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 REPLY BRIEF

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INTRODUCTION

Rose and Treasure Island had a written contract that required notice in a specific manner. Treasure Island neglected those requirements in its efforts to create a default and terminate Rose's tenancy. Now Treasure Island is trying to clean up after that error, arguing that the notice provision was unimportant, that Rose does not have standing to enforce its own contract, or that Treasure Island's general counsel—who sent the defective notice—should be excused for relying on his memory of a conversation years before a written amendment to the notice provision. Those are all arguments to ignore the parties' contract.

Treasure Island's answering brief, like the decision below, shoves that contract aside and argues that notice sent to any principal of Rose—or received by just one of four contractually required designees—is good enough. But neither a landlord nor a district court has the power to cheat the tenant out of the notice negotiated for in the lease agreement. Here, that contract itself defines effective notice, designating four people as required recipients to complete notice "to Tenant." Especially for the drastic remedy of forfeiting a tenant's leasehold estate, notice is effective only if sent as the written contract requires.

The Lease Requires Notice to Señor Frog's and its Counsel; Treasure Island Did Not Give it

It's easy to see why Treasure Island is desperate to avoid the terms of its contract. Treasure Island does not even pretend that it complied with the requirement to notify Señor Frog's and its counsel, Ronald R. Fieldstone and Susan Trench with Arnstein & Lehr LLP before terminating Rose's tenancy. (2 App. 314 § 11.) Rose made those additional designations for its own benefit to avoid this precise situation. There was no point to making the contract unless Rose was entitled to enforce the notice provision in full.

The Lease Requires Notice to Susan Markusch; Treasure Island Did Not Give it

A landlord must strictly comply with a requirement to provide notice before terminating a lease. While quarreling with Rose's citation to treatises and cases that state general principles, Treasure Island does not even attempt to distinguish Rose's cases that say exactly that. Regardless, failure to send the notice to at least three of the required recipients is not even substantial compliance.

The failure to notify Señor Frog's and its counsel is sufficient to invalidate Treasure Island's notice. But Treasure Island did not even

send its default letter to Rose's internal designee, Ms. Markusch. The parties could not orally remove her designation. And the written amendment *after* the alleged oral modification overrides and claim of waiver or estoppel. That amendment gave "full force and effect" to the original written contract except for the written amendments. As the written amendments did not identify a contact person other than Ms. Markusch, she remained one of Rose's four designees for notice.

Equity Does Not Support the Forfeiture

Treasure Island's appeal to equity is truly topsy-turvy. Every maxim of equity chafes against Treasure Island's position. Equity abhors forfeiture of real-property rights; it will not aid a landlord trying to terminate a tenancy without having performed the legal conditions for a termination. And unclean hands is a *defense* to a claim for equitable relief, not a substitute remedy for a plaintiff that cannot make out a legal claim.

The Record

Treasure Island also debases itself by lobbing false accusations about the record. Treasure Island asserts that the trial record contained a check that supposedly shows that Ms. Markusch actually re-

ceived notice of a default, but no such check was admitted at trial.

* * *

As Treasure Island had no valid basis for terminating the lease, this Court should reverse.

I.

TREASURE ISLAND COULD NOT TERMINATE THE LEASE WITHOUT NOTIFYING SEÑOR FROG'S AND ITS COUNSEL

Treasure Island accurately summarizes Rose's position that "the notice provisions of the lease and an amendment to the lease, when read together, provide for a particular form of notice, and that Treasure Island's failure to strictly comply with the lease as amended results in the forfeiture of Treasure Island's remedy as a matter of law . . . ." (RAB 4.) For Treasure Island, however, the factual circumstances of the purported default are more important than the contract itself, which is why it leans so heavily on credibility assessments. (RAB 4, 17.) But this was not even a case that needed evidentiary findings. All that it called for was enforcement of the written contract.

A. The Notice Requirement in the Written Contract Matters

Treasure Island's brief displays a disturbing tendency to dismiss

bargained-for rights as having "little significance." (*E.g.*, RAB 8.) Like the district court, Treasure Island wants to say that the details of the notice provision are not very important so that it can terminate the lease without observing those details. That is improper.

In fact, the modification to the notice provision in the fifth amendment was critical protection for Rose and Señor Frog's, not merely an "administrative change." (*Contra* RAB 8–9.) The relationship among Treasure Island, Rose, and Señor Frog's had evolved, with Señor Frog's occupying the position of sublesee rather than making direct payments to Treasure Island. (*Compare generally* 1 App. 34 *with* 4 App. 810:22–24.) Señor Frog's needed protection in case Rose's lease terminated (*see generally* 6 App. 1109), and both Rose and Señor Frog's needed protections to ensure that Señor Frog's would learn about and still be able to cure a default.

Legally, however, it should not matter *why* Rose secured a notice provision that required notice "to Tenant" to go to multiple people inside and outside the company. It matters that the parties entered that agreement. The district court's role was to enforce the agreement as written. It had no authority to question or weaken the notice to which

Rose was contractually entitled. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev., Adv. Op. 49, 376 P.3d 151, 156 (2016) (citing *Reno Club., Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947)).

