2d Civil No. B222284

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 8

ESTHER GINSBERG, et al.

Plaintiff, Respondent and Cross-Appellant,

vs.

HANNA GAMSON, et al.

Defendant, Appellant and Cross-Respondent.

Appeal from Los Angeles Superior Court, No. BC346782
Honorable Ricardo Torres, Department CCW-316

APPELLANT'S OPENING BRIEF

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APPELLANT/PETITIONER: Hanna Gamson RESPONDENT/REAL PARTY IN INTEREST: Esther Ginsberg; Harry Eden	

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1. This form is being submitted on behalf of the following party (*name*): Hanna Gamson

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Date: February 26, 2010

Luisa Jaffe
(TYPE OR PRINT NAME)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

The trial court found as a matter of law that Esther Ginsberg holds a perpetual tenancy to operate a vintage clothing store on the ground floor of Hanna Gamson's 90-year-old commercial building in midtown Los Angeles. The court reached this result after refusing to allow briefing, refusing to consider evidence, focusing on a single lease clause instead of considering the entire lease and its context, and relying on plainly inapplicable law.

Ginsberg originally leased the building from Gamson's parents, under a lease that provided a limited right to renew. In the wake of her father's death and her mother's descent into dementia, Gamson acceded to Ginsberg's request that she sign a replacement lease as her mother's conservator. Though back-dated to the date of the original lease and providing for the same rental, the replacement lease contains a renewal clause that Ginsberg claims gives her the right to renew the lease indefinitely. Despite a prior denial of summary judgment on the basis that the replacement lease is ambiguous, the trial court, through a different judge, found that it unambiguously provides a perpetual right to renew (limited by statute to a total of 99 years).

This bench-trial decision set the stage for Ginsberg to recover on a claim that Gamson's lease disputes with Ginsberg amounted to tortious interference with Ginsberg's lease rights—a claim on which Ginsberg recovered substantial punitive damages, although the trial court later struck those as unauthorized in this purely contractual dispute. And it set the stage for the trial court to issue an injunction that not only substantially rewrote

the parties' lease but also will require court supervision for the *next eight decades*.

The result is unsupportable. Courts in California and throughout the country are virtually unanimous in disfavoring perpetual contract rights and refusing to find them in the absence of explicit, unambiguous language. There is no such explicit, unambiguous language here: The lease's renewal clause itself is far from clear, and the lease as a whole—which the trial court never considered—negates any reasonable possibility that the parties intended the lease to be perpetual. Countless courts have rejected perpetual lease claims on language much more explicit than in Ginsberg's lease.

The injunction, premised on the assumption that there really is a perpetual (99-year) lease, would be unwarranted even if the trial court were right about the lease, because it goes far beyond anything authorized by the lease or the law.

The judgment must be reversed as to the interpretation of the lease and issuance of the injunction, and remanded for a reassessment of attorneys' fees and costs.

STATEMENT OF FACTS

A. The Parties And The Premises.

Appellant and cross-respondent Hanna Gamson owns a two-story commercial building at 136 South La Brea Avenue in Los Angeles (near Beverly Boulevard). (3 RT 209:9-12 (Reporter's Transcript on Appeal, Volume 3, page 209, lines 9-12), 239:1-3.)

Respondent and cross-appellant Esther Ginsberg is one of the building's tenants. (4 AA 815 [Ex. 7] (Appellant's Appendix, Volume 1, page 815).) She sells vintage clothing and textiles in the ground floor retail space (Premises); while this litigation has been pending, the second floor spaces have been mostly unoccupied. (3 RT 209:19-210:4; 4 RT 482:24-483:2; 5 RT 730:5-7; see 4 AA 862 [Ex. 230] [photograph].)

Respondent Harry Eden is Ginsberg's husband and co-tenant. (3 RT 245:17-21; 4 AA 822.)[1]

B. Gamson's Parents Enter Into A Lease With Ginsberg That Provides For A Limited Renewal Right.

Ginsberg leased the Premises in April 1996 from Gamson's parents, Isaac and Ingeborg Rubinfeld, under a lease made on a standard Wolcott's form (Rubinfeld Lease). (4 AA 863 [Ex. 601]; 3 RT 235:25-236:6; 5 RT 732:26-733:22.)

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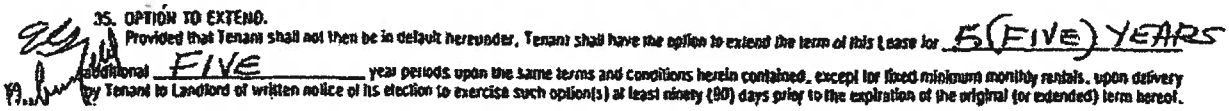
[1] Eden is not a plaintiff; Gamson named him as a cross-defendant on her claim for declaratory relief as to the interpretation of the lease. (2 RT 50:2-6.) We generally refer only to Ginsberg as the tenant, since she ran the business and had most of the communications with Gamson.

The printed form for the Rubinfeld Lease had this renewal clause:


35. OPTION TO EXTEND.
Provided that Tenant shall not then be in default hereunder, Tenant shall have the option to extend the term of this Lease for 5 (FIVE) YEARS additional FIVE year periods upon the same terms and conditions herein contained, except for fixed minimum monthly rentals, upon delivery by Tenant to Landlord of written notice of its election to exercise such option(s) at least ninety (90) days prior to the expiration of the original (or extended) term hereof.

(4 AA 866, ¶ 35.)[2] The lease's rent escalation clause provided that the parties had to agree on the renewal rent and there would be no renewal without agreement.[3] Thus, under the Rubinfeld Lease the landlord had the right to require an adjustment to current market rent at the time of the renewal.

C. Ginsberg Gets Gamson To Sign A Revised Lease That Ginsberg Now Claims Gave Her A Right To Renew The Lease Indefinitely.

Isaac Rubinfeld died soon after signing the Rubinfeld Lease. (5 RT 734:12-13.) Ingeborg apparently began descending into dementia before her husband's death, and around July 1996, Gamson was appointed her conservator. (3 RT 238:16-18; 5 RT 734:14-24.)

At about the same time, at Ginsberg's request, Gamson signed a replacement lease in her capacity as conservator. (4 AA 815, 824 [Ex. 7];

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[2] "Tenant shall have the option to extend the term of this Lease for 5 (FIVE) YEARS additional FIVE year periods upon the same terms and conditions herein contained . . . ."

[3] "If the parties hereto are unable to agree on the minimum monthly rent for the extended term(s) within said thirty (30) day period, the option notice shall be of no effect and this Lease shall expire at the end of the term."

5 RT 735:1-9.) The new lease (Conservator Lease) is the subject of this litigation.[4]

Also on a stationery-store form, the Conservator Lease was back-dated to April 15, 1996, the same date as the Rubinfeld Lease. (Compare 4 AA 815 [Ex. 7] with 4 AA 863.) The printed-form terms of the leases are identical, but the Conservator Lease includes a specially-prepared Addendum in place of the printed-form renewal clause. The Addendum includes this "Option to Extend Term" (Renewal Clause):

> 1. OPTION TO EXTEND TERM. Provided tenant is not in default under the lease, Tenant shall have the option to extend the term of the lease for additional five year periods upon the same terms and conditions contained in the lease except as hereafter stated. Tenant shall exercise this option to extend the term of the lease by serving on Landlord the Tenant's written notice of Tenant's exercise of the option to extend not less than ninety (90) days prior to the expiration of each term.

(4 AA 823.) Unlike under the Rubinfeld Lease, rent escalation is no longer negotiated upon renewal. Instead, it is calculated this way:

$$\text{Option Rent} = \frac{\text{Consumer Price Index for March, 1996}}{\text{Consumer Price Index for March, 2001}} \times \$3{,}000.00 \text{ (etc.)}$$

And there is a cap for rent escalation: "In no event shall the rent adjustment for the next extended term exceed 10% of the rent during the expiring term of the Lease." (*Ibid.*)

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[4] The circumstances of the execution of the Conservator Lease are suspicious and vigorously disputed. However, consistent with its finding that the Renewal Clause is unambiguous (see Statement of the Case, § C.1., *post*), the trial court barred all evidence on the subject. (See 5 RT 737:4-28, 743:26-745:3, 787:10-788:15.)

Other changes are that under the Conservator Lease the tenant does not have to pay property tax increases until the sale of the property (4 AA 823-824, ¶ 4), whereas under the Rubinfeld Lease the tenant shared in tax increases currently (4 AA 863, ¶¶ 6-7); the Conservator Lease assigns responsibility for fire insurance to the landlord (4 AA 817 [Ex. 7], ¶ 11), while the Rubinfeld Lease left the clause blank (4 AA 864, ¶ 11); and the Conservator Lease grants the tenant a right of first refusal if the landlord sells the property (4 AA 824, ¶ 6), while there is no corresponding right in the Rubinfeld Lease.

The base term under the Conservator Lease expired on April 14, 2001. Ginsberg exercised her one undisputed right to renew in an amendment signed in early 2001. (See 1 AA 44, 78 [exhibit to complaint; renewal not disputed].) That five-year renewal expired in April 2006.

D. Gamson Resists Ginsberg's Claim That She Has A Perpetual Renewal Option.

The parties' relationship did not go smoothly. However, as their disputes generally do not pertain to Gamson's appeal, we provide only an overview.

Ginsberg complained about water intrusion into her space and what she claimed were inadequate repairs of some damage that had been caused by a fire in a neighboring property in 2002. (See 1 AA 48, ¶ 17.) In late 2003, Ginsberg requested Gamson's consent to sublease the Premises to a Doris Raymond. (3 RT 252:4-253:4.) Although Gamson consented (4 AA 867 [Ex. 632]; 3 RT 336:5-337:13), she also made clear that she did not believe that Ginsberg had a further renewal right, in that she sought to

have Ginsberg sign a new lease with no renewal options (e.g., 3 RT 234:26-235:17, 252- 259; 4 AA 825-835 [Exs. 57, 60, 64]; see also 4 RT 453-464).

