice of default, a defaulting tenant may seek "equitable relief from default and declaration of forfeiture if performance later is tendered without unreasonable delay and no circumstances have intervened to make it inequitable to give such relief." *Benetti v. Kishner*, 93 Nev. 1, 3, 558 P.2d 537, 538–39 (1977); *accord* 14 RICHARD A. LORD, WILLISTON ON CONTRACTS § 42:2 (4th ed. updated 2016).

A contract may be read to permit a forfeiture only if plain, clear, unequivocal language requires it. *Am. Fire & Safety, Inc.*, 109 Nev. at 360, 849 P.2d at 355.

A. Rose Substantially Complied with its Obligations under the Lease

If "substantial compliance" were the rule, then it should have protected Rose, too. Indeed, some courts hold that "[e]ven if all the terms of the lease had been broken, nevertheless a court of equity would relieve the lessee against a forfeiture, if the lessor could be made whole and all arrearages paid up." *Ellison*, 19 Ohio Dec. at 854–55. It is un-

necessary to go that far here, however; Rose tendered payment *before* it ever received a proper notice of default and just one day after the termination letter following the defective notice. As evidenced by the district court's judgment that Treasure Island incurred no damages, Rose tendered payment "without unreasonable delay, and no circumstances have intervened to make it inequitable to give such relief." *Benetti*, 93 Nev. at 3, 558 P.2d at 538–39.

The court's deviations from the lease might have been excusable were it not that Treasure Island is trying to evict its tenant on a technicality. Saying that Treasure Island need not strictly adhere to the notice requirements to terminate the lease, while holding that Rose cannot tender its rent payment immediately after learning from its sublessee about the noncontractual notice, turns the purpose of the "substantial compliance" rule on its head. The lease should have been construed to avoid the forfeiture of Rose's tenancy.

B. Treasure Island Acted in Bad Faith by Pursuing Termination under a Defective Notice'

1. Rose Did Not Have "Unclean Hands"

The court also misconstrued the unclean-hands doctrine. That doctrine applies to egregious conduct that causes serious harm. *Las Ve-*

gas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 124 Nev. 272, 276, 182 P.3d 764, 767 (2008). A mistaken position that is quickly abandoned and causes "no real damage" will not support a finding of unclean hands. *Id.* Here, similarly, the district court faulted Rose for not timely paying Treasure Island, but Rose moved quickly to correct its error, and the delay caused no damage.

2. Treasure Island Terminated the Lease in Bad Faith

By contrast, Treasure Island's opportunism in manipulating a defective notice to terminate the 30-year deal, after it knew that Rose wanted to cure, was an act of bad faith.

a. PARTIES TO A LEASE MUST ACT IN GOOD FAITH

"[A]ll contracts impose upon the parties an implied covenant of good faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 427 (2007). That means a party cannot do something that, while technically permitted under the contract, would compromise the other party's benefits under the contract. For example, a boxing promoter who contracted to have a title series at the Hilton hotel could not manipulate the likely profit of those matches by

stripping a key fighter of his title and effectively keeping him out of the Hilton events. *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 232–33, 808 P.2d 919, 922–23 (1991). Although doing so was not a breach of the express contract terms, it could be seen as unfairly advancing the promoter's own interest in making better money outside the series at the Hilton's expense. *Id.* Similarly, in *Oxford Associates*, the court held that the landlord's attempt to end a 15-year lease after one late annual tax payment was in bad faith, and "a wholesale forfeiture of the Lease would be unconscionable." 2007 WL 128886, at *4.

b. TREASURE ISLAND'S ATTEMPT TO TERMINATE THE LEASE IS IN BAD FAITH

Here, terminating a 30-year lease after one late percentage-rent payment breaches the covenant of good faith. The market conditions, the manner and timing of Treasure Island's noncontractual "notice," and Treasure Island's actions following that noncontractual notice all point to termination as pretext for Treasure Island's own purposes. Rose has invested substantial time and money in negotiating its lease with Treasure Island. Rose and Señor Frog's have relied on that lease in their own relationship.

Attempted termination under these circumstances was a bait-and-

switch. As part of its development plans, Treasure Island had succeeded in eliminating the pirate show—a substantial draw to the restaurant—by agreeing to provide additional notice to Señor Frog's counsel. (2 App. 312, § 7.) But in its efforts to oust Rose as the "middleman" for further development, Treasure Island did not provide the notice it had agreed to, leaving Rose exposed to the very risk it had contracted to eliminate—that the people in charge of curing the default would not be informed about that default. Treasure Island did not even mention the default to Mr. Dragul when he visited the property that same week. (3 App. 725:17–21, 4 App. 772:21–773:10.)

Even if the lease had permitted it, termination strips Rose of 30 years of bargained-for property rights to promote Treasure Island's own interests. Had Treasure Island sat down with Rose to negotiate its exit, the parties could have had an honest conversation. Instead, Treasure Island tried to kick Rose out on a technicality—while itself disregarding the technical requirements of the lease. That is improper. *See Polizzotto*, 129 So. at 536 (a "technical objection . . . seized upon" to terminate a lease is bad faith).

CONCLUSION

The legal issues in this appeal are straightforward and call not merely for a new trial, but for judgment in Rose's favor. Rose never received the notice of default that it contracted for, so the judgment declaring Rose's lease terminated is infirm. This Court should reverse the judgment.

DATED this 24th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

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DATED this 24th day of July, 2017.

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I certify that on July 24, 2017, I submitted the foregoing APPELLANT'S OPENING BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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