Before a termination of its lease, Rose was entitled to—but did not get—the notice that the lease required.

B. Treasure Island Ignored the Obligation to Notify Señor Frog's and its Counsel

The lease agreement declares that any notice "to Tenant" must be mailed to Señor Frog's[1] and its counsel, Ronald R. Fieldstone and Susan Trench with Arnstein & Lehr LLP. (2 App. 314 § 11.) As Treasure Island admits, it did not. (RAB 11.)

C. Rose Can Fully Enforce its Bargained-for Notice

1. Notice to Rose's Designees is Part of the Obligation to Notify Rose

Rose made those additional designations for its own benefit to avoid this precise situation, and it is entitled as a party to the contract to enforce the notice provision in full. Treasure Island insists that "[a]ny notice obligations Treasure Island had to Señor Frog's were sepa-

[1] "Señor Frog's" is the name of the restaurant owned and operated by Operadora Andersons S.A. de C.V. (3 App. 605–06.) For simplicity, in this brief Operadora is usually referred to as "Señor Frog's."

rate from this case, and could not be raised by Rose." (RAB 50.) But Treasure Island misses the point: Because Señor Frog's is not a party to the contract, notice addressed to Señor Frog's and its counsel is not a direct obligation *to Señor Frog's*; it is what *Rose* insisted on as notice to Rose.

So long as Treasure Island agreed, Rose could have designated anyone to receive notice "to Tenant," within or without the company. Rose directed Treasure Island to send notice to Señor Frog's and its counsel, and Treasure Island agreed. That direction is not separate from the obligation to send notice to Rose—it is *how* Treasure Island effects notice to Rose.

2. Parties Have Standing to Enforce their Own Contracts

Treasure Island cites no authority forbidding a party to a commercial lease agreement from enforcing the contract's terms. The district court relied on precedents in other states regarding insurance contracts, but those contracts are governed by separate statutory and regulatory regimes within each state. *Compare, e.g.*, *Pierce v. Sentry Ins.*, 421 N.E.2d 1252, 1253 (Mass. App. Ct. 1981) (cited at 4 App. 941) (upholding notice to insured without notice to mortgagee because require-

ment to notify mortgagee was separate based on statute and separate contract with the mortgagee), *with O.P.H. of Las Vegas, Inc. v. Ore. Mut. Ins. Co.*, 133 Nev., Adv. Op. 60, 401 P.3d 218, 221–22 (2017) (adopting strict-compliance standard for notice to cancel insurance based in part on Nevada's "overriding concerns of protecting its citizens and insuring that they are afforded fair and equitable treatment by insurers" (quoting *Daniels v. Nat'l Home Life Assurance Co.*, 103 Nev. 674, 677, 747 P.2d 897, 899 (1987))). Those cases have no bearing on the rights of parties to enforce their commercial contracts.

In any case, Treasure Island acknowledges that none of those cases involved a failure to give the notice in a negotiated contract. (RAB 51.) When a party secures a right to notice through *contract*, the party always has standing to enforce the promise. *See In re C & C TV & Appliance*, 103 B.R. 590, 591–93 (E.D. Pa. 1989)) (tenant who received notice entitled to enforce requirement to copy counsel). *See generally Campbell v. Parkway Surgery Ctr., LLC*, 354 P.3d 1172, 1180 (Idaho 2015) (contracting parties have right to enforce all obligations in the contract, including those for the benefit of third parties); *Associated Teachers of Huntington, Inc. v. Bd. of Educ.*, 306 N.E.2d 791, 794 (N.Y.

1973) (same); *Filer v. Keystone Corp.*, 9 N.Y.S.3d 480, 483 (N.Y. App. Div. 2015) (same); *In re Spong*, 661 F.2d 6, 10–11 (2d Cir. 1981) (same); 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:54 (4th ed. updated 2016); RESTATEMENT (SECOND) OF CONTRACTS § 305(1) (1981)); RESTATEMENT (FIRST) OF CONTRACTS § 138 (1932).

3. Señor Frog's Status as a Third-Party Beneficiary Compounds the District Court's Error

The district court's refusal to consider the requirement to send notice to Señor Frog's and its counsel was doubly erroneous because Señor Frog's was a third-party beneficiary of the agreement.[2] It was an indispensable party to any declaration terminating Rose's lease, which ends Señor Frog's sublease, too.[3]

Although the district court never "rejected" the unrebutted testimony of David Krouham, Operadora's president, that Señor Frog's

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[2] In a reversal of position, Treasure Island now says that Señor Frog's is *not* a third-party beneficiary of the agreement as amended. (RAB 56.) That is false. The parties included a new section in the fifth amendment expressly "*for the benefit of Señor Frog's*." (2 App. 313, § 9 (emphasis added).)