On November 11, 2004, Ginsberg wrote to Gamson stating, "I am officially giving you notice that I am exercising my next option (2nd of 5) to extend my lease for the next 5 years, when the current option expires." (4 AA 854-855 [Ex. 90].) There followed an exchange in which Gamson made clear that if Ginsberg wanted to remain in the Premises, she would have to sign a new lease (e.g., 4 AA 856-857 [Ex. 95]), but Ginsberg remained without doing so. There is no evidence that after signing the Conservator Lease Gamson ever agreed that it gave Ginsberg a right to renew her lease indefinitely.

STATEMENT OF THE CASE

A. Ginsberg Sues For Breach Of Lease; Gamson Cross-Complains For A Declaration That The Lease Does Not Confer A Right To Perpetual Renewals.

In February 2006—two months before the expiration of the one undisputed renewal and before Gamson could have sought to evict Ginsberg on the basis that her lease had expired—Ginsberg filed her complaint. (1 AA 2 [Complaint].) In essence, she alleged that Gamson refused to recognize that Ginsberg had options to renew the lease after 2006 and had embarked upon a course of conduct designed to force Ginsberg either to leave the Premises or sign a new lease at a higher rent. (1 AA 5-7.)

Gamson denied Ginsberg's allegations (1 AA 83) and filed a cross-complaint seeking, among other things, rescission of the Conservator Lease (1 AA 89). Following various demurrers and

amendments, the operative pleadings are Ginsberg's First Amended Complaint (1 AA 44) and Gamson's Third Amended Cross-Complaint (1 AA 129), which seeks a declaration that the Conservator Lease contains only one renewal option that expired in 2006 (1 AA 132-135).[5]

B. The Trial Court (Hon. Edward Ferns) Finds That The Renewal Clause Is Ambiguous And Denies Cross-Motions For Summary Judgment.

The parties filed cross-motions for summary judgment addressed to Gamson's declaratory relief claims. (1 AA 153, 177.)

In essence, Gamson argued that there is a strong policy against perpetual leases; that a lease will not be construed to confer a perpetual right of renewal unless it expresses that right unambiguously; and that the Renewal Clause is ambiguous and therefore conferred only one renewal, which expired in 2006.[6] (1 AA 164-171.) Ginsberg argued that the clause is absolutely clear and must be construed as providing an indefinite series of renewals. (1 AA 194-199.)

The judge originally assigned to the case, the Honorable Edward Ferns, denied the motions. He ruled that "there is ambiguity as to whether

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[5] Ginsberg's third cause of action for promissory fraud was dismissed on demurrer (demurrer was sustained with ten days leave to amend but no amendment was filed). (1 AA 82A.)

[6] Although we use the term "perpetual lease" because that is the usual terminology in the case law, it is technically a misnomer: Under Civil Code section 718 an urban lease that would otherwise qualify as perpetual is limited to 99 years. (*Shaver v. Clanton* (1994) 26 Cal.App.4th 568, 575-576 (*Shaver*).) For purposes of the present case, 99 years is such a long time—well beyond the parties' lifetimes—that the difference is meaningless.

an option or options were granted to the tenant" and that the option language is "internally contradictory." (2 AA 306-307.) He also considered some extrinsic evidence that Ginsberg submitted, including a lease that Ginsberg proposed after execution of the Conservator Lease that provided for "four five year options" and some estoppel certificates. (2 AA 307-308.) He concluded that this evidence reflected an intent that there be only one option to renew. (2 AA 307.) Accordingly, he ruled, "[b]ecause of the ambiguity in the Conservatorship Lease, and the Amendment thereto, and the Estoppel Certificates, this court cannot determine that there are no disputed facts as to interpretation of the agreement, and neither set of parties is entitled to Summary Judgment or Summary Adjudication of issues." (*Ibid.*)

C. Trial And Judgment.

1. The trial court (Hon. Ricardo Torres) rules as a matter of law that the Conservator Lease unambiguously provides Ginsberg with unlimited options to renew the lease.

Because Judge Ferns was not available when the case came up for trial on August 31, 2009 (see 1 RT D-1-4), the case was transferred to the Honorable Ricardo Torres (2 AA 324, 356; 2 RT 1).

Gamson moved to bifurcate the trial, seeking a bench trial on the interpretation of the Renewal Clause before trial of the remaining claims went to a jury. (2 AA 286.) Ginsberg opposed the motion, arguing the presence of conflicting extrinsic evidence. (2 AA 299-302.)

When the parties reported for trial on September 1, Judge Torres had before him only Gamson's motion to bifurcate and the most recent volume of the superior court's file. (2 RT 1:17-24, 7:27-28.) He explained that he had only limited time available and that he "ha[d] to be done with this case" by September 14.[7] (2 RT 6:22-28.) He concluded that bifurcation was not appropriate, and that instead he should address the lease interpretation question as a matter of law before impaneling a jury to hear Ginsberg's claims. (2 RT 4:13-22.)

Reconvening after lunch (2 RT 15), the court had heard no evidence and had reviewed only Ginsberg's First Amended Complaint, the Rubinfeld Lease, the Conservator Lease, and two cases (*Shaver*, *supra*, 26 Cal.App.4th 568 and *Becker v. Submarine Oil Co.* (1921) 55 Cal.App. 698 (*Becker*), discussed in detail in § I.C.4, *post*). (2 RT 15:11-19:24.) Gamson urged the court to follow *Becker*, *supra*, 55 Cal.App. at p. 700, which states that "leases which may have been intended to be renewable in perpetuity, if at all uncertain in that regard, will be construed as importing but one renewal." (2 RT 20-23, 28-29.) But the trial court, apparently believing that *Becker* relied on the rule against perpetuities (it did not, see § I.A., *post*), found that the controlling case is *Shaver*, *supra*, 26 Cal.App.4th 468, which held that the rule against perpetuities does not apply to leases. (2 RT 18:24-19:9, 24:8-9, 29:8-10, 37:21-23.) Focusing solely on the Renewal Clause and without reading the lease as a whole as Gamson urged (2 RT 25:27-28, 30:5-9, 43:20-22), the court found that the

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[7] Judge Torres' repeated expressions of impatience regarding trial time occurred almost exclusively during Gamson's trial presentation. (See 4 RT 566:4-6, 619:3-6, 621:2-11, 622:9-15; 5 RT 633:28-634:1, 688:4-6, 693:23-24, 705:2-8, 711:22, 712:16-17, 713:5-6, 739:26-28; 6 RT 813:4-5.)

Renewal Clause was unambiguous and that it granted the tenant a "series of five-year options" to renew (2 RT 33:14-19).

Gamson urged the court to consider Ginsberg's 2004 letter in which she stated that she was exercising her "2nd of 5" renewal options. (2 RT 34:15-37:12, describing an exhibit to the Third Amended Cross-Complaint [1 AA 151-152] that was received in evidence as Exhibit 90 [4 AA 854-855].) The court was unmoved, apparently because even if the letter was an admission that Ginsberg did not hold a perpetual right to renew her lease, 25 years "covers the period we're in right now." (2 RT 36:7-11.) In response to Gamson's argument that this evidence demonstrated ambiguity, the court said, "[c]ounsel, we're done with this issue. We're done with this issue. I don't keep going on." (2 RT 36:12-37:4.)

Gamson asked for the opportunity to submit a brief on the interpretation of allegedly perpetual leases that would include "extensive law from jurisdictions all over the United States." (2 RT 37:17-38:6; see 2 RT 27:23-25, 46:18-21.) The court refused, stating that "I'm not interested in other jurisdictions" (2 RT 27:26); "I don't need any authorities from across the nation. . . . [Show me] [a] California case that says that Shaver [is] wrong" (2 RT 37:20-23).[8]

The court granted judgment to Ginsberg and Eden on the cross-complaint. (2 AA 336.)

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[8] We demonstrate below (§ I.C.4., *post*) that *Shaver* actually has no application to this case.

2. The jury awards compensatory and punitive damages, Ginsberg having sought the latter on the basis of her claimed right to perpetual renewals.

The court reserved Ginsberg's injunction claim for a post-verdict bench trial (2 RT 101:17-18), and the rest of the case proceeded to a jury. The jury was instructed on breach of written and oral contract, trespass to chattels, and "intentional interference with use of property." (2 AA 360-368, 372.) The only instruction on this last claim described a tenant's right to quiet enjoyment. (2 AA 372.)

Ginsberg's theory, as she argued it to the jury in support of her claim for punitive damages, was that she had made multiple demands for Gamson to perform what Ginsberg claimed were landlord obligations; that Gamson had wrongfully refused to meet those demands unless Ginsberg agreed to execute a new lease at higher rent; and that Gamson's conduct in seeking a new lease had "interfered" with Ginsberg's use of the premises. (6 RT 938-940.) Ginsberg sought compensatory economic damages of $544,173 and, on her claim for "intentional interference with use of property," punitive damages of $1.2 million (6 RT 932, 938-940). Rejecting Gamson's argument that no punitive damages were available because Ginsberg's interference claim was purely contractual, the trial court allowed a punitive damages instruction. (4 RT 497-498; 6 RT 893-898; 2 AA 381-382.)

The jury rendered a special verdict in which it found for Ginsberg on all of her claims except for trespass to chattels, awarded $49,100 in compensatory damages, and awarded $385,000 in punitive damages (2 AA 388-393).

3. In a bench trial, the trial court awards injunctive relief.

Following briefing (2 AA 400, 463, 475), the court held a bench trial on Ginsberg's injunction claim (7 RT 1044-1063). Ginsberg's brief essentially asked that Gamson be ordered to provide access to various areas in the building so that Ginsberg could make repairs. (2 AA 401.) However, Ginsberg made clear that she did not plan to make any repairs herself until the conclusion of the appeal. (2 AA 402:13-15; 7 RT 1048:27-1049:9.)

Gamson argued that the requirements for an injunction had not been met and that the proposed injunction would materially rewrite the parties' lease. (2 AA 476-482; 7 RT 1054:21-1056:14.) Rejecting these arguments, the court ordered something that Ginsberg had not asked for and for which the Conservator Lease does not provide: Gamson was to "make repairs to the Building within 48 hours of notice of the need for repairs from Ginsberg; and if repairs are not made by Gamson within 48 hours, then Gamson is to immediately provide access to the Building to Ginsberg for Ginsberg to undertake and complete such repairs." (2 AA 495, ¶¶ 2-3; see 7 RT 1059:20-1060:7.)