[3] Treasure Island does not dispute that it had no obligation to lease to Señor Frog's on the same terms, or at the same rental level, that it leased to Rose. (RAB 13; *see* 1 App. 205, at § 9(a)(i); *see also* 6 App. 1109–10 § 1(a).)

would have cured any default had it known (*contra* RAB 50), the court made a legal determination that Señor Frog's could not assert its own rights without intervening. Treasure Island now says that Señor Frog's "chose not to intervene in the action because it did not believe its rights were affected." (RAB 56.) But that misplaces the obligation. Señor Frog's rights unquestionably *are* affected by a declaration that Rose's lease—and by extension, Señor Frog's sublease—is terminated. It is the duty of the party seeking that relief to join all affected parties; it is not the affected parties' duty to intervene. *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)); *Crowley v. Duffrin*, 109 Nev. 597, 601–03, 855 P.2d 536, 539–40 (1993).

Señor Frog's is a necessary party whose nonjoinder voids the judgment. In complaining that Rose waived the issue, Treasure Island ignores that the question of necessary parties is jurisdictional: "Failure 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)); *accord Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 395–96, 594 P.2d 1159, 1163 (1979). Treasure Island also argues for the first time that the judgment "does not effect [sic] any claim Operadora may have against Treasure Island," and suggests that Señor Frog's could sue Treasure Island for damages. (RAB 57.) But the judgment does not reserve any such right. (4 App. 941–42.) And more important, Señor Frog's right is not to "sue for damages"; it is to protect its property rights under the sublease. *See Stoltz v. Grimm*, 100 Nev. 529, 533, 689 P.2d 927, 930 (1984) (if "the subject matter of the contract was real property," an action for damages would be "inadequate").

D. The Sublease with Señor Frog's Does Not Excuse Treasure Island's Defective Notice under the Lease

At the same time as Treasure Island seeks to prevent Rose from enforcing the contract to which Rose *is* a party, Treasure Island seeks to excuse its defective notice by reference to a sublease to which Treasure Island is *not* a party or intended beneficiary. Here is the argument: the sublease requires Rose to copy Señor Frog's on communications that Rose receives from Treasure Island, so Treasure Island never has to comply with its own obligation to address notice to Señor Frog's and its

counsel. (RAB 56.) In other words, the failsafe that notice to Señor Frog's and its counsel was supposed to provide would be toothless when it is most needed—when Rose's internal designee is not sent notice of the purported default.

The argument is just as absurd as it sounds. First, Treasure Island is not the beneficiary of that requirement in the sublease; Señor Frog's is. Second, even if Treasure Island were an intended beneficiary, it could use the sublease only as a *shield* in an action by Rose or to enforce the sublease, not as a *sword* to deny Rose a legal defense that it did not receive effective notice and thereby terminate both lease and sublease.

II.

TREASURE ISLAND COULD NOT TERMINATE THE LEASE WITHOUT ADDRESSING NOTICE TO SUSAN MARKSUCH

Treasure Island's plea for a "substantial compliance" standard for pretermination notices depends very much on the argument that Rose cannot raise Treasure Island's admitted failure to address three of Rose's four designees for notice—Señor Frog's, Mr. Fieldstone, and Ms. Trench. For if Rose is entitled to enforce the notice provision in its en-

tirety, Treasure Island's letter to Gary Dragul is not even substantially compliant.

But even if Rose were barred from enforcing its designation of external recipients for notice, Rose is still entitled to strictly compliant notice to its internal designee, Ms. Markusch. As with the requirement to send notice to Señor Frog's and its counsel, Treasure Island flees from the written contract, instead relying on a *contested*, *oral* modification—prohibited both by the contract and by statute—all before an unambiguous *written* amendment to the contract.

A. The Written Contract Could Not be Orally Modified

In the original lease agreement, Rose listed addresses for itself and Señor Frog's, and designated Ms. Markusch as its internal contact. (2 App. 289 § 19.6.) The contract permitted the parties to "specify a different address and/or contact person" by giving written notice (2 App. 289 § 19.6), recognizing that those are separate concepts. Rose updated its address in the fifth written amendment but never changed the designation of Ms. Markusch as one of Rose's contacts for notice. (2 App. 314 § 11.)

Treasure Island instead sent its letter to the wrong person, Mr.

Dragul. In an attempt to erase that error and have Rose's lease forfeited, Treasure Island points to a supposed oral direction from Mr. Dragul to send notices only to him, but any oral statement was ineffective to modify the written contract. The contract itself and the statute of frauds a prohibit that result.

1. The Lease Prohibited Oral Modification

Treasure Island disregards the lease's clear prohibition on oral amendments. (2 App. 290 § 19.9; 2 App. 314 § 9(d).) Treasure Island resorts to the cases dealing with the kinds of contracts that do not have to be in writing. (RAB 37 (relying on *Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964), a sign-installation case). Treasure Island cites no authority prohibiting the enforcement of such a clause in a long-term lease, which must be written. *See Merrill v. DeMott*, 113 Nev. 1390, 1399–401, 951 P.2d 1040, 1045–47 (1997). The lease agreement's prohibition on oral modification was independently enforceable and could not be overcome by the doctrine of part performance.

2. The Statute of Frauds Applies

In addition to the contractual prohibition, NRS 111.210(1) provides

that "[e]very contract for the leasing for a longer period than 1 year . . . shall be void unless the contract . . . be in writing." This lease agreement—for an initial term of 10 years and optionally for another 20—is unequivocally subject to the statute.

a. THE STATUTE OF FRAUDS PROHIBITS ORAL AMENDMENT TO A LONG-TERM LEASE

The statute of frauds applies equally to modifications. (*See generally* AOB 44–45.) Treasure Island does not seriously contend otherwise. (RAB 38.)

b. THE NOTICE PROVISIONS ARE SUBSTANTIVE TERMS THAT CANNOT BE ORALLY MODIFIED

Treasure Island's new argument that the notice and default provisions are not "substantive" (at RAB 38–39) is without merit. The statute of frauds does not except a contract's procedural provisions. To the contrary, notice provisions are integral parts of a contract, such that if the contract must be in writing, the notice provisions must be, too. *See F. Garofalo Elec. Co., Inc. v. N.Y. Univ.*, 705 N.Y.S.2d 327, 331 (N.Y. App. Div. 2000) (when a construction contract required notice as a condition precedent to seek payment for extra work and delay, "an oral modification of that agreement is not enforceable"); *French v. Sabey*

Corp., 931 P.2d 204, 208 (Wash Ct. App. 1997) (rejecting plaintiff's argument that parties could orally agree to notice period and severance pay in a five-year employment contract because "first, nothing in the record shows that these provisions were separately negotiated or intended as separate agreements, and second, they have no meaning or effect outside the context of the employment agreement"), *aff'd*, 951 P.2d 260 (Wash. 1998).

c. ROSE REPEATEDLY RAISED AND PRESERVED THE ISSUE FOR APPELLATE REVIEW

Treasure Island falsely represents that Rose did not raise the statute of frauds in the district court. (RAB 37.) Rose raised the issue repeatedly—in its answer (1 App. 7, Affirmative Defense No. 6); in opening statements (3 App. 600:3–5, 604:5); during the trial (3 App. 721:7–22); in closing argument (4 App. 916:16–19); and in post-trial motions (4 App. 959:11–13). Despite Rose's warnings, the district court ignored the statute of frauds in enforcing the alleged oral modification. This issue is preserved for appellate review.

B. The Written Amendment Superseded Any Oral Modification

1. The Amendment Came after any Alleged Oral Direction

Reading Treasure Island's answering brief, one can forget that the purported oral modification—which allegedly wiped out notice to all of Rose's written designees—is based on one comment in 2012, two years before the parties executed their fifth amendment to the contract.

2. The Amendment Expressly Addressed Notice

As much as Treasure Island wants to diminish it, notice was a critical feature of the fifth amendment, and for the first time the parties agreed that notice "to Tenant" required additional copies to Señor Frog's counsel, not just Señor Frog's itself.

3. The Amendment Expressly Rejected Any Prior Oral Modifications

The amendment is not just striking for what's new, however. It also reiterated the prohibition on oral waivers or modifications and, critically, nixes any prior oral modifications. (2 App. 314 §§ 9(d), 10 (confirming that the written amendment "constitutes the entire agreement of the parties").) It maps out how to read the contract, giving the original lease agreement "full force and effect" except as detailed in the

five written amendments. (*Id.* § 10.) As no written amendment changes Ms. Markusch's designation as a "contact person" for notice under the agreement, her designation remained in effect—or was restored—with the fifth amendment.

Treasure Island's brief is silent on this aspect of the fifth amendment and the legal consequences that flow from it. By the terms of the amendment and the parol-evidence rule, the district court was barred from considering evidence of any oral modification from before the fully integrated written amendment. (*See* AOB 47–48.)

C. Rose was Not Estopped from Requiring Notice to Ms. Markusch

The timing of the fifth amendment also wipes out Treasure Island's waiver and estoppel arguments. Treasure Island does not contend that Mr. Dragul repeated his direction *after* the fifth amendment. Treasure Island's failure to comply with the written contract as amended is not Rose's fault.

Although there is no real question that Treasure Island was aware of the fifth amendment and that Rose did not intend for Treasure Island to rely on any representations *preceding* that amendment—either of which is sufficient to defeat estoppel—Treasure Island focuses on the

element of detrimental reliance. Treasure Island slings calumnies at Rose's counsel for synthesizing several Nevada cases that apply estoppel principles (RAB 43–45), but it is Treasure Island's interpretation that misleads.

In particular, Treasure Island asserts that *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314 (1996), rejected a claim of estoppel "solely" because Breliant, the property owner, was unaware of the "true facts" (the extinguishment of an easement) when he represented to PEC, a neighboring apartment complex, that it had an easement. (RAB 45.) While that was *one* basis for the Court's decision, the absence of detrimental reliance was an *independent basis* to reject estoppel:

> *Moreover*, we conclude that there is no evidence in the record to show that PEC was induced to make a detrimental change of position because of Breliant's unintentional misrepresentation over the continuing existence of the First Easement.