4. Judgment.

Judgment was entered on November 10, 2009. (2 AA 492.)[9] It incorporated the trial court's prior ruling that Ginsberg held a perpetual lease: "Ginsberg and Eden, jointly and severally, have a series of options to extend the term of the Commercial Lease [i.e., the Conservator Lease] for additional five-year periods, limited by Civil Code Section 718 to 99 years

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[9] The interlineations reflect rulings on post-judgment motions.

from the inception of the Commercial Lease on April 15, 1996." (2 AA 495.) The clerk served a notice of entry of judgment on the same day, along with a copy of the judgment. (2 AA 490.)

D. Post-Judgment Motions.

On November 25, 2009, Gamson filed a notice of intent to move for a new trial and a motion for judgment notwithstanding the verdict. (3 AA 517, 522, 540; see 3 AA 591 [Opposition], 4 AA 778 [Reply].) These challenged the punitive damages award on several grounds, including that punitive damages were unavailable because Ginsberg's claims were all contractual.

The motions were argued on January 15, 2010. (7 RT 1064-1073.) The trial court agreed "100 percent" with Gamson that punitive damages were not available for the "intentional interference" claim and struck them from the judgment. (7 RT 1067:11-28, 1071:6-21, 1073:3-11; 4 AA 791; see 2 AA 492.) We expect Ginsberg to challenge this ruling in her cross-appeal.

The court also awarded Ginsberg attorneys' fees of $563,639.75 and costs of $38,842.62. (4 AA 791-792; see 7 RT 1074 et seq.)

E. Appeal; Statement Of Appealability.

The judgment was appealable as a final judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).) The January 15 order was appealable (a) with respect to the award of fees, as an order entered after judgment (*ibid.*); (b) to the extent the trial court implicitly denied Gamson's alternative grounds for vacating the punitive award, as an order denying a motion for judgment notwithstanding the verdict (Code Civ. Proc., § 904.1, subd. (a)(4)).

On February 8, 2010, Gamson filed a notice of appeal from the judgment and from the January 15 order. Her notice of appeal was timely under California Rules of Court, rule 8.104: She had filed timely motions for a new trial and for JNOV on November 25, 2009, which was within 15 days after the November 10 mailing of notice of entry of judgment. (Code Civ. Proc., §§ 659, 663a.) The timely filing of these motions extended the deadline for filing the notice of appeal to 30 days after notice of entry of the trial court's January 15 order (Cal. Rules of Court, rule 8.108(b)(1)(A)), and the notice of appeal was filed within that period.[10]

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[10] The trial court's ruling on the new trial/JNOV motions was timely. The clerk's November 10, 2009 notice of entry did not trigger the trial court's 60-day deadline under Code of Civil Procedure section 660 because it was not served pursuant to Code of Civil Procedure section 664.5, in that it did not state that it was served pursuant to court order. (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1277.) Rather, the 60 days was triggered by Gamson's November 25, 2009 filing of her notice of intention to move for a new trial (Code Civ. Proc., § 660), and the January 15, 2010 ruling was well within 60 days after that.

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. *Does the Conservator Lease—construed in light of universal judicial disfavor of perpetual leases, and considering the lease as a whole and the context in which it was made—confer a perpetual right of renewal (limited by statute to 99 years)?*

Review is de novo, because the trial court interpreted the Renewal Clause solely on the basis of its language. The parties had no opportunity to present extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 ["It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence"].) "Although the question whether a contract is or is not ambiguous or uncertain is a matter of determination, in the first instance, by the trial court, the question is one of law, and the trial court's determination is not binding on an appellate court." (*Wechsler v. Capitol Trailer Sales, Inc.* (1963) 220 Cal.App.2d 252, 263.)

2. *Did the trial court abuse its discretion in ordering an injunction that rewrote the parties' lease and that—if the trial court's perpetual lease ruling is correct—would require 85 years of court supervision?*

Injunctions are ordinarily reviewed for abuse of discretion. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912.) However, "[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of (the) action. . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of

discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

ARGUMENT

I.

THE CONSERVATOR LEASE DOES NOT CONFER A PERPETUAL RIGHT OF RENEWAL.

> [O]pen-ended leases and options in perpetuity must be about as common as polar bear sightings in Death Valley.

(*Shaver*, *supra*, 26 Cal.App.4th 568, 578, conc. opn. of Crosby, J.) So wrote Justice Crosby, disagreeing with his court's decision to publish a case concerning a lease with perpetual renewals.

He was right: Perpetual leases are indeed rare. That is because the law universally disfavors them. It mandates that a perpetual lease can *only* be created by an unambiguous expression of the parties' intent to that effect *contained within the document*. Because the Conservator Lease is ambiguous, as a matter of law it was not perpetual but rather conferred only one option to renew.

The trial court's erroneous finding that the Conservator Lease conferred a perpetual right of renewal requires reversal with directions to enter judgment for Gamson on her cross-complaint, or at least for a full trial on the interpretation of the lease.

A. Overview Of Perpetual Leases.

In keeping with case-law terminology, we use the term "perpetual lease" to denote a lease that can be renewed indefinitely at the tenant's option (limited to 99 years under Civil Code section 718). Although perpetual leases are not automatically void, they are strongly disfavored. The dispute here is whether the Conservator Lease can be construed as perpetual, and thus falling within Civil Code section 718.

The general rule is that a court will not find a lease to be perpetual in the absence of very explicit language to that effect. (§ I.B., *post.*) Without such explicit language, a renewal clause confers a right to only one renewal. (*Penilla v. Gerstenkorn* (1927) 86 Cal.App. 668, 670 ["'A general covenant to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, except the covenant to renew; to include which would make the lease perpetual'"].)

Although courts sometimes use the term "perpetuity" to describe a perpetual lease, they generally are not invoking the rule against perpetuities, which most courts recognize does not reach lease transactions. (See *Shaver*, *supra*, 26 Cal.App.4th at pp. 572-574 [while some earlier California cases applied the rule to leases, the weight of authority is contrary, and the Uniform Statutory Rule Against Perpetuities (Prob. Code, § 21205 et seq., Stats. 1991, ch. 156, § 24) expressly excludes leases]; *Fisher v. Parsons* (1963) 213 Cal.App.2d 829, 838-842 [rejecting application of rule to leases]; *Becker*, *supra*, 55 Cal.App. 698, 700 [perpetual leases are "not within the purview of the rule against perpetuities"]; but see *Morrison v. Rossignol* (1855) 5 Cal. 64, 65 [holding, without discussion and without explicitly mentioning the rule against

perpetuities, that a clause for perpetual renewals "is, in effect the creation of a perpetuity" and "therefore against the policy of the law"]; accord, *Epstein v. Zahloute* (1950) 99 Cal.App.2d 738, 739 [citing *Morrison* and apparently relying on the rule against perpetuities].)

Although California courts clearly disfavor perpetual obligations (§ I.B., *post*), decisions specifically concerning claimed perpetual leases are indeed as rare as Justice Crosby's polar bear. To our knowledge, there is only one reported California case that actually construes such a lease without reference to the rule against perpetuities—*Becker*, *supra*, 55 Cal.App. 698. *Becker* correctly states the governing interpretative rule that if a renewal clause is "at all uncertain," it entitles the tenant to only one renewal. (See § I.B., *post*.) However, *Becker*'s underlying facts are so different from ours—among other things it involved a 1908 oil-drilling lease—that it cannot provide concrete guidance on how to interpret the Conservator Lease.[11]

We therefore ask the Court to "look to how other jurisdictions have dealt with the problem." (*Aydin v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1190 [construing insurance policy, court follows "overwhelming weight of authority"].) The answer from other jurisdictions is clear: Courts disfavor perpetual leases and will not uphold them in the absence of very explicit language.

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[11] We discuss *Becker* in detail in Section I.C.4., *post*, along with *Shaver*, *supra*, 26 Cal.App.4th 568, on which the trial court erroneously relied.

B. Courts Universally Disfavor Perpetual Leases And Therefore Will Not Construe A Lease As Perpetual Unless It Contains Unambiguous Language To That Effect.

Over a century ago, the United States Supreme Court stated that "[f]rom the ordinary covenant to renew, a perpetuity will not be regarded as created. There must be some peculiar and plain language before it will be assumed that the parties intended to create it." (*Winslow v. Baltimore & O.R. Co.* (1903) 188 U.S. 646, 655 [23 S.Ct. 443, 47 L.Ed. 635] (*Winslow*).)

Becker, *supra*, 55 Cal.App. 698 echoes this view: "[L]eases which may have been intended to be renewable in perpetuity, *if at all uncertain in that regard*, will be construed as importing but one renewal." (*Id.* at p. 700, emphasis added; see 7 Miller & Starr, Cal. Real Estate (3d ed. 2004 § 19:40, p. 116) [a lease "must clearly express the parties' intention when it is intended that the tenant had the right to extend or renew for more than one period"].)

This disfavor of perpetual obligations is not just a principle of leasing law; it applies to contracts generally. "Contracts for life or in perpetuity will only be upheld *when the intention is clearly expressed in unequivocal terms*, and courts are prone to hold against the theory that a contract infers a perpetuity of right or imposes a perpetuity of obligation, and they will only construe a contract to impose such an obligation *when the written document itself compels the construction and none other*." (*Shannon v. Civil Service Emp. Ins. Union* (1959) 169 Cal.App.2d 79, 81, emphasis added [insurance agency contract for indefinite term was terminable at will by either party]; *O.T. Johnson Corp. v. Pacific E.R. Co.* (1937) 19 Cal.App.2d 306, 311 [court rejected claim that grant of land for

use as railway obligated railway to operate passenger trains in perpetuity in order to avoid reversion; "it seems that if such had been the contract upon so important a matter, the intention would be found expressed *in definite and unequivocal language*," emphasis added]; *Nissen v. Stovall-Wilcoxson Co.* (1953) 120 Cal.App.2d 316, 319 ["A construction conferring a right in perpetuity will be avoided unless *compelled by the unequivocal language of the contract*," emphasis added]; accord, *Zimco Restaurants v. Bartenders Union* (1958) 165 Cal.App.2d 235, 238 (*Zimco*) [collective bargaining agreement with drive-in restaurant was not perpetual]; see *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1103 [rejecting interpretation that insurance policy conferred perpetual coverage; "(The insurer) correctly observes that construing a contract to confer a right in perpetuity is clearly disfavored"].)

The unequivocal language that courts almost universally require does not mean language that can *possibly* be construed as creating a perpetual lease. Certainty is crucial, to such an extent that a number of courts require explicit "words of perpetuity" like "'forever', 'for all time', and 'in perpetuity.'" (*Lattimore v. Fisher's Food Shoppe, Inc.* (N.C. 1985) 329 S.E.2d 346, 349 (*Lattimore*); see § I.C.2.b., *post.*)

In line with these principles, courts throughout the country have held that if a lease renewal clause is ambiguous as to the extent of tenant's renewal right, it will not be construed as perpetual but rather as conferring only one renewal term. We refer to this as the "ambiguity/one-renewal rule." For example:

United States Supreme Court: *Winslow, supra*, 188 U.S. at p. 655 (creation of perpetual lease requires "peculiar and plain language").

Florida: *National Home Communities, L.L.C. v. Friends Of Sunshine Key, Inc.* (Fla.Ct.App. 2004) 874 So.2d 631, 633 ("Leases in perpetuity are universally disfavored," and courts will not so construe a lease "unless the language of the agreement clearly and unambiguously compels them to do so"); accord, *Chessmasters, Inc. v. Chamoun* (Fla.Ct.App. 2007) 948 So.2d 985, 986).

Indiana: *Geyer v. Lietzan* (Ind. 1952) 103 N.E.2d 199, 200 (*Geyer*) ("The law does not favor perpetual leases. A lease will not be construed as conferring a right to perpetual renewals unless it clearly so provides, in language so plain and unequivocal as to leave no doubt that such was the intention and purpose of the parties").

Massachusetts: *Curtis Pine Grove, Inc. v. Otter Trap, LLC* (Mass. Super.Ct. 2009) 2009 WL 2506279, *4 (*Curtis Pine Grove*) ("The legal bias against a perpetual lease is strong and overcomes language that suggests indefinite renewals or extensions").

Michigan: *Gould v. Harley* (Mich. 1921) 183 N.W. 705, 706 ("'As a general rule, however, the courts will not construe a lease as conferring a right to perpetual renewals, unless the lease clearly so provides, the courts not looking with favor upon such a claim'").

Missouri: *Blackmore v. Boardman* (1859) 28 Mo. 420, 426 ("As the law discourages perpetuities, it does not favor covenants for continued renewals; but, when they are clearly made, their binding obligation is recognized and will be enforced").

New Mexico: *Burke v. Permian Ford-Lincoln-Mercury* (N.M. 1981) 621 P.2d 1119, 1121 (*Burke*) ("The law does not favor perpetual leases and

will not construe leases as conferring the right to perpetual renewals unless the language is so plain and peculiar as to leave no doubt that such was the intention of the parties," citing *Winslow*, *supra*, 188 U.S. 646).

North Carolina: *Lattimore*, *supra*, 329 S.E.2d at p. 348 ("[p]erpetual leases and covenants for perpetual renewals are not favored and will not be enforced absent language in the lease agreement which expressly or by clear implication indicates that this was the intent of the parties," citing *Winslow* and cases from the highest courts of eight states).

Ohio: *Hallock v. Kintzler* (Ohio 1942) 51 N.E.2d 905, 906 (noting "the fundamental rule that perpetual leases are not favored and that general covenants as to right of renewal are therefore usually limited to a single renewal unless an intention to create a perpetuity is clearly shown").

Vermont: *Rutland Amusement Co. v. Seward* (Vt. 1968) 248 A.2d 731, 734 (*Rutland Amusement Co.*) ("Equity will not enforce perpetual renewals of a lease for a term of years unless such an intention is expressed in language devoid of all ambiguity").

Virginia: *McLean v. U.S.* (E.D. Va. 1970) 316 F.Supp. 827, 829 ("Perpetual leases are not favored in the law, nor are covenants for continued renewals which tend to create a perpetuity. The intent to create a perpetual lease must appear in clear and unequivocal language, so plain as to leave no doubt that it was the intention and purpose of the parties so to do," apparently applying Virginia law and citing numerous authorities).

Washington: *Oak Bay Properties, Ltd. v. Silverdale Sportsman's Center, Inc.* (Wash.Ct.App. 1982) 648 P.2d 465, 467 (*Oak Bay Properties*) ("Although the cases stop short of announcing a presumption against

perpetual leases, clearly they are disfavored and leases are interpreted to avoid this result whenever possible").[12]

C. The Conservator Lease Does Not Unambiguously Create A Perpetual Right To Renew. Indeed, Virtually All Aspects Of The Lease Militate Against Such A Right.

1. Settled rules of interpretation require considering the lease as a whole, along with surrounding circumstances.

The Renewal Clause cannot be interpreted in isolation. It is a basic tenet of contract interpretation that the court must examine the contract the as a whole. (*Kuhlemeier v. Lack* (1942) 50 Cal.App.2d 802, 807 ["In construing any part of the lease the entire document should, of course, be considered"]; Civ. Code, § 1641.)

Nor is the lease the sole source of interpretation. It has long been settled in California and elsewhere that "'courts must look not only to the

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[12] See also Annot., Sufficiency of Provision of Lease to Effect Second or Perpetual Right of Renewal (1984, supplemented through 2010) 29 A.L.R.4th 172, § 4 (collecting cases); 49 Am.Jur.2d (2010) Landlord and Tenant, §§ 142-143 (collecting cases); 52 C.J.S. (2010) Landlord and Tenant, § 87 (collecting cases).

A very small minority apparently does not apply the ambiguity/one-renewal rule, despite expressing disfavor of perpetual leases. (See *Pechenik v. Baltimore & O. R. Co.* (W.Va. 1974) 205 S.E.2d 813, 815 ("West Virginia law disfavors perpetual leases, but doubtful questions will usually be construed in favor of the lessee"; court found right to perpetual renewal in clause stating that lessee under a 20-year lease had the right "to renew this lease at its option for successive periods of twenty years upon the terms hereof," 205 S.E.2d at p. 814); *Pope v. Lee* (N.H. 2005) 879 A.2d 735, 740 [*semble*: apparently applying standard contract interpretation rules, although parties agreed that the lease was *not* perpetual].).

specific language employed, but also to the subject matter contracted about, the relationship of the parties, the circumstances surrounding the transaction, or in other words, place themselves in the same position the parties occupied when the contract was entered into, and view the terms and intent of the agreement in the same light in which the parties did when the same was formulated and accepted.'" (*Zimco*, *supra*, 165 Cal.App.2d at p. 239; see *Geyer*, *supra*, 103 N.E.2d at p. 201 [although "in isolation" renewal language "would be strongly indicative" of a perpetual lease, court considered other provisions, such as a use restriction and covenant to return property in "as good condition" as negating perpetual lease]; accord, *Cook v. Adams County Plan Com'n* (Ind.Ct.App. 2007) 871 N.E.2d 1003, 1007-08.)

2. Multiple features of the Conservator Lease demonstrate why it cannot be construed as perpetual.

a. The absence of words of perpetuity in the Renewal Clause strongly suggests that the parties did not contemplate a perpetual lease.

The North Carolina Supreme Court has been particularly emphatic in requiring explicit words of perpetuity in order to find that a lease is perpetual. In *Lattimore*, *supra*, 329 S.E.2d 346, the lease's renewal clause contained multiple references to plural renewals, including two references to "successive five-year terms." (*Id.* at p. 347.) Noting that "[t]he presence or absence of 'customary words of perpetuity' must be accorded great significance in determining whether a perpetual lease or a perpetual right to renewals exists" (*id.* at p. 349), the court held that the clause did not

establish a perpetual lease. The court adopted a "'brightline' rule": "Unless a lease agreement contains the terms "forever", "for all time", "in perpetuity" or words *unmistakably* of the same import, no perpetual lease or right to perpetual renewals may be found to have been created." (*Id.* at p. 350, emphasis in original.) The court rejected the tenant's argument that the terms "successive" and "for so long as" were sufficient indications of perpetuity, because they "[do] not have the same unmistakable import in the context of a lease agreement as do the customary words of perpetuity previously set out." (*Ibid.*)

The Conservator Lease's language—"additional five year periods," "expiration of each term" (4 AA 823)—is certainly no more explicit than *Lattimore*'s "successive" and "for so long as." And, as in *Lattimore*, there are no "customary words of perpetuity" in the Conservator Lease.

Lattimore is not alone. The New Mexico Supreme Court reached an almost identical result in *Burke*, *supra*, 621 P.2d 1119. There the original term was for one year, and the renewal clause gave the tenant "the right to renew said lease for successive like terms." (*Id.* at p. 1120.) As in *Lattimore*, the court considered whether the references to plural renewals ("successive like terms," "expiration of the then current term") were sufficient to create a perpetual lease, and concluded that they were not: "An examination of the [tenant's] lease reveals no clear and unequivocal language granting a perpetual right of renewal. The renewal grant of 'successive like terms and consideration' does not necessarily imply a covenant for perpetual renewal when viewed in context with the other terms of the lease." (*Id.* at p. 1121.)

The present facts militate just as strongly against a perpetual lease. Nothing in the Conservator Lease provides any more basis for perpetual renewals than the lease in *Burke*—"additional five year periods" in the Conservator Lease is essentially synonymous with "successive like terms" in *Burke*. Many other cases note the importance of words of perpetuity.[13] The Court should apply their principles here and on that basis hold that the Conservator Lease is not perpetual.