Breliant, 112 Nev. at 674, 918 P.2d at 321 (emphasis added) ("Moreover" omitted at RAB 45). The detriment is not measured by the intention behind the misrepresentation; it is measured by what the relying party does in response. Here, PEC obviously did something—they had

negotiations with Breliant—but that was not evidence of a "detrimental change of position."

Here, Treasure Island wants to read "detrimental" out of the requirement for detrimental reliance, reducing it to mere reliance. Treasure Island sent a letter to Mr. Dragul when it ought to have sent it to Ms. Markusch, Señor Frog's, Mr. Fieldstone, and Ms. Trench. The misdirected letter was not a "change in position," much less a detrimental one. Treasure Island could have sent a corrected notice at any time. The district court confirmed that Treasure Island suffered no damage by dismissing its breach-of-lease claim.

Why estoppel should *not* apply in a case like this is probably best explained by a case that Treasure Island cites. In *Dickerson v. Colgrove*, the U.S. Supreme Court invoked the doctrine to prevent a plaintiff from ejecting occupiers of land after the plaintiff's predecessor had promised that they could keep it:

> The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbiddden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. **It is available only**

> **for protection, and cannot be used as a weapon of assault.** It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit.

100 U.S. 578, 580–81 (1879) (emphasis added) (emphasized sentence omitted at RAB 40). Here, whatever direction Mr. Dragul supposedly gave led to no "loss or injury"; it was not a "fraud and falsehood" for Rose to execute an amendment that clearly vanquished any oral amendment. And above all, the doctrine is not available as a "weapon of assault" to forfeit Rose's property rights after Treasure Island's conceded failure to give the notice that the contract requires.

D. Strict Compliance, Not Substantial Compliance, is the Rule

1. The Cases Uniformly Require Strict Compliance in this Situation

Notice as a condition to the right to terminate a tenant's estate must be strictly complied with. Treasure Island argues that "[n]ot one case with facts even remotely similar to the facts of this case has been cited." (RAB 28.) It then criticizes several cases cited for general propositions, but leaves unaddressed the three cases—discussed at length in the opening brief—whose facts most clearly mirror this one. (*See generally* AOB 22–23.)

In *Oxford Assocs. Real Estate, L.P. v. TSI Society Hill, Inc.*, the federal district rejected a substantial-compliance standard under nearly identical facts: the lease agreement designated two individuals, including one external designee, to receive notice "to Tenant." CIV.A.05 CV 04445, 2007 WL 128886, at *2 (E.D. Pa. Jan. 11, 2007). The landlord's letter sent to the attention of *others* at the same address was not effective "'notice' as defined in the Lease." *Id.* "[*S*]*trict compliance* is a prerequisite to forfeiture." *Id.* at *3 (emphasis added).

In re C & C TV & Appliance again involves similar facts and the same result. 103 B.R. at 591–93. The landlord did not send effective pretermination notice "to Tenant" when it addressed just the tenant itself, ignoring the lease's requirement to copy counsel. *Id.* (requiring strict compliance) (affirming 97 B.R. 782, 785 (Bankr. E.D. Pa. 1989)).

And *Saladino v. Rault Petroleum Corp.* again holds that a landlord must address notice as specified in the lease agreement, not just see that the tenant's president gets actual notice. 436 So. 2d 714, 716 (La. Ct. App. 1983).

Tellingly, Treasure Island cites no case approving just "substantial compliance" with a pretermination notice of default.

2. Strict Compliance is Consistent with Nevada Law

The decision to require strict compliance is not haphazard. It follows from the same kinds of considerations that Nevada has long looked to—text, policy, and equity:

> [I]n determining whether strict or substantial compliance is required, courts examine the statute's provisions, as well as policy and equity considerations. Substantial compliance may be sufficient "to avoid harsh, unfair or absurd consequences." Under certain procedural statutes and rules, however, failure to strictly comply with time requirements can be fatal to a case. In other contexts, a court's requirement for strict or substantial compliance may vary depending on the specific circumstances. . . . "[T]ime and manner" requirements are strictly construed, whereas substantial compliance may be sufficient for "form and content" requirements.

Leven v. Frey, 123 Nev. 399, 406–08, 168 P.3d 712, 717–19 (2007) (quoting 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 57:19, at 58 (6th ed. 2001)) (footnotes omitted). When a contract requires notice of default before some penalty or other remedy becomes available, the considerations all point in the same direction: "notice requirements [must] be complied with strictly if the parties have expressly included them in an agreement as an opportunity to cure a default." *Cain v. Kramer*, CIV.A.00-10341-DPW, 2002 WL 229694, at *15 (D.