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[13] *McLean v. U.S.*, *supra*, 316 F.Supp. 827, 828 ("Nowhere in the lease does the language 'perpetual,' 'forever,' 'for all times,' 'in perpetuity,' 'successive,' 'endless periods,' 'continuous,' 'everlasting,' or any similar words of description of the terms of the lease appear"); *Lonergan v. Connecticut Food Store, Inc.* (Conn. 1975) 357 A.2d 910, 914 (*Lonergan*) ("Nowhere in the provision appear any of the words customarily used to create a perpetual lease, such as 'forever.' 'for all time,' and 'in perpetuity,' words whose presence or absence in a lease is of considerable significance to a court in deciding whether a right of perpetual renewal was intended by the parties"); *Geyer*, *supra*, 103 N.E.2d at p. 201 (same; "We cannot agree that the giving of the right to 'successive renewals' means that such renewals are available to the appellant forever and without end. The word 'successive' imports concatenation. It does not define duration"); accord, *Smyrniotis v. Marshall* (Ind.App. 2001) 744 N.E.2d 532, 535 (citing *Geyer* and noting "[the plaintiff] directs us to no such language in this lease, and we find it to contain no express indication that the lease provided for renewals in perpetuity"); *Curtis Pine Grove*, *supra*, 2009 WL 2506279 at pp. *3-4 (same, citing numerous cases); *Blackmore v. Boardman*, *supra*, 28 Mo. at p. 426 [upholding as perpetual a lease stating that it was renewable "from time to time *perpetually* at the option of the (tenant)," emphasis added]; *Rutland Amusement Co.*, *supra*, 248 A.2d at pp. 732, 734 (renewal clause stating that "this lease shall automatically renew for similar five year periods" did not create perpetual lease; "[i]t is true that leases in perpetuity, or durable leases, have been upheld in various decisions of this Court. In those instances the conveyances have been expressed in traditional and explicit language, such as 'forever,' 'as long as grass grows or water runs.' This language is notably absent from the lease before us"); *Tischner v. Rutledge* (Wash. 1904) 77 P. 388, 389 (same).

b. The Renewal Clause itself is ambiguous.

Judge Ferns was right: The Renewal Clause is ambiguous. Judge Torres erred in finding it unambiguous. " A contract is ambiguous when on its face it is capable of two different reasonable interpretations." (*Wechsler v. Capitol Trailer Sales, Inc.*, *supra*, 220 Cal.App.2d at p. 263.) That two different judges could reach opposite conclusions only underscores that the Renewal Clause lacks the clarity that the cases uniformly require.

The entirety of the language in the Renewal Clause that might arguably suggest a perpetual lease are a few plurals—"additional five year periods"; a provision for notice before "the expiration of each term"; a reference to "[t]he rent payable during each option term"; and a reference to "adjustments" and "changes" to the rent. (4 AA 823.)

Many cases hold that plurals aren't enough. (*Curtis Pine Grove*, *supra*, 2009 WL 2506279 at p. *3 ["The Lease does speak in terms of 'succeeding twenty-five (25) year periods' but one must not read too much into the words 'succeeding periods.' Succeeding imports concatenation and does not define duration"]; *Burke*, *supra*, 621 P.2d at p. 1121 ["The renewal grant of 'successive like terms and consideration' does not necessarily imply a covenant for perpetual renewal when viewed in context with the other terms of the lease"]; *Lattimore*, *supra*, 329 S.E.2d at p. 350 ["successive" "does not have the same unmistakable import in the context

of a lease agreement as do the customary words of perpetuity previously set out"].)[14]

Beyond this, other language in the Renewal Clause contradicts the plurals:

- The caption is "1. OPTION TO EXTEND TERM"—singular.
- The CPI formula for rent adjustments is based on a single period, 1996 (the year the Conservator Lease was executed) to 2001 (the year the base term expires), without any change to the formula over time or even any reference to future years.
- The option provision mixes singular and plural phrases, providing: "Tenant shall have the option [singular] to extend the term [singular] of the lease for additional five year periods

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[14] See also *Chessmasters, Inc. v. Chamoun*, *supra*, 948 So.2d at pp. 985-987 (renewal clause referring to "any additional extended Five-Year period" and "each extended Five-Year period" did not create perpetual lease); *Kalicki v. Bell* (N.J. Super. Ct. App. Div. 1964) 199 A.2d 58, 59 (clause granting "an option to renew this lease for like period or periods" did not create perpetual lease; "[a]n option for renewal of a lease will not be construed as granting to the tenant the right of perpetual renewals unless the intention to create such right is clearly and unequivocally expressed in the instrument"); *Levy v. Amelias* (N.Y. Sup. Ct. 1955) 141 N.Y.S.2d 101, 103 ("the privilege of an option of a multiple renewal of this lease" did not create perpetual lease); *McCreight v. Girardo* (Or. 1955) 287 P.2d 414, 415 (clauses providing for "the option of renewal of this lease, on the same rental basis and on the same terms, from year to year" and conferring an option to purchase "during the term of this lease or renewal thereof" did not create perpetual lease; *Gray v. Stadler* (Wis. 1938) 280 N.W. 675, 676 ("privilege of renewals for similar periods" and "extension in periods of fifteen years, optional with the Lessee" did not create perpetual lease); but see *Pechenik v. Baltimore & O. R. Co.*, *supra*, 205 S.E.2d at p. 815 (disagreeing with other courts on significance of such language as "successive").

[plural]"; "Tenant shall exercise this option [singular] to extend . . . ." (4 AA 823.)

The lease's singular-plural clause—"[w]hen required by the context of this Lease, the singular shall indicate the plural" (4 AA 822, ¶ 33)—does not remove the ambiguity, but rather exacerbates it. As Judge Ferns noted, the clause "is of no assistance, as the use of the 'singular' in the lease was not required by the context of the option provisions, instead, the use of the singular creates confusion." (2 AA 282.)

Although one *might* read the Renewal Clause, standing alone, as allowing perpetual renewals, its ambiguous language does not—as the cases require—*compel* that result. Just the opposite: Under the ambiguity/one-renewal rule, as stated by courts throughout the United States, the ambiguity is alone sufficient to require a finding that the Conservator Lease is *not* perpetual. And even if that were not true, at a minimum Gamson was entitled to a full trial on the issue—not the perfunctory, no-evidence, motion-like review that the trial court provided.

c. The Conservator Lease's highly restrictive rent escalation clause is inconsistent with a perpetual lease.

The Renewal Clause's rent escalation provision states:

$$\text{Option Rent} = \frac{\text{Consumer Price Index for March, 1996}}{\text{Consumer Price Index for March, 2001}} \times \$3{,}000.00 \text{ (etc.)}$$

It caps the five-year rent increase at 10%. (4 AA 823.)

The clause contains a clear mistake: The fraction is backwards, and would cause the rent to decline except in those very rare years in which

inflation is negative. The mistake evidences a lack of drafting care that could also explain the inconsistent mixtures of plurals and singulars. So does the cryptic notation "(etc.)" after "$3,000.00"—nothing in the lease imbues "(etc.)" with any meaning.

Even with the correct fraction, the clause is far more consistent with a single renewal than with multiple renewals. Recent CPI changes are an obvious, though not infallible, basis for predicting near-term changes. A 10% cap with just a single rent adjustment after five years, is heavily one-sided, but it is within a range that parties might negotiate in 1996.[15] And using a fixed base number for the calculation ($3,000) bespeaks an intent to make the calculation only once.

In contrast, in 1996 no reasonable person would have expected historically low inflation rates to persist for any great length of time, much less indefinitely. (See *Lonergan*, *supra*, 357 A.2d at p. 914 [absence of rent escalation clause in light of landlord's obligations to repair and to pay taxes "strongly suggests" that parties did not intend perpetual lease]; accord, *Curtis Pine Grove*, *supra*, 2009 WL 2506279 at p. 4; *Geyer*, *supra*, 103 N.E.2d at p. 201 [if rent escalation provision were construed to allow only one rent increase, "it would seem to be an unreasonable provision in a lease in perpetuity"].) And using the single 2001/1996 ratio with $3,000

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[15] The 10% cap is one-sided in the tenant's favor because, apart from the fact that there is only a single rent adjustment in five years, the cap was (and still is) near historic lows for the rate of inflation. (See United States Department of Labor Statistics <http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?series_id=CUURA421SA0&data_tool=XGtable> [as of Dec. 12, 2010].)

as the only base number would be meaningless: The rent could never increase.

In a trial of this issue, Gamson could easily have provided evidence of what common-sense economics dictates: The landlord's tax and maintenance obligations would be certain to increase over time, and the artificially-depressed rental income could not be expected to keep pace with the landlord's expenses. At some point—probably not that far in the future, given the property's aged condition—the lease will become not just worthless, but a liability to the landlord. The parties could not have intended such a result.

This is the kind of reality check that the court did in *Burke*, *supra*, 621 P.2d 1119, when it said that it was "also influenced by the practical considerations of this case." (*Id.* at p. 1121.) It noted that a perpetual lease would place the landlord "in an untenable position whereby he would have no right to terminate the lease, no right to negotiate a fair rental price that reflects the burdens of inflation and taxation, and no means of relieving the property of its encumbrance. Without a clear manifestation of the landowner's intent to assume this position, we cannot allow a trial court to imply such intent by its construction of a poorly-written instrument."[16]

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[16] While the *Burke* lease apparently had no rent escalation clause at all, the Conservator Lease's clause permanently ties escalations to the change in the Consumer Price Index from 1996 to 2001—not quite the straitjacket that the *Burke* lease appears to have been, but close, considering that in Ginsberg's view the lease will last another *eight decades*.

d. The nature of the Premises is inconsistent with a perpetual lease.

The Conservator Lease is for the bottom floor of a two-story, multi-tenant commercial building in which Ginsberg holds no ownership interest. In contrast, long-term leases are generally ground leases for unimproved or minimally improved land on which the ground lessees construct improvements, often own those improvements, and take responsibility for repair and maintenance. (Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2010) ¶¶ 7:3, 7:16, 7:19, 7:20 (Greenwald & Asimow).) Indeed, "[p]erhaps the most obvious difference between a ground lease and other leases is the duration of the term. The term of a ground lease is typically very long—35, 50 or 99 years." (*Id.* at ¶ 7:3.) That is because "[t]he parties conceptually view a long-term ground lease much akin to the transfer of a fee interest . . . ." (*Id.* at ¶ 7:39; see *E. Gottschalk & Co., Inc. v. County of Merced* (1987) 196 Cal.App.3d 1378, 1385 ["Many long-term leases do amount to a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest"].) In a sense, the long-term tenancy is the ground lessee's reward for its substantial investment in the property.

These characteristics of typical long-term leases bear no resemblance to the Conservator Lease, which involves only a portion of a small commercial building and contemplates no significant investment by Ginsberg. While the law apparently does not categorically prohibit a perpetual lease of a portion of a commercial building, our research has not revealed a single case in which a court construed a lease as perpetual in that

kind of situation.[17] The handful of cases finding perpetual leases all involve leases of land alone, of land and a standalone building, or of oil and gas. The very nature of the Premises is at odds with any kind of long-term lease, much less a perpetual lease.

e. The Conservator Lease's use restrictions are inconsistent with a perpetual lease.

The lease's use restrictions were added to the printed form that comprises the main body of the lease:

6. USE.
Tenant shall use the Premises only for a retail store selling textiles, clothing, accessories, light furnishings and other similar items and for no other purpose without the Landlord's prior written consent.

(4 AA 816, ¶ 6.) This describes Ginsberg's business. But it is not reasonable to believe that anyone, even Ginsberg herself, would have expected this kind of business to continue indefinitely. By the time she signed the Conservator Lease in 1996, Ginsberg had been working with vintage clothing for some 30 years (3 RT 203:6-10), and she claims that she runs a highly specialized business that depends entirely on her personal involvement and expertise (3 RT 204-207, 213-218). She described "[g]oing out and finding the pieces" as "one of the unique things to my store" and as "the art in doing it." (3 RT 217:22-27; see 3 RT 223:12-13 ["it's a passion and I don't really see it as a business"], 370:8-15 [Ginsberg's expert testifies that she brings "[her] design clients from

[17] *Shaver*, *supra*, 26 Cal.App.4th 568, involved a lease of shopping center space (not further described in the opinion), but the parties *agreed* that the lease was perpetual. (See § II.C.4., *post*.)

Europe or my celebrity clients" to Ginsberg's store].) This is not remotely like a ground lease or like the oil and gas lease in *Becker*, *supra*, 55 Cal.App. 698, in which operations could last multiple lifetimes.

Ginsberg, already in her 50s when the Conservator Lease was signed, and who according to her counsel was only likely to run her business for "another ten years" (6 RT 938:26-28), had no need of a perpetual lease to run such a personal business—she would have to live to be 150 to see its benefit. The very presence of the use restrictions suggests that the parties intended a limited term, given that the typical long-term tenant tries to "make certain that the lease allows for a flexible change of use. This is especially important because of the extensive duration of the rental term; i.e., ground lease tenants will rarely be able to foresee what potential uses might be desirable or necessary 30, 50 or 90 years hence." (Greenwald & Asimow, *supra*, ¶ 7:22.)

Multiple courts have held that similar use restrictions are not consistent with perpetual leases. (*Geyer*, *supra*, 103 N.E.2d at p. 201 [if lease containing a use restriction to "general merchandising business" were construed as perpetual, it "could serve to tie up this property forever for one particular and narrow use, regardless of whether, over the passing of many years, the location might make the property much more useful and valuable for other purposes"]; accord, *Cook*, *supra*, 871 N.E.2d at pp. 1007-1008 ["the restriction on the use of the premises indicates that the parties more probably contemplated a short term lease," citing *Geyer* as a "pivotal decision" regarding perpetual leases]; *Rutland Amusement Co.*, *supra*, 248 A.2d at p. 734 [lease restricted use to "outdoor theater"; "The narrow use and the demand for good husbandry, for the protection of the

lessor's reversion, oppose an intention to lease with interminable renewals"]; *Oak Bay Properties*, *supra*, 648 P.2d at p. 467 [lease restricted use to "sporting goods store"; renewal clause providing for one-year renewal and "the right to renew annually thereafter" did not create perpetual lease, the court noting among other things that "(t)his restriction on the use of the premises indicates the parties more probably contemplated a short-term lease, even though the lessee could change the use with the lessor's permission"].)

f. Multiple obligations in the Conservator Lease are inconsistent with a perpetual lease.

The obligations in the Conservator Lease cannot be squared with even a long-term lease, much less a perpetual lease.

Landlord's obligation to pay taxes (4 AA 816, ¶ 7). The Conservator Lease requires the landlord to pay all property taxes (4 AA 816, ¶ 7) except for a portion of any annual increase if—and only if—the property is sold during the term of the Lease (4 AA 823-824, ¶ 4). One would expect a perpetual lease to have a mechanism for the landlord to pass all tax increases through to the tenant. (*Lonergan*, *supra*, 357 A.2d at p. 914 [absence of rent escalation clause in light of landlord's obligations to repair and to pay taxes "strongly suggests" that parties did not intend perpetual lease]; *Rutland Amusement Co.*, *supra*, 248 A.2d at p. 734 ["(T)he lessor's undertaking to pay all real estate taxes during the life of the lease is inconsistent with a purpose to intentionally surrender her beneficial interest in the reversion"]; see Greenwald & Asimow, *supra*, ¶ 7:38 ["Ground leases are almost invariably of the 'triple net' type (i.e., tenant bears all maintenance and operating costs")].)

Landlord's obligation for maintenance and repairs (4 AA 816, ¶ 9). The Conservator Lease imposes comprehensive obligations on the landlord to maintain the foundation, exterior walls, plumbing and HVAC systems. Considered in light of the restrictive, one-sided rent-increase cap and the fact that in 1996 the Premises were in a 75-year-old building in the middle of Los Angeles, this clause militates against a perpetual lease. Taken literally, the clause would mean that the landlord could never demolish and rebuild, but would instead have to maintain in good condition a building long overdue for replacement. (*Smyrniotis v. Marshall*, *supra*, 744 N.E.2d at p. 535 [provision for landlord to maintain leak-free roof and pay for repairs to structure and HVAC "particularly unlikely" to be included in perpetual lease, citing *Geyer*, *supra*, 103 N.E.2d 199]; *Lonergan*, *supra*, 357 A.2d at p. 914 [landlord's obligation to repair and pay taxes without rent escalation clause inconsistent with perpetual lease]; Greenwald & Asimow, *supra*, ¶¶ 7:31 to 7:32 ["the landlord characteristically has no maintenance obligations under a long-term ground lease"].)

Landlord's obligations regarding damage or destruction (4 AA 818, ¶ 12). If the Premises are totally or partially destroyed, the Conservator Lease requires the landlord to restore the Premises, or under certain conditions either party can terminate the lease. Multiple courts recognize that this is not what one would expect if the parties had intended to create a perpetual lease in favor of the tenant. (*Lonergan*, *supra*, 357 A.2d at p. 914 [absence of rent escalation clause that would allow lessor to meet continuing repair and maintenance obligations under the lease "strongly suggests that the creation of a right to perpetual renewal was not the intention expressed by the parties" in the lease]; *Oak Bay*

Properties, *supra*, 648 P.2d at p. 467 [provision that landlord is responsible for structural repairs and has option to rebuild upon destruction "appear to be inconsistent with a lessee's right to renew perpetually"]; see Greenwald & Asimow, *supra*, ¶ 7:222 ["most damage and destruction provisions" in ground leases "require the tenant to repair any damage to (or destruction of) the improvements; and rarely give either party the right to terminate the lease upon damage or destruction"].)

Tenant's obligation to return premises in good condition (4 AA 820, ¶ 19). The Conservator Lease requires that "[o]n the last day of the term hereof, or on any sooner termination, Tenant shall surrender the Premises to Landlord in good condition, broom clean, ordinary wear and tear accepted [*sic*]." (4 AA 820, ¶ 19.) This, too, implies a definite term rather than a perpetual lease. Under a perpetual lease, the tenant would most likely have the right to demolish the building, since the cost of demolition after many years would probably be less than the cost to maintain the property in the condition in which it was leased. (*Burke*, *supra*, 621 P.2d at p. 1121 [lease contemplating return of premises "'in a condition equivalent to that in which they were delivered'" suggests lease not perpetual]; *Rutland Amusement Co.*, *supra*, 248 A.2d at p. 734 [requirement that "(t)he lessee's management must be in a good and husbandlike manner" suggests lease not perpetual]; *Oak Bay Properties*, *supra*, 648 P.2d at p. 467 [lessee's obligation "to keep the premises in good repair and quit the premises in a neat and clean condition at the expiration of the term indicates a short-term rather than a long-term lease"].)

Landlord's obligation to pay water and trash costs (4 AA 823, ¶ 2). The Addendum imposes on the landlord the responsibility to pay for water

and trash service. (AA 835, ¶ 2.) As noted earlier, long-term leases—which are generally ground leases—tend to be "net" leases that impose costs like this on the tenant. (Greenwald & Asimow, *supra*, ¶ 7:38 ["Ground leases are almost invariably of the 'triple net' type (i.e., tenant bears all maintenance and operating costs)"]; *Lonergan*, *supra*, 357 A.2d at p. 914 [landlord's obligation to pay "charges relating to the use of water" contraindicates perpetual lease in absence of rent escalation clause sufficient to cover the expense].)

g. Other features of the lease strongly suggest that it is not perpetual.

No provision for recordation of memorandum of lease. Treatises advise that lease documents for long-term commercial leases should always be recorded. (Friedman, et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2010) ¶ 2:478.1 to 2:479, pp. 28-148 to 28-149, citing *Gates Rubber Co. v. Ulman* (1989) 214 Cal.App.3d 356 [landlord's purchaser not charged with notice of tenant's unrecorded option to purchase that was not described in recorded short-form lease]; see Gov. Code, § 27280, subd. (a) ["Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter"]; Civ. Code, §§ 1213-1214 [effect of recording].)