Mass. Feb. 4, 2002) (interpreting *Milona Corp. v. Piece O' Pizza of Am. Corp.*, 300 N.E.2d 926, 927 (Mass. App. Ct. 1973)) and citing *Sentry Ins. v. John J. Sullivan Inc.*, 128 B.R. 7, 10 (Bankr. D. Mass. 1990) and *Priestley v. Sharaf's, Inc.*, 344 N.E.2d 905, 908 (Mass. App. Ct. 1976)).

Textually, a default provision requiring notice is mandatory, not advisory. *Cf. Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275, 1278–79 (2011) (requiring strict compliance with "mandatory" language for documenting a mortgage assignment). As to policy, courts strictly construe lease-default provisions against the landlord "to avoid forfeiture whenever possible" of the tenancy. *Oxford Assocs.*, 2007 WL 128886, at *3. This avoidance of forfeitures is also a principle of equity. *Id.*; *see also In re C & C TV & Appliance*, 103 B.R. at 592 (requiring strict compliance with pretermination notice requirement because "forfeitures are odious" (internal quotation marks omitted)); *cf. also City of Hamilton v. Callon*, 696 N.E.2d 281, 282 (Ohio Ct. App. 1997) (strictly construing notice requirement of civil-forfeiture statute because "forfeitures are not favored in law or equity"). At least for the "time and manner" of serving a pretermination notice under the contract, only strict compliance will do. *See Leven*, 123 Nev. at 406–08, 168

P.3d at 717–19.

3. Substantial Compliance would be Inconsistent with Nevada Law

Treasure Island continues to rely on the insurance-cancellation cases (RAB 51) but ignores that the Nevada Supreme Court recently rejected a "substantial compliance" defense in that context. In *O.P.H. of Las Vegas, Inc. v. Oregon Mutual Insurance Co.*, the Court held that "statutes imposing requirements on cancellation notices 'are to be strictly construed.'" 133 Nev., Adv. Op. 60, 401 P.3d at 221–22 (quoting ERIC MILLS HOLMES, HOLMES'S APPLEMAN ON INSURANCE 2D, § 16.10, at 446–47 (2016)).

The mechanic's-lien cases are likewise inapplicable because the *Leven* factors point in the opposite direction: the statute aims just to "notify the property owner of the lien." *Las Vegas Plywood & Lumber, Inc. v. D & D Enters.*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982). Awareness is generally sufficient, as the lien does not place the property at immediate risk of forfeiture. Equity, too, usually favors the lienor, who would otherwise face forfeiture of their labor and materials. *See Hardy Cos. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010). Sometimes, though, the Nevada Supreme Court requires *strict*

compliance: a property owner is entitled to strictly compliant notice of a lien based on offsite work because the owner, even if aware of that work, is held to just the onsite progress. *Iliescu v. Steppan*, 133 Nev., Adv. Op. 25, 394 P.3d 930, 934 (May 25, 2017).

Unlike a mechanic's lien, a pretermination notice under a lease agreement is the last step before a forfeiture of the tenancy. The tenant in that circumstance is entitled to assume that its designated recipients will receive notice in the exact time and manner called for in the agreement.

4. Treasure Island's Noncompliance was Prejudicial

Here, strict compliance would not have been "absurd compliance." (*Contra* RAB 36.) Treasure Island had previously proved itself capable of complying with the notice provision. (*See* 1 App. 155; AOB 6–7.) And here, the decision not to comply prejudiced Rose. For the drastic measure of terminating its long-term lease, Rose expected Treasure Island to send the required notice to Señor Frog's and its counsel, which would act as a backstop if something fell through the cracks internally. And Rose's internal contact, Ms. Markusch, reasonably expected a notice addressed to her attention.

III.

EQUITY DOES NOT HELP A LANDLORD EJECT A TENANT WITHOUT GIVING PROPER NOTICE

Treasure Island muddles the maxims that "the law abhors a forfeiture," *Humphrey v. Sagouspe*, 50 Nev. 157, 254 P. 1074, 1079 (1927), and that "litigants seeking equity must come with 'clean hands,'" *Tracy v. Capozzi*, 98 Nev. 120, 123, 642 P.2d 591, 593 (1982).

A. The Termination of a Lease Works a Forfeiture; Holding a Landlord to its Notice Obligations Does Not

Termination of a tenant's estate for failure to pay rent requires the landlord's strict compliance because it is a forfeiture, 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).

Treasure Island asserts that subjecting a landlord to strict compliance with a notice obligation amounts to a "forfeiture" of Treasure Island's "right of termination when rent is wrongfully withheld." (RAB 27 n.19; *see also* RAB 30–31.) But Treasure Island forfeits nothing. Rose

remains obligated to pay rent, and Treasure Island remains free to terminate the lease following proper notice. Treasure Island cites no authority suggesting that holding a landlord to its pretermination duties amounts to a forfeiture. To the contrary, the authorities unanimously support the tenant in this situation. *See also Oxford Assocs.*, 2007 WL 128886, at *3; *In re C & C TV & Appliance*, 103 B.R. at 592.