If Ginsberg intended the Conservator Lease to be perpetual, one would expect her to have recorded the lease or a memorandum of lease. But the Conservator Lease is not in a form appropriate for recording because the signatures are not acknowledged (Gov. Code, §§ 27287-27288); it contains no language providing for recordation; and there is no evidence that either it or a memorandum was recorded. (See *Golden West*

Baseball Co. v. City of Anaheim (1994) 25 Cal.App.4th 11, 31 (in holding that a particular agreement did not create a lease, court noted that "the agreement was not recorded, as leases often are.")

No provision for payment of documentary transfer tax. Revenue and Taxation Code section 11911 authorizes counties and cities to impose a tax on changes of ownership of real property; leases lasting longer than 35 years including all option terms are considered changes of ownership.[18]

Despite its explicit provisions about other taxes, the Conservator Lease is silent about documentary transfer taxes. The issue is irrelevant to a short-term lease, but allocation of the payment responsibility would be important in a long-term lease. (See Greenwald & Asimow, *supra*, ¶ 7.265 [ground leases typically provide that tenant is responsible for all taxes].) The absence of any such allocation demonstrates that the parties did not believe they were signing a perpetual lease.

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[18] Rev. & Tax. Code, §§ 60 ("change in ownership" means transfer of an interest "the value of which is substantially equal to the value of the fee interest"), 61, subd. (c)(1) (defining "change in ownership" to include "[t]he creation of a leasehold interest in taxable real property for a term of 35 years or more (including renewal options) . . ."); *Thrifty Corp. v. County of Los Angeles* (1989) 210 Cal.App.3d 881, 883-885 (holding that 35-year leases can be taxable pursuant to Revenue & Taxation Code section 11911); see L.A. County Code, § 4.60.010 et seq. (imposing transfer tax); L.A. Muni. Code, § 21.9.2 (same).

3. Extrinsic evidence shows that Ginsberg herself did not believe the lease provided perpetual options.

Judge Torres had before him at least one piece of extrinsic evidence that provided yet a further basis for rejecting the perpetual lease interpretation, or at least finding the Renewal Clause ambiguous: Ginsberg's November 2004 letter by which she purported to renew the Conservator Lease for a purported second option period. In that letter she gave notice "that I am exercising my next option (*2nd of 5*) to extend my lease for the next 5 years, when the current option expires." (4 AA 854-855 [Ex. 90], emphasis added; see 2 RT 34:23-26 [Gamson cites document as exhibit to Third Amended Complaint].) The letter is an admission that whatever Ginsberg thought the renewal terms were, she did *not* believe she had perpetual renewal rights. Although the trial court was not inclined to consider the significance of this evidence, "[t]he test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.'" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

It is a "cardinal rule of construction that when a contract is ambiguous or uncertain the practical construction placed upon it by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties." (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 772-773, internal quotation marks omitted; see also *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 936 [A court "is required to give 'great weight' to the conduct of the parties in interpreting the instrument before any controversy

arose"].) Ginsberg's conduct in 2004 cannot be squared with any belief that she held a perpetual lease.

4. No California authority supports construing the Conservator Lease as perpetual.

In the trial court, Ginsberg argued—and the court agreed—that *Shaver*, *supra*, 26 Cal.App.4th 568 governs this case and compels a finding that the Conservator Lease is perpetual, albeit capped at 99 years under Civil Code section 718. (2 RT 5:24-28, 24:8-9, 34:11-12, 37:20-23.)

It isn't so.

The *only* issue in *Shaver* was whether a lease that was *admittedly* perpetual was entirely void under the rule against perpetuities. (*Id.* at p. 571 ["At issue is whether a lease amendment which provides for perpetual options to renew is void because it violates the rule (against perpetuities)"].) The Court of Appeal concluded that commercial leases are not subject to the rule, but that the term of the lease was limited to 99 years by virtue of Civil Code section 718. The court did not purport to interpret the relevant lease clause; indeed, it did not even quote the language. It accepted without question the trial court's conclusion, which the parties did not contest, that "'the parties attempted to provide for option renewals into infinity.'" (26 Cal.App.4th at p. 575.)

"[A]n opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) *Shaver* provides no guidance whatever on how to determine whether a particular lease is perpetual. Its only impact is to confirm that *if* a lease is *in fact*

perpetual, then Civil Code section 718 automatically limits it term to 99 years. There is no dispute about that issue here.

There are two California decisions that found perpetual leases absolutely void—*Morrison v. Rossignol*, *supra*, 5 Cal. 64 and *Epstein v. Zahloute*, *supra*, 99 Cal.App.2d 738. But as noted earlier (§ I.A., *ante*), both decisions appear to rely on the inapplicable rule against perpetuities and in any event they contain no analysis: *Morrison* does not quote the renewal clause or explain why it was perpetual (5 Cal. at p. 64); *Epstein* quotes the clause, but concludes that it allows a perpetual renewal without any discussion of why (99 Cal.App.2d at pp. 738-739). Apart from the fact that both decisions reflect the universal judicial distaste for perpetual leases, they provide no useful guidance for analyzing the Conservator Lease.

That leaves *Becker*, *supra*, 55 Cal.App. 698 as the only California decision that expressly interprets an allegedly perpetual lease. Though recognizing that "leases which may have been intended to be renewable in perpetuity, if at all uncertain in that regard, will be construed as importing but one renewal" (*id.* at p. 700), the court found that the lease before it *was* perpetual.

Becker involved an oil-drilling lease that conveyed the property to the tenant for a term of ten years "with the right of renewal for a further term of ten years at the end of such term, or at the end of any subsequent term for which it may be renewed." (*Id.* at p. 699.) The Court of Appeal found a perpetual right of renewal because "the language is so plain that no room is left for doubt." (*Id.* at p. 700.) But the holding does not control interpretation of the Conservator Lease.

First, the lease language in *Becker* does not suffer from the plural-singular conflicts and the other ambiguities in the Renewal Clause.

Second, *Becker* did not undertake the kind of whole-lease analysis that the law universally requires, so it is impossible to know how the remainder of the lease may have demonstrated the parties' intent.

Third, the very nature of the lease in *Becker* would have required a different kind of inquiry than is appropriate here. An oil-drilling lease is fundamentally different from other kinds of real estate leases—and particularly from leases like the Conservator Lease for retail space of a portion of a commercial building.[19] In the world of mineral rights, perpetual leases are not the anomaly that they are in other contexts. (See *Callahan v. Martin* (1935) 3 Cal.2d 110, 118-120 [a lease of oil drilling rights for a term of years is personal property, but it is a real property interest if it is for life or in perpetuity]; 6 Miller & Starr, Cal. Real Estate (3d ed. 2000), § 17.24, pp. 52-53.) Instead of rent, the tenant typically pays on the basis of oil recovered and must make a substantial up-front investment. There is no way to know how many years it will take to make a profit, or indeed when, if ever, the tenant will even recover its investment. (See *id.*, § 17.24, pp. 55-56.) (In *Becker*, the lessee under the 1908 lease invested some $100,000—the equivalent of about $2.23 million

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[19] The Court of Appeal noted this distinction in *Epstein v. Zahloute*, *supra*, 99 Cal.App.2d 738, albeit in aid of an erroneous rule against perpetuities analysis; it stated that "the lease in question in the *Becker* case was an oil and gas lease and what the court there said must be considered in the light of the fact that such a lease creates a profit *a prendre* and vests in the lessee an estate in real property. [Citations.] An assignment by the landowner of an interest in his oil rights without limitation as to time does not violate the rule against perpetuities. [Citation.]" (*Id.* at p. 739.).

today—and never recovered more than enough to meet expenses; see 55 Cal.App. at pp. 699, 703.) Long-term leases are essential to this notoriously risky enterprise, and a perpetual lease makes sense in that context. In contrast, a retail tenant can project the likely near-term course of the business with far more accuracy, rarely needs to make such a disproportionately high front-end investment, and can often recover at least some of the investment if the business fails. A perpetual lease makes no sense in the context of a vintage-clothing business.

Fourth, when *Becker* was decided in 1921, courts were just beginning to figure out how to interpret and enforce oil and gas leases. Even 14 years after *Becker* and 27 years after the execution of the *Becker* lease, our Supreme Court noted: "The difficulty experienced in defining with exactitude the nature of the assignee's rights is due in part to the fact that the oil industry is of very recent development, while in this country, by statute and judicial precedent, our classification of property as realty or personalty is based on common-law definitions which crystallized in a time when oil interests were not the subject of judicial cognizance." (*Callahan v. Martin*, *supra*, 3 Cal.2d at p. 115.)

This distinction does not render less persuasive *Becker*'s correct expression of the law's disfavor of perpetual leases. That aspect of the opinion was not at the frontier of real estate law, but rather was firmly grounded in decades of settled precedent, including the two cited cases that involved conventional real estate leases (apparently what today would be considered ground leases). (*Becker*, *supra*, 55 Cal.App. at p. 700, citing *Diffenderfer v. Board, etc.* (Mo. 1894) 25 S.W. 542 and *Syms v. Mayor of New York* (N.Y. 1887) 11 N.E. 369.)

So while *Becker* was correct on its general statement of how courts should look at leases that are claimed to be perpetual, it is not a reliable guide to determining whether the Conservator Lease itself is perpetual.

* * *

The pervasive "judicial distaste" for perpetual leases (*Oak Bay Properties*, *supra*, 648 P.2d at p. 467) requires close scrutiny of the Conservator Lease. That scrutiny reveals that apart from the handful of plural words in the Renewal Clause—itself hardly a model of clarity—every other aspect of the Conservator Lease strongly suggests that the parties did not intend it to be perpetual. Add to that Ginsberg's own clearly-shown belief that she did not have a perpetual lease and there can be only one result: The Conservator Lease is not perpetual.

D. Because The Conservator Lease Does Not Unambiguously Confer A Perpetual Renewal Right, Ginsberg Had Only One Renewal Term That Expired In 2006.

The Court should conclude as a matter of law that the Conservator Lease does not confer a perpetual option—either because the lease's ambiguity bars such a result under the ambiguity/one-renewal rule, or because when the lease is construed as a whole and in context it is clear that the parties could not have intended a perpetual lease.

If there is no perpetual renewal option, what remains? On this point, there can be no dispute: "[L]eases which may have been intended to be renewable in perpetuity, if at all uncertain in that regard, will be construed as importing but one renewal." (*Becker*, *supra*, 55 Cal.App. at p. 700; see *Penilla v. Gerstenkorn*, *supra*, 86 Cal.App. at p. 670 ["'A general covenant

to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, except the covenant to renew; to include which would make the lease perpetual'"].)

The base term of the Conservatorship Lease expired on April 14, 2001. Ginsberg exercised her only option, which extended the term for an additional five-year period that ended on April 14, 2006. She has been a month-to-month holdover tenant ever since. (4 AA 820, ¶ 20; Civ. Code, § 1945.) Such a tenancy is terminable by either party on 30 days' notice. (Civ. Code, § 1946.)

E. Relief Requested.

1. The judgment as to whether the Conservator Lease is perpetual must be reversed.

If the Court agrees that there is no perpetual option as a matter of law, Gamson is entitled to a reversal with directions to enter judgment on Gamson's cross-complaint to the effect that the Conservator Lease has expired and that Ginsberg is a month-to-month tenant whose tenancy is terminable on 30 days' notice.

At the very least, the Conservator Lease's pervasive ambiguities entitle Gamson to a full trial on the lease's meaning, at which both parties can present extrinsic evidence on the point—as Ginsberg herself requested before trial. (2 AA 300-302, 310-311.)

2. Although reversal as to the perpetual lease ruling would require a new trial on all other issues, Gamson may be able to waive a new trial as to the compensatory award.

Any reversal as to the trial court's perpetual lease ruling will nominally require a new trial on Ginsberg's various breach-of-lease claims. That is because they are inextricably connected to the trial court's interpretation of the Conservator Lease. For example, the core theory of Ginsberg's First Amended Complaint is that Gamson's alleged conduct was designed "to interfere with plaintiff's quiet and peaceable possession and enjoyment of the Leased Premises for the purpose of forcing plaintiff to abandon her Lease and to vacate the Leased Premises." (1 AA 48:22-27; see 6 RT 938-940 [Ginsberg's closing argument]; 2 AA 404-405 [Ginsberg's memorandum in support of injunction].) But without a perpetual lease, Gamson would have had every right to demand that Ginsberg sign a new lease or vacate the Premises when the Conservator Lease expired in April 2006.

Nevertheless, given the jury's modest compensatory award, if the Court reverses as to the perpetual lease ruling and affirms the order striking punitive damages, Gamson will waive a new trial on the breach-of-lease claims. Otherwise, the entire case must be retried.

3. Any reversal as to the perpetual lease ruling requires a reassessment of the prevailing party for purposes of awarding attorneys' fees and reconsideration of the effect of Gamson's section 998 offer.

Although Gamson believes that the attorneys' fee award is excessive, she recognizes that the standard of review bars a successful challenge to the amount. But any reversal that affects the perpetual lease ruling will require the trial court to redetermine who was the prevailing party for purposes of Civil Code section 1717. A general reversal will necessarily vacate the trial court's finding and require a redetermination following a new trial. But even a limited reversal that just affects the perpetual lease ruling will require a redetermination, regardless of whether Ginsberg ends up with net monetary recovery.

That is because the trial court must exercise its discretion anew by considering the overwhelming significance of the lease interpretation issue in the overall result of the case—a fact the trial court itself repeatedly noted in its determination of the amount of fees to award. (See 7 RT 1088:24-25, 1091:19-21, 1138:1-7.) As one court noted, "[t]he sort of relativist inquiry required to determine which among several aspects of relief may predominate certainly suggests more than a simple mathematical calculation of which party recovered more money." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1151.) A change in the prevailing-party determination will also require a reevaluation of Gamson's offer under Code of Civil Procedure section 998. (See 2 AA 507-510; 7 RT 1074-1081.)

If Gamson ultimately prevails on the lease interpretation, the trial court could well find that she is the prevailing party overall.

II.

THE TRIAL COURT ABUSED ITS DISCRETION BY ISSUING AN INJUNCTION NOT AUTHORIZED BY LAW.

If the Court reverses the judgment on the perpetual lease issue, then the injunction—whose premise is a 99-year relationship between the parties—must likewise be reversed. But the injunction must be reversed in any event, because it goes well beyond what the lease and the law permit.

The injunction orders Gamson "to make repairs to the Building within 48 hours of notice of the need for repairs from Ginsberg; and if repairs are not made by Gamson within 48 hours, then Gamson is to immediately provide access to the Building to Ginsberg for Ginsberg to undertake and complete such repairs." (AA 495, ¶ 2.) The trial court issued the injunction under the incorrect assumption that Gamson was locked into a 99-year lease with Ginsberg, and its remarks from the bench reveal that its injunction decision was influenced by positions Gamson had taken that were inconsistent with such a lease. (See 7 RT 1057:21-1058:3.) If the perpetual lease ruling is reversed, this erroneous view of the parties' relationship requires a new trial as to injunctive relief: There is no way to know how the trial court would have exercised its discretion under a correct view of the relationship, and this Court cannot infer the results of discretion not exercised. (See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384 ["When the record clearly demonstrates what the trial court did, we will not presume it did something different"];

Metropolitan Water Dist. of Southern California v. Campus Crusade for Christ, Inc. (2007) 41 Cal.4th 954, 966-967, 970 [in eminent domain case, trial court improperly took from the jury the question of probability of rezoning; "Because the trial court examined the evidence of rezoning under an unduly rigorous standard, we direct the Court of Appeal to remand the matter to the trial court to reexamine the record under the correct standard in the first instance"].)

But the injunction is improper even if viewed through the lens of a perpetual lease, because it fails to meet the requirements for an injunction as a matter of law.

Civil Code section 3422 provides, as relevant here, that a court can issue an injunction: "1. Where pecuniary compensation would not afford adequate relief; [¶] 2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; [¶] 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings." A court may *not* issue an injunction "[t]o prevent the breach of a contract the performance of which would not be specifically enforced . . . ." (Civ. Code, § 3423, subd. (e).) The facts do not meet any of these requirements.

Damages are adequate and not difficult to ascertain. Monetary loss is the only damage Ginsberg has ever claimed, and the only damage she ever could suffer, from any alleged failures to repair and maintain. That kind of loss is easy to calculate: It's the cost of repair and the value of any damaged personal property—exactly the theories Ginsberg urged at trial and on which she recovered damages.

Under the Conservator Lease, if Gamson fails to make repairs that Ginsberg believes are Gamson's responsibility, Ginsberg has the right to make those repairs herself and charge Gamson for them. (See 4 AA 816, ¶ 9.) Ginsberg chose not to make repairs before filing this action (see 2 RT 96:9-99:21) and indeed has chosen not to do so until the conclusion of the appeal, despite the damage award (7 RT 1048:27-1049:9). But that doesn't make the cost any more difficult to determine. These facts present a classic case for denial of an injunction. (See *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306 ["Generally, where damages afford an adequate remedy by way of compensation for breach of contract, equitable relief will be denied"].)

The injunction threatens a multiplicity of judicial proceedings. This case *is* the judicial proceeding for all claimed failures to repair to date. Although there was a dispute over Gamson's responsiveness to Ginsberg's demands—including whether Gamson was even obligated to perform the repairs Ginsberg demanded—Ginsberg has an explicit contractual remedy. She has no basis for asking a court to stand ready to intervene any time another dispute arises.

Nor can the Conservator Lease remotely qualify for specific enforcement, as required by Civil Code section 3423, subdivision (e): "Courts of equity will not decree the specific performance of contracts which, by their terms, stipulate for a succession of acts whose performance cannot be consummated by one transaction inasmuch as such continuing performance requires protracted supervision and direction." (*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp., supra*, 255 Cal.App.2d at

p. 304.) Courts will not assume "the impossible task of supervising continuous performance by the parties." (*Ibid.*)

Here, the court's task would be not just to supervise the details of an ongoing commercial relationship, but to do so *for eight decades*. That's not just an "impossible task"—it's unthinkable.

Beyond this, the injunction does not even enforce the lease as written. The Conservator Lease's notice-and-repair provisions distinguish between landlord repairs for emergency or hazardous conditions (repairs must be done immediately) and non-emergency conditions (repairs must be done within 30 days). (4 AA 816, ¶ 9(a) & (b).) But the injunction ignores these distinctions and materially re-writes the lease by requiring Gamson's immediate compliance with Ginsberg's demand for *any* kind of "need[ed]" repair, whatever that means—regardless of emergency, and apparently even regardless of whether the repair is the landlord's obligation. Ginsberg cited no authority, and we are aware of none, that permits a court not only to enforce a contract by injunction when damages are an adequate remedy for breach, and not only to do so over the course of decades, but also to substantially change the very terms of the contract being enforced.

The injunction is unsupportable. Even if the Court finds that there is a perpetual lease, the injunction must be reversed for further consideration in a way that complies with governing law.

CONCLUSION

Under every relevant authority, Ginsberg has only a conventional commercial lease with a single five-year renewal, under which she has been a holdover tenant since 2006. The trial court's precipitous ruling at the outset of trial, without benefit of evidence or briefing, did more than deprive Gamson of the opportunity to present her case. It gave Ginsberg an unjustifiable stranglehold on Gamson's property that, if upheld, will render the property worthless to Gamson.

The court should (a) direct entry of judgment for Gamson on her Third Amended Cross-Complaint, ruling that Ginsberg had only one renewal option and that her lease therefore terminated in April 2006 and she is a holdover tenant, or in the alternative order a new trial on the interpretation of the Renewal Clause; (b) direct the trial court to vacate the injunction; (c) remand for a redetermination of prevailing party and attorneys' fees; and (d) otherwise affirm the judgment.

Dated: December 16, 2010

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to California Rules of Court, rule 8.204(c)(1) the **APPELLANTS' OPENING BRIEF** is produced using 13-point Roman type including footnotes and contains 13,544 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 16, 2010

Robin Meadow

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On December 16, 2010, I served the foregoing document described as: **APPELLANT'S OPENING BRIEF** on the parties in this action by serving:

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