B. Treasure Island Cannot Invoke "Unclean Hands" to Eliminate Rose's Legal Defenses

1. "Unclean Hands" is Not a Claim for Relief

Unclean hands is a defense, not a basis for seeking affirmative relief. *N. Chester Cnty. Sportsmen's Club v. Muller*, 174 A.3d 701, 707 n.3 (Pa. Commw. Ct. 2017) ("The doctrine of unclean hands is a basis only for the denial of equitable relief and cannot support a grant of affirmative relief against the party who acted with unclean hands.").[4]

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[4] *Accord Keystone Commercial Props., Inc. v. City of Pittsburgh*, 347 A.2d 707, 709 (Pa. 1975) (granting plaintiff relief because of the defendant's unclean hands "is an inappropriate application of the unclean hands doctrine. That doctrine is a basis for a court of equity to refuse affirmative relief to either a petitioner or respondent. It is not a basis for a court of equity to grant affirmative relief."); *see also Talton v. BAC Home Loans Servicing LP,* 839 F. Supp. 2d 896, 911 (E.D. Mich. 2012) ("the clean hands doctrine is an equitable defense, not a cause of action"); *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 842 (N.D. Cal. 2005) ("unclean hands is an equitable defense, not a

2. "Unclean Hands" Does Not Apply to Legal Claims

As an *equitable* defense, moreover, "unclean hands" does not even apply to legal claims, such as an action to declare rights under a lease agreement.[5] *Simler v. Conner*, 372 U.S. 221, 223 (1963) ("The fact that

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cause of action"); *DiMauro v. Pavia*, 492 F. Supp. 1051, 1068 (D. Conn. 1979) ("The principle of unclean hands is usually applied only to *prevent affirmative relief*, because of some fraud or deceit relating to the matter in issue." (emphasis added)), *aff'd*, 614 F.2d 1286 (2d Cir. 1979); *Echo, Inc. v. Stafford*, 730 S.W.2d 913, 915 (Ark. Ct. App. 1987) ("The doctrine of unclean hands is an equitable defense. It may constitute a basis, in equity, for a denial of relief. It is not a tort; it will not form the basis of a cause of action.").

[5] *See Cattle Nat'l Bank & Tr. Co. v. Watson*, N.W.2d 906, 921 (Neb. 2016) (no unclean-hands defense to legal claim on a contractual guaranty); *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 607 (2d Cir. 2005) (defendant may not "avail itself of the unclean hands as a defense" because plaintiff was seeking "damages in an action at law"), *quoted in In re Ampal-Am. Israel Corp.*, 545 B.R. 802, 810 (Bankr. S.D.N.Y. 2016); *Weiss v. Smulders*, 96 A.3d 1175, 1198 (Conn. 2014) ("the equitable defense of unclean hands bars only equitable relief," not breach-of-contract claim); *W. Bend Mut. Ins. Co. v. Procaccio Painting & Drywall Co.*, 928 F. Supp. 2d 976, 987 (N.D. Ill. 2013) ("The defense of unclean hands is also an equitable defense, not applicable to a claim for money damages for a breach of contract."); *Zanders v. Reid*, 980 A.2d 1096, 1100–01 (D.C. 2009) ("the equitable doctrine known as 'unclean hands' is inapplicable to a legal claim for money, and it operates only where the plaintiff's misconduct occurred in connection with the same transaction that is the subject of her claim") (footnote omitted); *Aaron v. Mahl*, 674 S.E.2d 482, 487 (S.C. 2009) ("The equitable doctrine of unclean hands . . . has no application to an action at law." (citing *Holmes v. Henderson*, 549 S.E.2d 81 (Ga. 2001); *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987)); *Westlake Vinyls, Inc. v. Goodrich Corp.*, 518 F. Supp. 2d 918, 942 (W.D. Ky. 2007) (citing

the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action."). (*See also* 4 App. 943–44 (district court acknowledging that it was applying the equitable defense of unclean hands to a legal claim).)

3. Rose Did Not Have Unclean Hands

Every termination follows a tenant's failure to comply with some aspect of the lease agreement, including nonpayment of rent. But that has never been held a reason to waive the notice requirements preceding termination. That is precisely what notice is for. It gives the admittedly noncompliant tenant a chance to cure before the situation ripens into a default that would justify termination.

Here, the district court jumped from the fact of Rose's late pay-

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O'Brien v. Ohio State Univ., 859 N.E.2d 607, 618 n. 3 (Ohio Ct. Cl. 2006)); *Swisher v. Swisher*, 124 S.W.3d 477, 483 (Mo. Ct. App. 2003) ("The unclean hands doctrine is not available as a defense to proceedings at law, even though based on equitable principles."); *Kaiser v. Mkt. Square Disc. Liquors, Inc.*, 992 P.2d 636, 641 (Colo. Ct. App. 1999) (citing *Golden Press, Inc. v. Rylands*, 235 P.2d 592 (Colo. 1951)); *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952, 959 (Wyo. 1999); *Sammons Enters., Inc. v. Manley*, 540 S.W.2d 751, 757 (Tex. Civ. App. 1976); *Merchants Indem. Corp. v. Eggleston*, 179 A.2d 505, 514 (N.J. 1962) "[The unclean-hands doctrine] operates to deny a suitor the special remedies of equity, leaving him to his remedies at law. It does not deny legal rights . . . ."); *Mich. Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co.*, 111 F. 284, 290 (8th Cir. 1901).

ment to the conclusion that it had "unclean hands."[6] That circumstance is was *triggered* Treasure Island's responsibility to send a notice that strictly complied with the contract, if it wanted to terminate. It is not an excuse for denying Rose its bargained-for right to cure after proper notice.

IV.

THE FALSE—BUT IRRELEVANT— ACCUSATIONS ABOUT THE RECORD

We wish that we could debate the legal arguments rather than petty skirmishes over the record. Treasure Island understandably spends a lot of energy trying to prove that Mr. Dragul, Ms. Gold, and Ms. Markusch each saw the letter declaring a default. As discussed above, their awareness is irrelevant.[7]

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[6] Rose's independent duty under the sublease to forward notices from Treasure Island to Señor Frog's is not a basis for "unclean hands." Rose's obligation arises only after Treasure Island sends a proper notice, but Treasure Island did not send notice to *any* of the contractually required designees, so Rose's obligation never activated. In addition, the double obligation for Treasure Island and Rose to copy Señor Frog's was for Señor Frog's benefit, in case it missed one of the two notices. It is not for Treasure Island to avoid its contractual obligation to give pre-termination notice.

[7] And in the case of Mr. Dragul, while he disputed having seen the letter at trial, that is not even an issue on appeal. Rose simply explained

A. There is No Evidence that Ms. Gold Received the Letter, but it Does Not Matter if she Did

Contrary to Treasure Island's representation, there is no admissible evidence that Ms. Gold acknowledged the letter and requested an extension. (RAB 15–16.) The district court expressly refused to entertain that testimony on hearsay grounds, which Treasure Island is not contesting. (3 App. 744.)

But Ms. Gold's receipt would also be irrelevant. Treasure Island does not contend that Ms. Gold was a designated recipient for notice under the lease. (*See* RAB 15.)

B. There is No Evidence that Ms. Markusch Received the Letter, but it Does Not Matter if she Did

Treasure Island also argues that Ms. Markusch somehow got the letter, based on a record of her attempting a partial payment on May 16, 2015, two days after Treasure Island's letter. Treasure Island even states that "Exhibit 66, containing *the check*, was admitted into evidence" and accuses Rose of leaving this out of the appendix. (RAB 20

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why Rose negotiated *not* to have Mr. Dragul as the sole designated recipient of a notice of default: his job was not to make payment on individual accounts; that responsibility fell to Susan Markusch, who also relied on the sublesee, Señor Frog's, to alert them if there was a default.

n.13 (emphasis added).)[8] Exhibit 66 was an unrelated check from February 6, 2014, introduced only to show records of *prior* payments. (6 App. 1117; *see* 4 App. 810–11.)[9] Neither the elusive May 16, 2015 "check" nor the accompanying letter was ever introduced into evidence. (4 App. 844:22–24 (Treasure Island's counsel admits he does not have a copy of the check).) The "evidence" that Ms. Markusch sent such a check is the representation of Treasure Island's counsel to Mr. Dragul. (*See, e.g.*, 4 App. 844:8–15 (Mr. Dragul testifying to Treasure Island's counsel that "[y]ou're telling me that"); 4 App. 869:1–871:5.)

Ultimately, however, it does not matter whether Ms. Markusch never saw the letter and never attempted a payment, whether she attempted a payment without having seen the letter, or whether she saw the letter and then attempted a payment. A letter that was not sent to Ms. Markusch or the other three designees was not notice to Rose.

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[8] Rose's appellate counsel repeatedly contacted Treasure Island's counsel about what they wanted to have in the joint appendix. Treasure Island's current appellate counsel was not involved in the case at that time. *See also* NRAP 30(b) (requiring brevity in appendix submissions).

[9] Exhibit 67 was an unrelated letter from January 31, 2012. (6 App. 1118; 4 App. 810–11.) Exhibit 68 was a demonstrative chart of returned checks from Treasure Island, which does not include any record of a check from May 16, 2015. (6 App. 1121; 4 App. 842–43.)

CONCLUSION

Treasure Island's answering brief does not dispute question presented in this appeal: To terminate a tenancy, does a landlord have to comply with the notice requirements in the written lease? That legal question is clear. This Court could vacate and remand for the district court to apply the correct legal standard, but with Treasure Island's admission that it did not comply, the application is clear, too. This Court should reverse the judgment.

DATED this 20th day of February, 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 6095 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 20th day of February, 2018.

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I certify that on February 20, 2018, I submitted the foregoing APPELLANT'S REPLY BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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